THE MILLER AND THE LAW

By A. L. H. STREET

MILLER PUBLISHING CO.
MINNEAPOLIS, MINN.

The Miller and the Law

A HANDBOOK OF LEGAL
DECISIONS
SPECIALLY AFFECTING FLOUR MILLING
AND
ALLIED INDUSTRIES

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THE MILLER PUBLISHING COMPANY
MINNEAPOLIS, MINNESOTA

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PREFACE

THIS work is not designed to enable the layman to become his own lawyer. On the contrary, we suggest that many cases in court are attributable to delay in seeking private professional advice. A contract not covered by a standard form is drawn without an attorney's assistance. A lawsuit results, and where the layman in the beginning saved paying a lawyer the price of a new hat, he may deem himself fortunate in the end if he gets off for the price of an automobile.

The first object of this volume is to afford such information as will reduce hazards of litigation. In this light it may be likened to a book on hygiene that strives to avoid disease without attempting to make every man his own doctor. The object is amply justified by the everincreasing number of law reports, which leave no ground for doubting that many a litigant has repented that knowledge of some fundamental rule of law vitally affecting his business did not come to him in season. One ounce of foresight is often worth more than a ton of retrospection.

It is commonly, although erroneously, supposed that the law consists almost wholly of abstruse statements rendered still more difficult of comprehension by legal phrases understood only by judges and lawyers. This is not true of those branches of the law in which the layman is mainly interested. Rules of court procedure are not easily understood, but the layman is not concerned with them. Here he must trust to the guidance of a private attorney. But the principles of substantive law in which the layman is most interested are most easily understood. In fact, they afford entertaining reading as well as valuable education.

The second object of this work is to aid in the solution of controversies arising in the milling industry and the flour and feed trade, by showing what courts of authority have decided in similar cases. The volume is the result of long and numerous researches covering many years during which the author has been a contributor of legal material to The Northwestern Miller. It collates references to important court precedents which excusably might be overlooked by a lawyer in the preparation of a case within the limited time ordinarily permitted in the trial of a lawsuit. Hence, it is hoped that the attorney will find the work no less useful than will millers, merchants, brokers, salesmen, and others whose business and occupations are here specially dealt with.

Citations are given to the law reports, enabling reference to the full text of decisions mentioned.

In order that the book may prove more helpful to the reader, it is planned that legal articles by the author appearing in The Northwestern Miller after publication of this work will carry appropriate references to section numbers of this volume. In this way the book may be kept abreast of future court decisions supplementing or modifying the rules of law stated herein.

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PART I

Sales of Goods

CHAPTER I

GOVERNMENTAL REGULATION OF SALES*

PRICE REGULATIONS

SECTION 1. FIXING PRICES

WHAT can a state do in the way of dictating the prices at which commodities shall be sold, or in the way of setting a percentage of profit that may be derived?

It remains for the United States Supreme Court more specifically to determine the bounds of legislative power in this respect. In the meantime, the few available expressions of opinion by courts of lower, although of high, authority are of special interest. A notable example is the opinion of Judge Bourquin, of the United States district court for the district of Montana, in the case of A. M. Holter Hardware Co. vs. Boyle, 263 Fed. 134.

The opinion declares to be void a law which embodies provisions authorizing a state trade commission "to investigate and examine any or all of the books or papers of any person, firm, co-partnership or corporation engaged in business within the state of Montana, for the purpose of ascertaining the cost of commodities, foodstuffs and products, farm implements and machinery, and the selling price thereof, and to ascertain and determine the profits and charges collected . . . in the conduct of such business"; and authorizing the commission "to inquire into the management of the business," to "regulate the business of selling and otherwise disposing of commodities," to "establish maximum prices or . . . a reasonable profit to be charged in any particular locality for all commodities," "so long as deemed advisable," etc.

This legislation is disposed of by Judge Bourquin in language which is both clear and brief.

Although the opinion shows a firm conviction that existing conditions do not warrant a measure of the kind attempted to be enacted in Montana, parts of the decision intimate that public necessities might, under changed conditions, render some such measure valid. But it is clear enough that when the time comes that the state may dictate the price at which the dealer or manufacturer must sell his goods, the same power and reason must place a limit on the wage that the workingman may exact for a day's service.

The salient parts of Judge Bourquin's opinion are as follows: "This is a conventional suit to restrain enforcement of state legislation which provides for a trade commission to regulate business, and when and where it pleaseth to 'establish maximum prices or a reasonable margin of profit' in respect to all commodities, and, curiously enough, burial lots in cemeteries, for gain. . . .

"Plaintiffs' principal and determinative contention is that legislative regulation of prices in ordinary mercantile business is repugnant to the due process clause of the Fourteenth Amendment. At the outset defendants note that the enactment is . . . by an extraordinary legislative session to meet a drouth emergency, and that it includes a declaration that it is an emergency law, immediately necessary for public health, peace and safety. They allege that it is supported by public opinion and prevailing morality, and that all this, in connection with the war and its consequences in respect to production, supplies, demand, prices, and abuses, renders conclusive upon the courts the legislative judgment that the situation is one subject to the principle of legislative price regulation consistent with the Fourteenth Amendment.

"If this were so, the inalienable rights guaranteed by the Constitution would be at the mercy of legislatures. Fundamental rights are independent of legislative will, and no legislative declaration can foreclose inquiry whether or not they are infringed by legislative enactment. Emergency, opinion, morality, changes wrought by time and circumstances often

*See sections 27 and 206 on questions as to the effect on particular contracts of intervening governmental regulations; Chapter X on weights and measures; and Chapter L on matters dealing with restraint of trade.

justify exercise of powers that legislatures have; but they create no new powers. It is true the Constitution is not a barrier to changes in state policy and law to suit new circumstances and conditions, nor a barrier to new application of its principles; but it does oppose all changes that would avoid or supplant its principles with others, however calculated to suit the needs of the hour and the temper of the times. Its generic terms open always to include newly created species. . . .

"Legislative regulation of prices in business and employments that are of public interest, concern, and consequences is consistent with the Fourteenth Amendment. Like regulation in ordinary mercantile business and ordinary employments, all of which are purely private, is repugnant to said amendment. Time and circumstances may convert some of the latter into the former—so change their character and incidents that from purely private they are transformed into those of public interest, concern and consequence. When this occurs, they become subject to legislative price regulation, a new species of the genera of business of public interest, a new application of the old principle of regulation.

"In the instant suit, emergencies, public opinion, prevailing morality, war and its consequences, and legislative fiat have not transformed ordinary mercantile business into business of public interest. Despite them, the character and incidents of ordinary mercantile business remain unchanged. It is still open to and followed by many persons, rather than by a few, ranging from pushcarts, through all gradations, to mail-order emporiums, independent and in competition, wherein there are constant new adventurers.

"In defining what business is of public interest, concern, and consequence, and accordingly subject to legislative price regulation, the Supreme Court says it can be best explained by examples, and cites public utilities, insurance, and grain storage, and applies the principle to wages in public utilities and to wages of women and minors. It further says that, though there is some public interest in every person and in their every transaction, this is not the public interest in respect to which alone there is legislative power to regulate prices; that this latter public interest exists only when there is a 'broad and definite public interest,' arising by reason of the nature of the business, wherein its proper conduct concerns more than the parties to any single transaction, wherein by reason of peculiar circumstances the business sustains such relation to the public that it is affected by its consequences—in all, in marked contrast to ordinary mercantile business and ordinary employment."

After noting that the ground on which legislative restriction in ordinary mercantile transactions is excluded is unreasonable interference with right to follow any ordinary calling, to contract, to bargain, and so deprive of liberty and property without due process of law, Judge Bourquin proceeds:

"However it might be if the enactment was limited to the prime necessities and was a war measure, it is inconceivable that its all-embracing provisions, now the war is over, save as a fiction perpetuating rather dictatorial powers, are necessary to public health, peace and safety. It ranges from the street corner vendor of popcorn and bananas to the merchant prince, from coal to diamonds, from the babe's first swaddling band and cradle to the aged man's shroud, his coffin, and his grave. Trifles, necessities, luxuries—all are within its scope.

"As a whole, the enactment would accomplish a complete reversal of the American system of business economics that has prevailed from the nation's birth. True, there is no federal control over any state in the matter of economic theories it will pursue, provided not counter to constitutional limitations. But that involved herein goes beyond economics, and virtually invades and changes the methods, if not the system, of government. Who will question the wisdom of the Constitution that this shall not be done, save by three fourths of the states in concert?"

* *

An opinion written by Judge Rudkin, of the United States district court for the eastern district of Washington, has an interesting bearing on the highly important question as to what may be expected in the future in the way of valid interference by the state and federal governments with the fixing of prices at which commodities may be sold.

The opinion, which was handed down in the case of United States vs. Spokane Dry Goods Co., 264 Fed. 209, broadly intimated that in times of peace it is beyond the power of the United States and the several states to limit the right of one engaged in the sale of goods to fix the price at which he will sell, where he acts independently. Certain exceptions to this general rule, however, are noted in the opinion.

The decision involved application of the guaranties in the Federal Constitution that no person shall be deprived of life, liberty or property, without due process of law.

The court went so far as to hint that the national food control act might have been in some respects invalid even as a war measure, but declined to so rule, taking the position that "a decision of such far-reaching consequences, involving, as it does or may, the very life and foundation of the government, should come from the court of last resort, and not from this or any other inferior court." Speaking of governmental price fixing, the court said:

"The acts and regulations fixing the price of coal, of sugar, of wheat and its products, the act taking over the control of the railroads, and perhaps numerous other acts and regulations of that period, cannot be justified as mere peace-time regulations. . . . I have thus far assumed that the act cannot be justified as a mere state police regulation, and this is perhaps true. In discussing the right or power of the government to control prices in cases such as those now under consideration, Tiedeman, in his work on police power, says:

"'It is part of the natural and civil liberty to form business relations, free from the dictation of the state, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction. It is, therefore, the general rule that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay; and no one can compel him to take less, although the price may be so exorbitant as to become extortionate.

"'No one has a natural right to the enjoyment of another's property or services upon the payment of a reasonable compensation; for we have already recognized the right of one man to refuse to have dealings with another on any terms, whatever may be the motive for his refusal. But there are exceptions to the rule which can be justified on constitutional grounds.' 1 Tiedeman, State and Federal Control of Persons and Property, section 96.

"The exceptions referred to are thus classified by Judge Cooley:

"'1. Where the business is one the following of which is not a matter of right, but is permitted by the state as a matter of privilege or franchise. Under this head may be classed the business of setting up lotteries, of giving shows, and of keeping billiard tables for hire, of selling intoxicating drinks, and of keeping a ferry or toll bridge.

"'2. When the state, on public grounds, renders to the business special assistance by taxation, or under the eminent domain, as is done in the case of railroads.

"'3. When, for the accommodation of the business, special privileges are given in the public streets, or exceptional use allowed of public property or public easements, as in the case of hackmen, draymen, etc.

"'4. When exclusive privileges are granted in consideration of some special return to the public and in order to secure something to the public not otherwise attainable.' Cooley's Principles of Constitution, p. 234.

"It has generally been supposed that these exceptions are somewhat enlarged upon by the decision in Munn vs. Illinois, 94 U. S. 113, 24 L. Ed. 77, and kindred cases. Thus, in discussing the effect of the decision in that case, Mr. Justice Field, in a dissenting opinion, said:

"'The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.'

"But without further discussing the rule or the exceptions, for reasons already stated, I am of opinion that the act should not be declared unconstitutional by this court."

The opinion was announced in a consolidated hearing on demurrers to indictments against dealers for charging exorbitant prices for wearing apparel, etc. Treating the food control act, under which the indictments were drawn,

as a valid war measure, the court overruled the demurrers. Judge Rudkin said:

"The situation confronting Congress was a difficult one at best. To fix profits definitely and arbitrarily, without reference to place or circumstance, would prove unjust and oppressive in the extreme, for it is a matter of common knowledge that what would be deemed a just and reasonable profit in one place or as to one commodity would be unjust and unreasonable in another place or as to a different commodity. Congress was therefore compelled to choose between the course pursued and some other course equally difficult, and the wisdom of its choice cannot be made the subject of judicial inquiry."

Despite what Judge Rudkin previously said concerning liberty of dealers to fix prices for commodities in normal times, he makes the following observations on the subject of profiteering, after noting that the indictments charged profits ranging from 118 to 138 per cent:

"If general conditions are correctly portrayed by the charges contained in these indictments, it will not be denied that there is a crying need for relief of some kind from some source. . . . That such prices or profits are extortionate no one will deny. Of course, if confined to the three stores in question, or to only a few stores, the people have a remedy in their own hands by withholding their patronage, and if they fail to make use of that remedy to the fullest extent they alone are to blame.

"On the other hand, if these conditions are general, and to continue indefinitely, the people are without remedy, except through governmental action, and I have little doubt that all powers of the government, both state and federal, will grapple with the evil, and that a remedy will be found well within constitutional limitations. It is to be hoped that such recourse will not be found necessary, as all history shows that the course of legislation, like the sum of human existence, is made up of extremes rather than of means, and if repressive measures are resorted to the day of sunshine for the transgressors may be turned into days of gloom, if not despair. . . .

"It may be that Congress has transcended its constitutional powers, it may be that there is no connection between the selling price of some small article of female attire and the prosecution of a war, which has passed into history and is little more than a memory, and it may be that the act of Congress is void for uncertainty; but I am not prepared to so hold."

* *

Judge Faris, of a co-ordinate tribunal, the United States district court for the eastern district of Missouri, being more strongly inclined to act on his own judgment than was Judge Rudkin, flatly held that the provision of the act, making it a felony to make any unjust or unreasonable charge in dealing in necessaries, etc., was void, as failing to define any offense with such certainty as to conform to the constitutional guaranty that an accused person shall be informed as to the nature and cause of the accusation.

Quashing an indictment against defendant in the case of United States vs. L. Cohen Grocery Co., 264 Fed. 218, Judge Faris said: "No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, and liberty are to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is therefore no better than lynch law.

"The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

"If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or a wrongful or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal. . . .

"It would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price beyond cost and carriage should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and

to its arbitrariness is added an indefiniteness, vagueness, and uncertainty which is dangerous, beyond excusing, to the property and liberty of innocent men."

The decision in the last cited case was affirmed by the United States Supreme Court (41 S. Ct. 298) on the grounds that "the mere existence of a state of war did not annul or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth amendments as to questions such as we are here passing upon"; and that the Lever act violated those amendments in fixing no ascertainable standard of guilt.

* *

That any power residing in legislatures to regulate the prices at which commodities may be sold must be exercised in definite terms, and that Congress failed to do this in the food control act, thereby invalidating one of that law's important provisions, was the opinion of Judge Tuttle, of the United States district court for the eastern district of Michigan, announced in the case of Detroit Creamery Co. vs. Kinnane, 264 Fed. 845, before the decision of the Supreme Court just referred to.

Enjoining a United States district attorney from instituting a prosecution against plaintiffs under the act, Judge Tuttle handed down an opinion in line with that announced by Judge Faris. Judge Tuttle said:

"The only question, therefore, now involved, is whether the provision of section four of this Lever act as amended, to the effect that 'it is hereby made unlawful for any person . . . to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries,' is constitutional.

"The Sixth Amendment to the Federal Constitution provides that 'In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.' It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries, would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question.

"Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly to be determined, so that the person engaging in such business may know whether or not he is a criminal?

"What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered?

"Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?

"These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed.

"We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the

accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law."

This decision was affirmed by the United States Supreme Court (41 S. Ct. 304).

See, also, the decision of the Alabama supreme court in the case of State vs. Goldstein, 93 So. 308.

STATE AND FEDERAL FOOD ACTS

SECTION 2. BLEACHING

The status of the federal regulations and a summary of state regulations regarding the bleaching of flour are set forth on page 92 of The Miller's Almanack for 1925.

In the course of the opinion of the Supreme Court of the United States in the case there referred to (United States vs. Lexington Mill Co., 34 S. Ct. 337), the court observed that flour "may be consumed, when prepared as food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act."

SECTION 3. OTHER PROCESSES

In Cardiff et al vs. Lewiston Milling Co., 266 Fed. 753, plaintiffs sued to recover a balance due on the price of dehydrated potatoes sold to defendant mill in the flour substitute days of 1918, for use in manufacturing flour. Plaintiffs also asserted breach by defendant of contract obligation to accept delivery of plaintiffs' full output of dried, unpeeled potatoes produced from the 1917 crop. The defense asserted that plaintiffs had failed to deliver sound goods, and that plaintiffs, in processing the potatoes, used excessive quantities of sulphur, thereby rendering the product unfit for food, within the meaning of the federal and Washington pure food laws, which inhibit adulteration and misbranding of food. The sale was made in Washington. Federal Judge Dietrich allowed judgment in plaintiffs' favor, and the mill appealed to the circuit court of appeals for the ninth circuit. The higher tribunal refused to disturb the award.

"The larger questions," remarks the circuit court of appeals, speaking through Judge Wolverton, "and the one about which the real controversy hinges, is whether the testimony was sufficient to compel submission to the judgment of the jury touching the use of sulphur dioxide in treatment of the potatoes in the process of dehydration, namely, whether it constitutes a deleterious ingredient, which may have rendered the product injurious to health, in view of the statute of the state of Washington relative to the adulteration of articles of food and drugs. . . .

"As a premise to the discussion, in view of the record, it may be affirmed that the United States pure food and drugs legislation does not come into the case, for the reason that the controversy does not involve interstate commerce. The processed potatoes were to be delivered to the defendant at plaintiffs' place of business in Yakima, Wash., and what the defendant may have desired or intended to do with the potatoes when received, whether to deal with them intrastate or interstate, could not affect or otherwise dominate the instant sale or transaction between the parties. We may therefore turn our attention exclusively to a consideration of the question in the light of local statute. The result must be the same, whether the one or the other statute is applicable, as the statutes themselves are practically alike. . . .

"By these statutes an article is deemed to be adulterated 'if it contain [in case of food] any added poisonous or other added deleterious ingredient which may render such article injurious to health.' This clause has received the interpretation of the Supreme Court of the United States in United States vs. Lexington Mill Co., 232 U.S. 399, 34 Sup. Ct. 337, 58 L. Ed. 658, L.R.A. 1915B, 774. This case involved the application of the 'Alsop process' by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air, and the mixture then brought in contact with flour. It was claimed that the process added to the flour product a poisonous or deleterious ingredient 'which might render the flour injurious to health.'

"After stating that the purpose and intent of the statute was to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances, which might render such articles injurious to the health of consumers, the court goes on to define the clause 'which may render such article injurious to health,' as follows:

" 'The word "may" is here used in its ordinary and usual signincation, there being nothing to show the intention of Congress to affix to it any other meaning. . . . In thus describing the offense, Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. . . . If it cannot by any possibility, when the facts are reasonably considered, injure the health of the consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act.'

"In view of this rendition of the statute, which is authoritative as well for the interpretation of the state statute, the court having been cited to no different interpretation by the state courts, we may now consider the question heretofore stated [whether the dehydrated potatoes were rendered harmful by the extent to which sulphur dioxide was used in their processing]."

After considering the evidence adduced in the case, the court proceeds:

"So that, under the statute as interpreted by the Supreme Court, there was ample evidence to go to the jury from which they might reasonably infer that the sulphur dioxide, used in the quantity which the evidence tends to show, could not possibly be injurious to health. Such being the case, a directed verdict for defendant plainly would not have been warranted or proper. A further discussion of the evidence upon the subject could only lead into the domain of the jury, wherein there is no necessity to venture."

Farther on in the opinion, in discussing the correctness of instructions given by the trial judge to the jury, the higher court adds:

"Since the question of implied warranty as to wholesomeness became an issue in the case, a matter which the court left to the jury, the burden was cast upon plaintiffs to show that their product was such as did not come within the interdiction of the statute. . . .

"The use that was to be made of the potato product by defendant was to grind it into flour, and this flour was to be used in combination with wheat flour at a ratio of 8 to 15 per cent of the potato flour. The investigations of the experts proceeded upon this hypothesis, and the testimony all the way through took into account the purpose of defendant in combining potato flour with wheat flour in these percentages. The inquiry, it should be said, also extended minutely respecting the effect the added ingredient would have upon the potato flour, without combination with wheat flour.

"Having premised as much, it is the strong contention of counsel for defendant that the court should have instructed the jury in the language of their requested instruction, namely, that it was sufficient to defeat the action if it was shown that it [the added ingredient, sulphur dioxide] 'may or might possibly or probably be harmful to health of consumers.' In view of the fact that the statute was designed to protect the public health from possible injury, the Supreme Court has, and rightly so, it seems to us, given it a broad construction, to render it effective in its utmost intendment. . . . Assuming, without deciding, that the requested instruction was one proper to have been given, it was not reversible error not to give it, if it was adequately covered by the general charge [instructions]. The court, in its charge, adopted, in effect, the language of the statute in defining the particular issue and in advising the jury as to what they were called upon to decide. . . .

"In the present case, the issue was whether the added ingredient, the sulphur dioxide, might render the product harmful to health. The facts and circumstances attending the controversy were all to be taken into account, and in view thereof it was to be considered whether it might reasonably be anticipated by considerate persons, mindful always of conserving the health of the consumer, that the product would, in the ordinary course of human events, possibly prove harmful or injurious to health."

The United States Supreme Court refused to disturb this decision (254 U. S. 646).

SECTION 4. ADDING MOISTURE TO GRAIN

Two or three years ago mills in the Southeast complained of an evidently deliberate addition of moisture to wheat by grain dealers for the purpose of securing profit from such operation. Grain dealers claimed that the addition was not illegal, so long as the wheat conformed to the standards as promulgated under the federal grain standards act.

The Bureau of Chemistry at Washington replied as follows to an inquiry in regard to the matter:

"The deliberate addition of moisture to wheat, even though the product as finally shipped in interstate commerce conforms to the standards as promulgated in the federal grain standards act, would constitute a violation of the federal food and drugs act. Such grain would be adulterated within the meaning of section 7, paragraph first and second, in the case of food, which will be found in the enclosed circular 21. The bureau has instituted numerous prosecutions under the terms of the act because of the adulterations of grain with added water.

"Recent correspondence which the bureau has received seems to indicate, as you suggest, that there is some misunderstanding among the trade upon this matter, and the bureau will therefore welcome any publicity which you may care to give the actual requirements of the law."

The above does not refer to addition of moisture necessary to proper milling, and we understand that the department does not undertake to prohibit such operation.

SECTION 5. MISBRANDING

A mixture branded "sample grain star oats" was held to be misbranded in violation of the federal food and drugs act in the case of United States vs. 154 Sacks of Oats, 294 Fed. 340, decided by the United States district court for the western district of Virginia. It was found by the court that an artificial mixture contained 23 per cent of foreign material, a percentage of which was wild oats.

* *

The United States district court, eastern district of Pennsylvania, held in the case of United States vs. Krumm, 269 Fed. 848, that the government's accusation against defendant of having violated the federal food and drugs act by selling adulterated and misbranded goods under the name "Krumm's Macaroni" was fatally defective.

The first count of the government's charge was that the goods were adulterated in that "a product prepared from flour had been substituted in whole or in part for macaroni, to wit, a product prepared from semolina, which the article purported to be." The second count charged misbranding in representing that the "article was macaroni, to wit, a product made from semolina, but was a product made from flour."

To the accusation defendant's counsel demurred on the ground that it failed to aver that the packages were original unbroken packages, and failed to aver that semolina is not flour, or a product made from flour; that it was not averred that macaroni is a product wholly prepared from semolina; that the definition of the word "macaroni," as given in the charge, is not consonant with the generally accepted meaning of the word; and that it was not charged that the particular product sold by defendant was dangerous to the health or welfare of the people, or intended to deceive purchasers. Disposing of the demurrer, the court said:

"The first ground of demurrer may be dismissed, for the reason that, while the food and drugs act prohibits shipping or delivering for shipment in interstate or foreign commerce any article of food which is adulterated or misbranded, it does not restrict the offense of shipping or delivering for shipment to articles in original unbroken packages; the restriction to original unbroken packages applying only to those who receive in interstate commerce and, having received, deliver in original unbroken packages any adulterated or misbranded articles.

"As to the averments in relation to the substance contained in the packages, I think they are lacking in that particularity in both counts which should be observed to inform the defendant with certainty of the charge he is to meet at the trial. The offense under the first count, adulteration, arises, in the case of food, 'if any substance has been substituted wholly or in part for the article,' and the offense of misbranding arises 'if the packages containing it or its label shall bear any statement, design, or device, regarding the ingredients or substances contained therein, which statement, design, or device shall be false or misleading in any particular.'

"According to the Century Dictionary, macaroni is a paste or dough prepared originally and chiefly in Italy from the glutinous granular flour of a hard variety of wheat. According to the Standard Dictionary it is an Italian paste made into slender tubes from the flour of hard glutinous wheat mixed with water. Semolina is defined to be the hard grains retained in the bolting machine after the fine flour has passed through.

"If the article in question, as averred in the first count, was prepared from flour, or, as averred in the second count, was made from flour, it was apparently

macaroni. But if it is intended to charge that macaroni is not made from the whole of the flour which comes from the mill, but in order to be macaroni must be made from the large, hard grains retained in the bolting machine after the fine flour had passed through, the counts are lacking in averments that semolina is not a part of the substance known as flour.

"Flour may be fine or coarse, it may be made from the whole grains of the wheat as 'whole wheat flour,' or it may be the fine bolted flour. If it is meant by the indictment to charge that, in order for a substance to be macaroni, it must be made wholly from semolina, and not contain any of the fine flour which, upon passing through the bolting machine, leaves a residuum of semolina, the information should plainly so state.

"It is of vast importance to the public that foodstuffs shall be what they purport to be through the labels, marks and brands upon the packages. It is a matter of common knowledge that in the fine wheat flour of commerce much of the nutritive property of the grain is absent, which remains in 'whole wheat flour.' A purchaser of an article labeled 'whole wheat flour' is entitled to receive what he is led to believe he is purchasing from what appears upon the label. Similarly, one who is purchasing an article labeled 'macaroni' is entitled to receive the article containing nutritive ingredients which genuine macaroni is known to contain. Otherwise, the party substituting some other substance for the proper ingredients, or designating it by names which falsely represent the contents or mislead the public, is liable to the penalties of the act.

"If, however, one is charged under the act with adulteration and misbranding, he must be informed with sufficient particularity and certainty of the charge against him to enable him to prepare his defense. This particularity and certainty are obviously lacking in the information filed.

"It may be that in the course of manufacture, trade, and public use the name 'macaroni' has come to mean an article made from flour, without regard to its containing semolina alone, and it may be that the word as accepted by the general public is not consonant with what was intended to be set out in the information. These, however, are trial questions.

"As to the remaining ground of demurrer, it is not necessary under the pure food and drugs act that an article, in order to be unlawfully adulterated or misbranded, must be dangerous to the health of the people."

* *

An opinion was lately asked as to whether or not it is lawful to export flour where the packages carry, in the language of the country to which export is being made, a misstatement that the flour was manufactured from spring wheat.

This question requires a negative answer, as the governing statutes are interpreted.

The second section of the federal food and drugs act prohibits the "introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of an article of food . . . which is adulterated or misbranded, within the meaning of this act." Another section of the act declares that food is misbranded when "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular."

Thus it will be seen that the act applies to exports as well as to interstate commerce, and that misbranding may consist of a false statement as to the nature of the ingredients or substances from which flour was made.

Flour has been held to have been misbranded under the following stated circumstances: When manufactured from buckwheat and corn and labeled "Buckwheat"; when labeled as "Best Water Ground," but in fact ground by steam roller process; when labeled as being made in one state when made in another; when labeled as "manufactured from finest hard spring wheat," but containing 15 per cent durum.

* *

That when seized for being misbranded, feed was not intended for sale, did not prevent its condemnation by the government, declared the United States district court, western district of Michigan, in the case of United States vs. 426 Bags of Economy Special Hog Feed, 276 Fed. 34. At the time of seizure the feed was being returned to the manufacturer for remanufacture, the bags containing misleading statements as to the percentages of the ingredients of the feed.

SECTION 6. IMITATING FOREIGN LABEL

The provision of the federal food and drugs act, declaring that an article shall be deemed to be misbranded if so labeled or branded as to mislead, or purport to

be a foreign product when not so, was applied by the United States district court for the western district of Pennsylvania in a proceeding to condemn 267 boxes of macaroni. Although the goods were made in the United States, the general make-up of the label used was distinctively Italian, and the only words tending to disclose the fact of domestic manufacture—"Italy Method. Mfg. U. S. A."—appeared inconspicuously at the end of a statement in Italian which indicated production at the principal seat of macaroni manufacture in Italy.

The court holds that an issue as to whether a product is unlawfully misbranded must be determined upon an inspection of the label itself and without regard to the manufacturer's actual intent to deceive. (225 Fed. 79.)

SECTION 7. PREMIUMS IN PACKAGES

The section of the Nebraska statutes which declares that food products sold in that state shall be deemed to be misbranded "if there be contained in the package any gifts, premiums or prizes," is a valid police regulation. So deciding, the supreme court of Nebraska held that it was an offense under the law to sell packages of "Souvenir Checkers Popcorn Confection" in which were contained tin toys.

Incidentally, the court stated that the fact that Congress has declared when a package of food shall be deemed to be misbranded does not prevent a state from making other requirements, not inconsistent with the act of Congress, respecting the sale of food products in package form.

"The evident purpose of the provision as to misbranding," said the court, "is to protect the public by requiring a full disclosure of the contents of each package, and to promote fair and honest competition in the sale of food products, by eliminating any act or element designed to conceal the true nature or value of the article packed." (Ex parte Arrigo, 152 N.W. 319.)

But in a later case (155 N. W. 240) the same court decided that coupons exchangeable for premiums might be placed in packages.

SECTION 8. INTERSTATE COMMERCE

In the case of Cleveland Macaroni Co. vs. State Board of Health of California, the United States district court for the northern district of California made some important observations upon the validity of state food regulations. (256 Fed. 376.)

The plaintiff company unsuccessfully sought to enjoin defendant board from applying state regulations concerning the branding of food to noodles manufactured by the company and shipped into the state, on the ground that interstate transactions within the exclusive province of the federal government were involved.

The goods involved were branded as "egg noodles," and the state board threatened condemnation of them as being misbranded, in that they were claimed to contain but 2 per cent of egg, whereas the state law requires at least 5 per cent to avoid classification as "plain noodles" or "water noodles." This standard is the same as adopted by the United States Department of Agriculture in the case of noodles shipped in interstate commerce.

The first point decided by the court was that, where goods packed in cartons are carried into a state in packing cases, and the cartons are removed from such cases by local retail dealers and placed on sale, the goods cease to be a part of interstate commerce and are subject to state regulation. There is nothing in the federal food and drugs act that interferes with the power of a state, after a product has become a part of its domestic commerce, to prescribe the standard of purity which will entitle it to be sold under a certain brand or label.

It was also decided by the court that the adoption by a state of a standard of purity for food the same as established by the federal government is not obnoxious, as amounting to a delegation of legislative powers by the state to federal authorities.

Speaking of the objects and validity of state regulations, the opinion added: "The provisions are evidently aimed at the protection of the inhabitants against deceit and misrepresentation as to the real character of the food presented for their consumption; and it matters not in this respect if the plaintiff's goods be, as claimed, healthful and nutritious food and free from deleterious matter. It is a question of requiring them to be labeled and sold for what they really are, and not as something else."

SECTION 9. SEPARATE OFFENSES

Fines are to be assessed, under the federal food and drugs act, with reference to the number of different kinds of articles contained in a single shipment, held the United States district court for the western district of New York in the case of United States vs. Direct Sales Co., 252 Fed. 882. The decision interpreted the provision of the act for a fine of not

more than $200 for the first offense of shipping an adulterated or misbranded "article" in interstate commerce, and for a fine of not more than $300 for a subsequent offense, or imprisonment for not more than one year, or both such fine and imprisonment.

In this case defendant was convicted of having included in one shipment seven different kinds of medicine, and of having both misbranded and adulterated each. Accordingly, it was decided that it was proper to assess 14 different fines.

As the section of the act involved embraces violations in the food industries, as well as in the drug trade, it follows that the same rule would be applied to a single shipment of mill products containing more than one commodity.

Referring to the statute, the court said: "According to this, the article is clearly specified as the unit of offense, as distinguished from the shipment, and as there were seven different articles in the shipment, and each was both adulterated and misbranded, it would seem that there were 14 separate and distinct violations of the act, for which separate penalties may be imposed. . . . The provision for different punishment for subsequent offenses was made in contemplation of violation of the statute subsequent to conviction for similar violations."

SECTION 10. RESPONSIBILITY OF AGENTS

Agents, as well as their principals, may be made criminally responsible for violations designed to prevent adulteration or misbranding of products, according to a decision of the Texas court of criminal appeals. (187 S.W. 215.)

See, also, section 14.

SECTION 11. BRITISH IMPORT REGULATIONS

A question arose as to whether flour packages going into the United Kingdom must be specifically marked as having been milled in the United States, or whether it was sufficient that the origin be indicated by the address of the miller.

Unless there happens to be some very recently adopted regulation to the contrary, and a careful search fails to disclose it, it is not necessary to mark flour packages with such specifications as "made in U. S. A." or "milled in U. S. A." The requirements of the British merchandise marks act under this head appear to be sufficiently met if there is "a definite indication of the country in which the goods were made or produced."

It is said, with apparent accuracy, at pages 851-852 of "Exporters' Encyclopedia," 1919-1920: "The 'merchandise marks act' of Great Britain provides that foreign goods imported into the United Kingdom, which do not bear any mark whatever, either on the goods themselves or on the packages or wrappers containing them, are not required to bear any qualifying statement, such as 'made abroad,' or 'made in the U. S.'

"Foreign goods bearing a name or trademark of a manufacturer in the United Kingdom must have that name or trademark, accompanied by a definite indication of the country of origin of the goods. The name of the country is a sufficient indication without the words 'made in,' if the name or trademark only appears; for instance 'John Smith, United States,' would be satisfactory. If such a mark as 'John Smith, Sheffield,' which is a place in England, is used, then the qualification must be 'made in the U. S. A.,' or similar wording.

"If the foreign imported goods bear the name of a place identical with or colorable imitation of a place in the United Kingdom (such as Newark, being also the name of a place in England), the name or trademark should be accompanied by the name of the country in which the place is situated; thus Boston, in Massachusetts, should be accompanied by the name 'United States' or 'U. S.'

"In no way must the trademark on imported goods seek to give the impression that the goods are of British or Irish origin.

"Trade descriptions in any language not the language of the country of origin must be accompanied by a statement of the actual country of production of the goods as, for instance, 'Made in Germany.'

"All the foregoing qualifications must be distinct, in equally conspicuous characters with and in proximity to the marks they are intended to qualify."

FEED REGULATIONS*

SECTION 12. IN GENERAL

The Alabama law of 1911, which regulates the sale of commercial feedingstuffs by providing for the registration, tagging, sampling, and analyzing thereof, does not apply to unbolted corn meal, unmixed with other ingredients, held the Alabama supreme court in the case of International Sugar Feed No. 2 Co. vs.

*For a summary of the state feed laws, see The Miller's Almanack for 1925, pp. 100-105.

Miller Grain & Commission Co., 72 So. 368.

When sued on a draft, defendant attempted to set up a defense that it was given for the price of 400 sacks of unbolted corn meal intended for use in feeding live stock, and that the meal was not tagged as required by the law above mentioned. The court held that no valid defense was presented, saying:

"The act, by its express terms, does not apply to corn meal which is unmixed with other materials. The court judicially knows that corn meal is an unmixed meal, made from entire grains of corn, and that unbolted corn meal is simply meal not bolted, or meal from which the bran has not been sifted or separated. There is nothing in the defense to show that the meal was mixed with other ingredients, so as to bring it within the provisions of the act."

SECTION 13. VALIDITY

An important judicial precedent appears in the case of Fisher Flouring Mills et al. vs. Brown, 187 Pac. 399, being a decision of the Washington supreme court. The decision sustains the constitutionality of the provision of the concentrated commercial feedingstuffs act, enacted at the 1919 session of the Washington legislature, and limiting to 10 per cent the quantity of crude fiber which the feeds enumerated in section 1 of the act may lawfully contain.

Section 1 declares that "the term 'concentrated commercial feedingstuffs,' as used in this act, shall include linseed meals, coconut meats, gluten feeds, sugar feeds, brewers' or distillers' dried grains, malt sprouts, feeds made from ground cereals or byproducts therefrom, including slaughter-house waste products when sold as feeds, mixed feeds, and mixed meals made from seeds or grains, and all materials of similar nature used for food for domestic animals, condimental feeds, stock feeds, and all patent proprietary or trade stock and poultry feeds for which nutritive value is claimed, but it shall not include hay or whole seeds, or unmixed meals made from entire grains of wheat, rye, barley, oats, corn, or other cereals, nor wheat flour or other flours."

Under section 3 it is provided that the maximum per cent of crude fiber in such feeds shall not exceed 10 per cent.

Plaintiffs sued to enjoin enforcement of the law, alleging in their complaint that they manufactured feedingstuffs containing more than 10 per cent crude fiber, but that they were wholesome and in general use throughout the state; that the provision in the law limiting the crude fiber content is arbitrary, and violative of all custom and precedent; that no other law has ever been enacted in any state or country making such restriction, or any at all approaching it; that the numerous flour mills and cereal food factories in the state produce large quantities of oat byproducts, wheat bran, wheat millfeed, barley shorts and screenings, and other byproducts that are of great value for animal feed, and for years, throughout the country, all such byproducts have been used as animal feed by combining them with other wholesome feed substances; that enforcement of the clause of the law in question would be unreasonable, result in the waste of byproducts, and deprive plaintiffs of their constitutional right to engage in lawful and ordinary business, as well as discriminate unjustly in favor of feeds containing 10 per cent or less of crude fiber, etc.

Sustaining the constitutionality of the act, the court said, in the course of an extended opinion:

"Since the evident purpose of the present act is to protect the consumer from what the legislature considers inferior articles of concentrated feedingstuffs, it is difficult to understand why a prohibition against importing into the feedingstuffs the baser constituent elements of other similar natural feeds is not germane to the title of the act against adulteration, since we find that by legislative enactments, although in other acts upon the subject of the adulteration of foods, the process of abstracting in whole or in part the valuable contents of natural foods is declared to constitute adulteration. . . .

"Manifestly the object of the legislature in protecting the vast and increasing number of users of concentrated commercial feedingstuffs in this state against the adulteration of the articles is within the police power; and in exerting this authority it is at liberty to adopt such measures, having reasonable relation to that end, as it may deem necessary to make its action effective. . . .

"Admitting that certain concentrated commercial feedingstuffs, as now manufactured by respondents, containing crude fiber in excess of 10 per cent, separately considered, are innocuous, it does not necessarily follow that they may not be incidentally included in a prohibition the scope of which is regarded by the law making power as essential to accomplish a purpose within the power of the legislature.

"Concerning the maximum allowed of 10 per cent fiber, it is obvious upon the face of the provision that the legislature considered and determined the matter according to its judgment; and for us to hold that in doing so it transcended its reserved powers would constitute an unwarranted departure from well-understood principles."

One objection unsuccessfully made by plaintiffs to the validity of the act was a technical one, concerning the sufficiency of the title of the act as an expression of the subject of the law.

SECTION 14. WHO ARE BOUND BY REGULATION?

The appellate division of the New York supreme court interpreted phases of the state concentrated commercial feedingstuffs law in the case of People vs. Down, 163 N.Y. Supp. 151.

It was decided that not only the manufacturer of such goods, but a dealer in them, is responsible for the truth of statements on packages concerning the ingredients, and is governed by the requirement that a statement of the composition appear.

* *

"Some time ago we sold some feed to a broker, the price basis being f.o.b., Chicago, under instructions to ship to Chicago and hold for diversion instructions," wrote a Minnesota mill. "It develops that this feed was later resold to another dealer, who in turn sold it to a Buffalo feed concern, which resold to a retail dealer in New York state. We have never registered our feed in New York, having moved our output through other channels. Officials in New York have found the feed on sale there, and have fined the dealer $50 for offering the feed for sale without its being registered.

"The middleman has requested us to pay this fine. We hold that we are not obligated, as we never offered our feed in that territory, and take the position that it was the duty of the dealer to ascertain whether the feed was registered before purchasing same. What is your opinion in reference to this matter? Have you had this question raised before?"

In my opinion, the mill is not legally liable under any possible view of the case, and the broker's buyer cannot legally shift the burden of the fine from his own shoulders, unless he can show that the broker misrepresented to him that the feed had been registered, and that he innocently relied upon the representation, in which case he could recover against the broker his resulting damage, including the amount of the fine.

Even if the mill's agreement for sale "price basis f.o.b., Chicago," subject to diversion instructions, and any undisclosed terms of the agreement, evidence a mutual understanding that the mill was to deliver at any final destination to which diversion might be ordered, so that delivery in New York might be said to be within the scope of the mill's undertaking, still it is clear that the mill would not be liable. This sale by the mill in New York, unlawful as it might be, would not excuse the retail dealer in offering the goods for sale without ascertaining whether they had been registered.

The fine imposed against the retail dealer implies a legal presumption that he offered the product for sale knowing that the statutory requirements upon which validity of his sale depended had not been met. Having done so, the law will not permit him to rest a claim for reimbursement against any one on his own violation of the law, except as above noted, any more than a man fined for being intoxicated could compel a saloonkeeper who may have unlawfully sold him the "makings" of the spree to reimburse him against the fine.

If the mill's contract of sale contemplated delivery by the mill outside the boundaries of New York, the carriers from Chicago being understood to be the buyer's representatives, then the mill never violated the laws of New York, for the very good reason that it never made a sale in New York.

It would seem that what has been decided concerning sales of commercial fertilizers would have analogous bearing. It is established law that "statutes relating to inspection of fertilizers have no extraterritorial effect, and noncompliance with their provisions does not affect the validity of a sale made in another state." (2 Corpus Juris, 1002.)

This rule has been applied in a case where a sale was consummated outside the state, although to a person who lived in the state; the title being in the latter when the goods came into the state. And it has also been applied where goods were delivered by the seller to the buyer in a state where the sale was valid, although the seller knew that the purchaser intended to take them to another state for resale where analysis and tagging were required.

* *

In a suit passed upon by the Arkansas supreme court (Trousdale et al vs. Arkadelphia Milling Co., 106 Ark. 477), it ap-

peared that plaintiffs acted as brokers for local customers in a Louisiana town, and also as agents for defendant mill, an Arkansas corporation. They ordered two cars of chops from the mill for their customers, and the feed was shipped to Monroe, La., as directed. The goods were not tagged to show the manufacturer's name and a guaranteed analysis of the contents, as required by the Louisiana pure feed law. In consequence, plaintiffs lost $221.25, and sued for reimbursement. In dismissing the suit, the Arkansas court said:

"The specific allegation showed an independent contract by which the purchasers [plaintiffs] represented the dealers at Monroe, La., rather than the manufacturers and sellers at Arkadelphia. The law of Louisiana relied upon by appellants has no extraterritorial effect, and appellee, as manufacturer, . . . was under no duty or obligation, and therefore was not guilty of any neglect in failing to tag said chops, although same might be sold to parties who intended to use them in the state of Louisiana.

"The contract . . . was as much for the benefit of the appellants, as independent brokers, as it was for that of the appellee. They were soliciting orders in the state of Louisiana for the purchase and sale of goods which were manufactured and sold to them in Arkansas-Louisiana. The act expressly makes it the duty of every person soliciting orders, whether such orders are accepted by him or his principal, to see that the provisions of the act are complied with."

See, also, section 10.

CHAPTER II

VALIDITY IN GENERAL OF SALES CONTRACTS*

SPECULATIVE OR GAMBLING FEATURES

SECTION 15. IN GENERAL

A JUDICIAL pronouncement on the validity of contracts relating to the sale of grain where actual delivery is not contemplated by one or both of the parties appeared in the opinion of the St. Louis court of appeals in the case of Elmore-Schultz Grain Co. vs. Stonebraker (214 S. W. 216).

The decision noted that the common law rule is that a contract to sell for future delivery is not invalid as amounting to a gambling transaction unless both parties participate in intention that there shall be no actual delivery, but a mere speculation in market fluctuations. But it is pointed out that the Missouri statutes have so modified this rule that it is now the law in that state that a dealing in grain futures is invalid although only one of the parties intends that the transaction shall be a mere speculation on the rise or fall of the market.

On the other hand, the opinion decided that, since the Missouri statutes can have no effect beyond the borders of the state, the common law rule, applying in Illinois, governs a suit brought by a broker to recover money claimed to be due under transactions on the Chicago Exchange, although the suit be brought in Missouri.

In the case of Smith vs. Bailey, 209 S.W. 945, the Kansas City court of appeals had occasion to reaffirm legal principles applicable to contracts for future delivery of grain where the dealings amount to mere trading on market fluctuations. After stating the trite rule that absence of intent to make actual delivery and an original purpose to merely gamble on future prices render void a contract to buy or sell grain for future delivery, the court said:

"We have no doubt that one may lawfully buy or sell grain for future delivery, if at the same time he intends to receive or deliver the same on the delivery day, and after his trade and before delivery if he finds that his investment, by reason of the change in the market, is a poor one, that he may protect himself by buying or selling an equal amount of grain, intending to deliver or receive the same, or that he might under similar circumstances sell the contract wherein he buys or sells grain for future delivery if that contract was a bona fide one, and the intention was for actual delivery at the time it was made; in other words, that one may lawfully trade against his future bona fide needs."

The same opinion held that a given transaction may be shown to have been invalid as gambling, although, in form, a valid trading on a board of trade, under rules providing for actual delivery of grain.

* *

Under the statutes of Missouri, an option on the purchase of grain for future delivery is not necessarily invalid as constituting a gaming transaction, held the Kansas City court of appeals in the case of Yontz vs. McVean, 217 S.W. 1000.

The parties to the litigation had entered into a written agreement under which plaintiff gave defendant $80 "for the privilege of 8,000 bus corn for December delivery at $1.40 per bushel, to be delivered at Clarksburg or Tipton, to be best merchantable corn. The $80 being all Yontz can lose on deal."

Defendant resisted liability for damages for refusal to deliver the corn, on various grounds, one of which was that the agreement was void as constituting a speculation in corn futures. But this contention was overruled by the court of appeals, which says:

"We must keep in mind that a valid contract of sale may be made for future

*Other phases of sales contracts, affecting their validity, are treated in succeeding chapters. For matter pertaining to the right of a nonresident corporation to enforce contracts involving the doing of business in a state where it has not secured a permit to do local business, see sections 394-396. See, also, Chapter L as to contracts restraining trade.

delivery of grain, even though the vendor has no grain on hand and will have to provide himself with the requisite quantity and quality before time of delivery. The thing which taints a sale for future acquisition and delivery is that there was never any intention to procure and deliver, or receive and pay for, thereby becoming a mere wager on the market price of the article at a given time. . . .

"The contract in question is not wholly of the character we have just mentioned, since it does not contemplate absolutely that there is a sale, in that plaintiff, as vendee, does not agree to buy, nor defendant to sell, unless plaintiff shall elect to buy at the time stipulated, viz., the month of December, 1919. In other words, plaintiff paid $80 for an option to purchase the corn at $1.40 per bushel, to become final and complete on his election to take it."

After quoting the Missouri statute against grain gambling, the court added:

"It will be noticed that all option contracts for grain are not prohibited by this statute. In some states they are, but not so in ours. It is only such contracts that are made by parties who do not intend to receive and pay for the property bought, or deliver the property sold, that are void. The evidence clearly saves this case from the prohibition of the statute."

* *

When the validity of a contract for future delivery of wheat is challenged on the ground that actual delivery was not contemplated by the parties, and that the transaction was a mere speculation in "futures," a court will closely scrutinize the transaction, disregarding form and looking to substance, declared the Kansas supreme court. The primary test of validity is mutual understanding in good faith that actual delivery will be made and received. (Stafford County Grain Co. vs. Rock Milling & Elevator Co., 146 Pac. 1139.)

* *

In Merriam & Millard Co. vs. Cole, 198 S.W. 1054, the Texas court of civil appeals entered judgment in plaintiff's favor on a contract for a sale of oats to defendant, as against defenses asserting that plaintiff was a nonresident corporation and had failed to obtain a permit to transact business in the state, and that the contract sued on involved an unlawful speculation in futures.

It was found by the court that there was a bona fide contract for a sale of oats, and that plaintiff had sufficient supply on hand out of which to make delivery. The court applied the following stated test of the validity of contracts for future delivery:

"A contract for sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such contract is valid only when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer, and if, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, . . . then the whole contract constitutes nothing more than a wager, and is null and void."

It was further decided in the same case that a contract for a sale of grain in interstate commerce is not governed by a state statute relating to sales for future delivery, nor by another state statute requiring foreign corporations to take out a permit before engaging in business in the state.

* *

Lamson Brothers & Co., Chicago, won a decision by the Iowa supreme court, upholding their right to recover damages from one Mensen for breach of a contract to buy 20,000 bus of corn. (174 N.W. 688.)

The suit was unsuccessfully defended, both in the trial and appellate courts, on the ground that there was no bona fide contract for a sale of the corn, but an invalid transaction in futures.

The supreme court remarked that the mere fact that nothing was said concerning delivery did not brand a deal in grain or other commodities as gaming. Intention to deliver will be inferred from a contract to sell.

Judgment in plaintiff's favor was affirmed mainly on the ground that there was sufficient evidence produced to warrant the jury's finding that there was a bona fide contract for a sale of the corn.

There was brought into consideration in the case an Iowa statute which provides that failure of a broker to furnish a customer with a written statement containing the names of the parties from whom the property bargained for was bought, or to whom sold, as the case may be, the time when, the place where, and the price at which, the same was either bought or sold, shall be prima facie evidence that there was no legitimate sale. It is held that failure to comply with this statute does not necessarily brand a transaction as gambling. It creates a

mere presumption, which may be overcome by proof of other circumstances indicating good faith intention that the property bargained for be actually delivered.

To the same general effect is the decision of the United States circuit court of appeals, eighth circuit, in the case of Lamson Brothers & Co. vs. Turner, 277 Fed. 680.

* *

When a note, mortgage or other security is given pursuant to an unlawful speculation in futures, suit to enforce it may be successfully defended on the ground of illegality of the transaction, according to the holding of the United States district court for the eastern district of Arkansas in the case of Carpenter vs. Beal-McDonnell & Co., 222 Fed. 453.

* *

"It is the law," said the Nebraska supreme court in the case of Lowe's Estate, 175 N.W. 1015, concerning grain speculation, "that an agent who undertakes to perform a contract which is contrary to public policy or in violation of law is under no obligation to perform it, but may violate it with impunity; but if he collects money for his principal upon an executed illegal contract, the principal can recover it by an action for money had and received for his use as upon an express or implied promise by the agent to pay it."

SECTION 16. DAMAGE CLAUSES IN SALES CONTRACTS

In the case of Sheffield-King Milling Co. vs. Jacobs, 175 N.W. 796, the Wisconsin supreme court decided that a contract providing for assessment of damages on the basis of wheat market values, for breach of the contract by the buyer, was not invalid as a gambling contract. The court said:

"It is suggested that, because the market price of No. 1 northern wheat at Minneapolis is made the basis for computing the plaintiff's damages, the contract is therefore void as a gaming contract. . . . There is, however, not the slightest intimation in the record that the parties at the time of making this contract did not intend to carry it out in accordance with its terms. In fact, every inference to be drawn from the conduct of the parties, both at the time of the inception of the contract and down to the time of its breach, indicates clearly and definitely that it was the intention of the parties to perform it. It is therefore a valid contract. . . .

"The fact that the great market places of the world are made use of by gamblers in the conduct of an illegitimate and unlawful business does not alter the fact that organized markets are not only proper, but necessary, to modern conditions. They perform a valuable and serviceable function in the process of distribution, and there is no reason why prices established there may not be made the basis for adjusting contract rights.

"It is apparent that at the inception of the contract the probable damages which the plaintiff might suffer in the event of a breach by the defendant would be difficult of ascertainment and uncertain. The parties agreed upon a fair basis of computation, and while the amount recovered is large, great variations in the market price of wheat and flour must have been anticipated by them, and in view of all the circumstances the amount recovered is not unconscionable. The contract was in no way a gaming contract, and therefore valid, and the judgment of the circuit court was right."

See, also, section 238.

SECTION 17. OTHER CLAUSES

In Strong vs. Thurston et al., 191 Pac. 575, the Kansas supreme court passed upon the validity of a contract clause covering failure of the seller to deliver within contract time. The provision in this case was to the effect that if the seller should be unable to ship within contract time, he should obtain instructions from the buyer as to whether the grain could still be used. The defendants objected that this clause made the contract invalid as constituting a gaming transaction, but the court overruled the objection, saying:

"We take the effect of the provision under consideration to be this: If the defendants failed to make shipment within the time set, they remained under an obligation to tender performance on their part at such time as they should select (unless sooner notified that the plaintiff had canceled or bought in), which offer the buyer might accept or reject; his election in this regard being likely to be influenced by the then state of the market. If he accepted it, the deal would be concluded by a shipment. If he rejected it, he thereby relieved the defendants from any liability for damages for breach of the contract.

"He could not, after receiving such offer, insist upon the defendants paying him the difference between the contract and market price and prevent their satis-

fying their obligation by actual delivery of the grain. The transaction, therefore, did not fall within the condemnation of either the common law or the statute. It was competent for the parties by agreement to make the right of the buyer to refuse the grain when offered one of the consequences of the sellers' default."

QUESTIONS OF IDENTITY

SECTION 18. IDENTITY OF PARTIES

Legal rights arising under a shipment of flour by mistake to one other than an intended person were involved in the case of Jones vs. Chicago, Burlington & Quincy Railroad Co. 170 N. W. 170, decided by the Nebraska supreme court.

Plaintiff sued at Lincoln to recover the value of a car of flour which he claimed the defendant railway company had wrongfully converted, but was nonsuited.

The flour was shipped from Minneapolis by the Washburn-Crosby Co. pursuant to a contract to sell to one Furman, of York, Neb., but, through mistake, it was shipped to the mill's order at Lincoln, with instructions to "notify" plaintiff. Draft for the price Furman had agreed to pay was drawn on plaintiff, with the bill of lading attached, and plaintiff paid the draft.

In the meantime, however, the mistake was discovered by the mill, which instructed the railway company not to deliver to plaintiff, but to return the shipment to Omaha, which the railway company did. In the meantime, the value of the flour had nearly doubled.

Plaintiff claimed that these facts established his rights as lawful owner of the shipment, and sought to hold the company liable for refusal to deliver on his offer to surrender the bill of lading. But the supreme court ruled against the claim, as did the trial court at Lincoln, saying:

"It was the duty of the defendant railroad company to deliver the flour to the true owner, and it was delivered to the Minneapolis company. The question, then, is whether the Minneapolis company or this plaintiff was the owner of the flour and entitled to delivery thereof. . . . 'Where a person contracts with another believing him to be one with whom he intends to contract, while as a matter of fact it is another person, there is no agreement, as where a person obtains goods by fraudulently impersonating a third person to whom the owner supposes he is selling, or by pretending to be the agent of a third person to whom the owner supposes he is selling.' 35 Cyc. 60.

"It appears that the Minneapolis company supposed it had contracted this flour to this plaintiff, when, as a matter of fact, it had contracted to Furman, and did not ship the flour as an offer to sell to the plaintiff, and had no intention of making a contract of sale with the plaintiff. The minds of the parties, therefore, never met so as to amount to a contract of sale. The plaintiff concedes that he had not ordered these goods, but testifies that he had instructed his son to order flour, and when he was notified of the shipment of this flour he supposed in good faith that it was his in response to an order by his son. . . .

"The draft, with the bill of lading, however, was drawn upon the plaintiff, and the price named was paid by him, and the draft and bill of lading delivered to him. The Minneapolis company could not retain the payment for the flour, and at the same time stop the delivery of the flour to the plaintiff."

The court, however, finds from the evidence that the mill did place the amount of the payment to plaintiff's credit and that he refused to receive it, considering that he had become the owner of the flour.

SECTION 19. IDENTIFICATION OF GOODS

There can be no breach of a contract for sale or purchase of goods unless the goods to be delivered have been identified, according to a decision of the Georgia court of appeals. This rule does not, however, invalidate an agreement under which one of the parties is given discretion to make a decision from specified grades, or to designate the quantity to be delivered within certain limits.

If the contract entitles the buyer to choose between several different grades, the seller has no right to make a choice for the buyer on the latter refusing to elect, and fix the recoverable damages by making a resale of the goods so selected for the buyer's account.

The same opinion is authority for the point that, even when a seller is entitled to resell for a defaulting buyer's account, there can be no valid resale unless notice of intention to make it be first given the buyer. (89 S.E. 177.)

SECTION 20. ALTERED TERMS

The general rule of law that one already bound by contract to do a thing

cannot exact a new contract of binding force from the other party, to pay an additional consideration for performance, was applied by the appellate term of the New York supreme court in the case of Porter vs. Orenstein, 180 N.Y. Supp. 418.

The specific holding in the case is that a seller of goods, being bound to deliver at the contract price, cannot enforce an agreement by the buyer to pay an increased price for the goods, although the seller may have encountered unexpected conditions making performance of the original agreement burdensome.

It is further held in the case that where a buyer refuses to pay an increased price, and is sued for the contract price of goods delivered, he may interpose a counterclaim for damages for nondelivery of the remaining goods called for by the agreement. The damages are to be measured by the difference between the market value of the goods not delivered and the price at which the seller agreed to deliver.

Where a buyer has become liable for demurrage charges, his subsequent promise to pay them is not sufficient consideration to support a waiver of rights on the part of the seller, the Alabama court of appeal held in Southern States Co. vs. Long, 73 So. 148.

MUTUALITY AND DEFINITENESS

SECTION 21. MUTUAL OBLIGATION REQUIRED

There is a general rule of law that a contract for the sale of goods is not mutually binding unless there is a reciprocal obligation to buy or sell a definite quantity of goods. It is not required that the quantity be stated as so many barrels or pounds; it may be ascertained by reference to some fact or circumstance that renders it certain, or approximately certain.

Contracts for sale of a buyer's "requirements" in his business frequently raise controversy as to whether they are invalid or not, and here is what the Delaware superior court finds to be the law after a careful search among the authorities:

In the case of American Trading Co. vs. National Fibre & Insulation Co., 111 Atl. 290, the court notes that early in its history the Minnesota supreme court declared a very strict rule against the validity of contracts providing for delivery of the buyer's requirements. "But," the court adds, "this rule has been somewhat modified on account of the growth and exigencies of business, and the later cases are rather uniform in holding that such contracts are not void for lack of mutuality and certainty if, in the light of the surrounding circumstances, the quantity contracted for can reasonably be ascertained or is capable of being approximately ascertained at the time of making the agreement.

"If the buyer has an established business which will require the commodities contracted for, it is presumed the business will continue, and under such circumstances the seller can approximately estimate the quantity of goods that will be required by the purchaser in his business. In such cases the law holds that there is mutuality of obligation and sufficient certainty respecting the quantity of goods that will be required by the buyer. . . .

"From an examination of the cases bearing upon the point, it may be stated that when the engagement of the buyer is merely to receive the goods he may want or order, or when his business is not established, and there is no reasonable probability that the business will continue, or will require any substantial quantity of the goods covered by the agreement, the law holds that the engagement of the buyer is not an obligation, but an option to take or not to take any goods only as he may desire, and the contract is void for want of mutuality or certainty."

What is said must not, of course, be taken as intimating that one may not buy an option to purchase goods.

The Delaware court holds that, where a contract is primarily invalid because not providing for any definite quantity of goods, the seller's acceptance of orders merely creates contracts for the quantities specified in the orders, without creating any obligation on his part to make further deliveries.

* *

Applying the fundamental rule of law that a one-sided contract is not enforceable,—that if one party is not bound by it the other is not.—the California district court of appeals held in the case of Schalk Chemical Co. vs. R. W. Pridham Co., 192 Pac. 195, that provision in a contract of sale of a specified number of cartons that, within the life of the contract, the buyer might "increase the amount of the original order," was not

binding on the seller. The buyer, not being bound to take more than the number specifically contracted for, could not require delivery of a greater number.

This holding, however, is not inconsistent with the right of parties to agree that on a certain consideration, which it seems might be the purchase of a definite quantity of goods at a given price, the buyer shall have an option to buy a certain additional quantity at a fixed price. In other words, an option may be sold, but a promise not supported by reciprocal obligation of some kind is voidable at the instance of either party.

See, also, the decision of the Montana supreme court in the case of McCaull-Webster Elevator Co. vs. Root (201 Pac. 319).

* *

Plaintiff, a manufacturer of macaroni, agreed, in consideration of defendant's promise to buy from plaintiff all macaroni retailed by him, to sell to defendant at wholesale prices, and not to sell to other retailers. Plaintiff also agreed, in case of failure to keep its part of the contract, to pay defendant $500 as damages. The validity of this contract was challenged in a suit brought by plaintiff to recover for goods delivered to defendant under the contract.

The trial court allowed plaintiff to recover the agreed price of the goods delivered to defendant, less $90 damages due to plaintiff's subsequent refusal to sell further quantities under the contract.

Defendant appealed, claiming that he was entitled to offset against the price of the goods delivered the $500 damages agreed upon to be paid for failure of plaintiff to keep its agreement to keep defendant supplied. Plaintiff asserted, in defense to this position of defendant, first, that the contract was invalid for want of mutuality, and, second, that the provision for $500 damages constituted an invalid penalty.

The Utah supreme court upheld plaintiff on the second point, but not on the first. It was decided that the agreement was not invalid for want of mutuality, because it bound plaintiff, for a limited period, to sell defendant his requirements, and bound defendant to buy exclusively from plaintiff. But the court held that the provision for $500 damages for plaintiff's breach of the contract in refusing to make further deliveries should not be enforced beyond the amount of actual damage, it appearing to be a penalty much in excess of the damages actually sustained by defendant. (151 Pac. 984.)

* *

The main rule was applied by the Pennsylvania supreme court in the case of Hutchison Baking Co. vs. Marvel, 113 Atl. 433, in defeat of plaintiff's right to recover damages for supposed breach of a contract to sell supplies to the baking company.

The company offered to buy from defendant at a fixed price "150 bbls of skimmed condensed milk, government standard." Defendant, in accepting the order, specified: "This order subject to approval of a 5-bbl sample, which we will ship at once to you."

Defendant failed to forward the sample, and afterward refused to do so. Thereupon the baking company bought substitute supplies elsewhere, and sued to recover damages for resulting loss. Upholding defendant's contention that no binding contract was consummated, the supreme court said:

"If the agreement to sell was qualified, and something further remained to be done before vendor and vendee obligated themselves, then no contractual relation was established. 'One party to a contract is not bound thereby, when it does not bind the other party; when there is no liability there is no obligation.' . . .

"In the present case, the company was not required to receive the goods unless the sample should be approved. It is true that the milk was to be of 'government standard,' yet there might be reason why the vendee would be justified in refusing to accept the goods, though the sample disclosed the percentage of solids required by that test. Until the vendee agreed to take the milk of the quality which the vendor was prepared to sell, there was no complete contract.

"An acceptance of an offer must be unqualified, to be effective. If new conditions be added, unless they relate to immaterial matters, or are such as are implied in law, . . . no liability is created, and such was the situation here. It was not a sale subject to buyer's inspection, but the determination of the quality by the purchaser was a condition precedent to formation of a definite understanding. . . .

"It is suggested that the proposed vendor was in default in not submitting his samples. That is so, but it does not alter the situation. 'Since there can be no contract without an offer and acceptance, the fact that the offerer by evasion prevents an acceptance of his offer will

not cause a contractual relation to be established.' "

* *

A contract is not rendered one-sided, and hence invalid for want of mutuality of obligation, because it safeguards the seller against liability for failure to deliver, in case of his being prevented from doing so through some cause beyond his control. The court recognizes such a provision as being a proper way for the seller to hedge against possible difficulties and hardships in the performance of his contract. (Texas Seed & Floral Co. vs. Chicago Set & Seed Co., 178 S.W. 731.)

The Nebraska supreme court sustained the validity of the Millers' National Federation uniform sales contract, as against objection that certain clauses, particularly those relating to remedies for breach of the contract, were void for want of mutuality of obligation, in the case of Peters' Trust Co. vs. Kleppinger, 197 N. W. 415.

* *

In the case of Acme-Jones Co. vs. Ellis Milling Co., 255 S. W. 829, the Kentucky court of appeals decided that a standard flour sales contract clause did not render the contract void for want of mutuality of obligation because the seller was given the right to cancel all or any unshipped portion of the flour under stated conditions. The court said on this point:

"An examination of the instrument will disclose this right so given may be only exercised by the seller after the expiration of the contract period; that is, at a time when the buyer no longer has the right, under the terms of the contract, to order the flour to be shipped. Each of the contracts fixes a definite period within which the shipments must be made, and after the expiration of that time the seller is merely given the right to cancel any unshipped portion thereof. During the life of the contract —that is, during the period within which the buyer may direct the shipment—the seller has no more right to cancel the contract, or any part of it, than has the buyer. In fact, not as much; for the buyer is expressly given the right to cancel, during the life of the contract, any shipment upon which default has been made by the seller for a period of 14 days."

It was argued by counsel for the buyer that the buyer might have ordered out every barrel of the flour within the stipulated time, and yet if it was not shipped within that time the seller had an option to cancel the contract. In other words, it was argued that as shipping is the duty of the seller, an order of shipment made toward the end of the period might be purposely delayed by the seller, and it be thereby placed in his power to virtually cancel the contract.

"It is sufficient to say, in answer to this," said the court, "that the rights of the parties in such a situation are not presented by this record, and it appears to be unnecessary to determine here whether, if shipments were directed to be made by the buyer within the stipulated period, and were not actually made by the seller within that time, he might thereafter decline to make them."

* *

The suit of Neola Elevator Co. vs. Kruckman, 171 N.W. 743, before the Iowa supreme court, involved the question whether defendant could relieve himself from liability in damages for failure to deliver a quantity of corn, as agreed, on the technical ground that the contract was invalid as being one-sided in its obligations for performance. The question was decided against him. His contention rested specially upon a clause in the contract reading as follows:

"If corn is not delivered within the time specified, the contract will be considered open until Neola Elevator Co. notifies seller in writing that same is canceled. Seller agrees not to refuse to deliver on this contract in case it is impossible (on account of car shortage, embargo or breakdown in elevator) for Neola Elevator Co. to receive grain when tendered."

Affirming judgment in plaintiff's favor, the Iowa court said:

"For a contract to be mutual, an obligation must be thereby imposed upon each party to do, or permit something to be done, in consideration of the act or promise of the other. Unless both are bound by the contract, neither will be bound thereby. Manifestly, an agreement in writing signed by the parties to be bound, by the terms of which one party buys, and the other sells, a definite quantity of grain, at a stipulated price, to be delivered at a certain place before a specified date, is supported by a good consideration and not void for want of mutuality. . . .

"Contracts are not deprived of mutuality simply because one party thereto is granted privileges not given to the other. Their obligations need not be equal."

The opinion also recognizes the well-settled rule of law that time for delivery of goods by the seller may be extended by verbal agreement, although the contract of sale fixing the original delivery date was in writing.

A clause in an order blank, reciting that all orders accepted by the sellers are accepted for delivery to the best of the sellers' ability, but that they will not be "liable for failure to deliver any portion of orders taken, sometimes caused by circumstances over which we have no control," is not invalid as lacking obligation on the part of the sellers to deliver. So held the Massachusetts supreme judicial court. Construing such a provision, the court said:

"It means that performance of the agreement by the sellers was not left optional with them, but was an absolute binding obligation to make deliveries to the best of their ability at the time specified in the agreement, unless they were prevented from making such deliveries by causes for which the sellers were not responsible and over which they had no control."

See, also, the decision of the United States circuit court of appeals, eighth circuit, in the case of Stafford Flour Mills vs. Peck, 289 Fed. 43).

SECTION 21A. PERFORMANCE CURES DEFECT

Ordering goods and receiving them under an agreement to buy cures any invalidity of the agreement on the ground of indefiniteness or lack of mutual obligation. This rule, which has often been applied by the courts, was followed by the Georgia court of appeals in the cases of Shelton Mill vs. Coker et al, 128 S. E. 695.

One Walters entered into a written agreement with plaintiff mill under which it was provided that the mill would ship to him from time to time such quantities of flour as might be mutually agreed upon. Walters agreed to sell the goods at such prices as the mill might deem proper, and to account to the mill for all goods sold, at prices fixed by the mill, the excess received by Walters to be retained by him as compensation for storing, insuring and selling. The products were to remain the property of the mill until sold by Walters. Bond to insure performance of the contract on his part was given.

The mill sued on the bond, averring that Walters had failed to account for nearly $2,000 worth of flour shipped to him.

As a defense, it was unsuccessfully asserted that the bond was void because the contract, performance of which it purported to secure, was invalid because it lacked mutuality of obligation and was indefinite in its terms. Evidently, this objection rested upon the fact that the contract provided for no definite quantities of products and no definite prices or means of ascertaining the same.

SECTION 22. CERTAINTY OF TERMS

A contract for delivery of one or more "cars" or "carloads" of a given commodity is not invalid for failing to sufficiently specify the quantity bargained for. It will be assumed that the parties to the agreement intended a delivery in accordance with the capacity of a railway car of the kind ordinarily used in transporting the particular kind of goods, in the absence of a showing of mutual understanding to the contrary. (Alabama supreme court in Ferguson vs. W. F. Covington Mfg. Co., 85 So. 726.) See this and other cases reviewed in the chapter relating to the quantity of goods to be delivered under a contract of sale, Chapter IX.

In Bowers vs. Whitney, 88 Minn. 168, defendant denied that an agreement to deliver rye constituted a valid contract to sell rye. But the court said: "It is clear, and we so hold, that the word 'deliver' in the memorandum imports a sale and delivery of the rye. We hold that the memorandum in this case was sufficient to satisfy the statute of frauds, and that the court erred in excluding the offered evidence, and rightly granted a new trial of the action."

SECTION 23. MISTAKE AS TO TERMS

"There is no doubt," said the West Virginia supreme court of appeals, "that when an unequivocal offer is made by one party to another, which offer is in good faith accepted, a contract is formed, and both parties are bound thereby; but there is another rule which seems to be equally as well established, and that is that, where the party making the offer makes a mistake, and the price at which the articles are offered is so out of proportion to the real value thereof that the other party must know that the offer is made by mistake, or the circumstances which surround the parties at the time are such as to give notice to the party receiving the offer that it has been made under a misapprehension upon the part of the other party of some material fact, or the party to whom the offer is made actually does know that such offer is made through a misapprehension of a material fact, no contract will arise from the acceptance thereof in case the party making the offer, upon discovering the mistake, repudiates the same." (103 S.E. 282.)

One-sided mistakes in business transactions do not relieve the obligation of a contract. So the Pennsylvania supreme court was in line with other judicial authorities when it decided, in the case of Holmes vs. Cameron, 110 Atl. 81, that where goods have been contracted for sale by sample, the seller cannot avoid performance of the agreement on the ground that he submitted a sample of a higher grade of goods than he intended to submit.

In this case, defendant had sold a bill of goods to plaintiff by sample, but a week later wrote that it would be impossible to deliver, because a mistake had been made and defendant had no goods of the kind called for by the sample. In the meantime the market value of the goods had risen to a point considerably higher than the contract price.

Plaintiff recovered damages for nondelivery of the goods, and the supreme court affirmed the decision, saying, in part:

"In the sale of goods by sample there is an implied warranty that the bulk shall correspond with the sample in quality. . . . It follows that plaintiff was entitled to goods corresponding to the sample, and the fact that defendant did not have them in stock was no excuse; neither was the fact that he made a mistake in the sample. There is nothing to take this case out of the general rule that, in the absence of fraud, a party will not be relieved from a contract because of his own mistake. . . .

"So far as appears, defendant could have procured goods to satisfy the contract, both in quantity and quality; therefore it is not a case where performance was impossible. 'A contract to perform an impossible thing may be void; but it never is impossible to procure and deliver an article of commerce which may be had in the market in some quarter of the world. . . . It must be impossibility, not difficulty, that will excuse from performance of a contract.'"

* *

One who has entered into an unambiguous contract for the sale or purchase of goods will not be permitted to avoid liability on his undertaking on the ground that he misunderstood the meaning of the telegrams forming the contract. The Mississippi supreme court applied this conclusion in the case of Monroe County Hay Exchange Co. vs. Allen & Co., 86 So. 297. Referring to the seller, the court said:

"If by negligence or inattention he construed the telegram to mean something wholly at variance with its express terms, he should not be permitted to take advantage of his inattention to the damage of the other party who was without fault."

* *

A decision of the Kansas supreme court has a very important bearing on the making of contracts of sale by telegraph, the opinion having been handed down in the case of Cargill Commission Co. vs. Mowery. June 29, 1915, defendant, as the Hutchinson Grain Co., exchanged several code telegrams with plaintiff. Defendant's offer to sell wheat closed with the message: "Book the 30,000 to 35,000 bus No. 3 hard wheat $1.31 Minneapolis; wire if booked." Plaintiff replied: "We book 30,000 to 35,000 No. 3 hard wheat $1.31, basis Minneapolis, five days' shipment." The same day, defendant sent plaintiff a letter confirming sale of 3,000 to 3,500 bus, and plaintiff sent one confirming for 30,000 to 35,000 bus.

Plaintiff received defendant's letter July 1, and wired attention to the fact that the code words used by defendant called for the greater quantity of wheat. Defendant replied that error was made in selecting the words. In the meantime, plaintiff had contracted for resale of 30,000 to 35,000 bus, and notified defendant that he would be looked to for delivery of that quantity. He delivered in accordance with his intention to sell 3,000 to 3,500 bus, but resisted suit to recover damages for his refusal to ship more. The trial resulted in defendant's favor, but the supreme court reversed the decision, awarding judgment in favor of plaintiff.

The higher court held that a binding contract of sale of 30,000 to 35,000 bus was made by the telegrams exchanged June 29, and that, since plaintiff was not advised of defendant's mistake in the selection of code words until after plaintiff had contracted a resale on the faith of defendant's accepted offer, defendant must bear the loss resulting from his own mistake. (161 Pac. 634.)

But the decision does recognize the point that, where a letter confirming telegraphic negotiations apprises the addressee, before he has assumed any obligations on the strength of the agreement, that a mistake has been made in the telegrams, the mistake may be corrected.

In a supplemental opinion (162 Pac. 313) the supreme court modified its decision by ordering a new trial on the question whether plaintiff was chargeable

with knowledge of the mistake by reason of an alleged impossibility of buying and shipping the larger quantity of wheat at Hutchinson within the five-day limit fixed by the contract. The court said:

"We had been inclined to assume that in the Hutchinson wheat market in June, 1915, it would have been quite possible to purchase that amount of wheat of the kind [30,000 to 35,000 bus of No. 3 hard wheat] in the time specified. But we are now constrained to hold that these allegations formed an issue of fact—the essential one being the plaintiff's knowledge of such alleged impossibility—and that the defendant is entitled to have a jury decide this issue."

On the original hearing of the case defendant argued that plaintiff's acceptance of from 3,000 to 3,500 bus, after being advised that defendant had intended to sell that amount only, concluded plaintiff against claiming further delivery, but the supreme court found that plaintiff was entitled to accept all delivery tendered, as partial performance only.

See, also, the decision of the Kansas City court of appeals in the case of Haubelt Bros. vs. Rea & Page Mill Co., 77 Mo. App. 672, holding that a mill was bound by a mistake made by a telegraph company in transmitting a flour quotation, involving a difference of 70c per bbl.

MISCELLANEOUS ASPECTS

SECTION 24. DECEIT BY SALESMAN

See the case of Rock vs. Petty Store Co., 224 S. W. 5, referred to in section 239, holding that if the general manager of a store refused to give a flour order and the seller's salesman obtained an order immediately afterward from the assistant manager, without disclosing the general manager's refusal, the contract was voidable by the store company on the ground of deceit.

SECTION 25. AUTHORITY OF PURCHASING AGENTS

The validity of sales contracts as affected by the authority of the seller's representatives is dealt with in Chapter VII.

General authority given an agent to buy commodities gives him implied power to bind his employer by making agreements concerning the terms of a purchase. And where defendant advised plaintiff that its agent was in plaintiff's locality for the purpose of buying hay, that justified the plaintiff in assuming that the agent had authority to make a binding contract of purchase, without necessity of confirmation by defendant. (California district court of appeal, in Whitaker vs. Dunlop-Morgan Co., 186 Pac. 181.)

Contracting to buy 100 days' supplies was held to be within the scope of a bakery manager's apparent authority, in the case of Bay State Milling Co. vs. Saginaw Baking Co., 196 N. W. 204, decided by the Michigan supreme court.

In Hurst vs. Hill, 188 Pac. 973, the Oregon supreme court recognized that the owner of a retail business may become charged with liability on contracts for the purchase of flour and other supplies made by an employee who has customarily made such purchases, but the opinion restated the established rule of law that a finding that one was authorized to make a contract for another cannot be predicated on the bare fact that the supposed agent has declared himself to be authorized. "You cannot prove the authority of the agent by his own declarations out of court," said the court.

In a suit to recover damages for claimed breach of a contract to buy flour, wherein the suing mill offered testimony tending to show defendant buyer's reason for canceling the contract, it was held by the Georgia court of appeals to be proper to permit defendant's president to testify that the witness who gave such testimony did not represent defendant in the flour deal. (J. C. Lysle Milling Co. vs. Whitfield Grocery Co., 106 S.E. 8.)

SECTION 26. VALIDITY OF SIGNATURE

From the standpoint of the addressee it is obviously to be preferred that the signature to a letter carrying an obligation be autographic to forestall the possibility of the sender denying that he authorized the letter to be sent. But, as decided by a southern court of high authority, a typewritten signature to an ordinary contract is just as valid as an autographic one when once shown to have been affixed with authorized intention that it operate as a signature.

The merest scratch of a pen will usually suffice as a signature when supplemented by proof of such intention, so it follows that the mere fact that an autographic signature is defective or illegible will not invalidate it. There are numerous decisions which have upheld the validity of signatures by abbreviations and

by initials, and signatures affixed by one person at the request of the ostensible signer.

Ordinarily, it is not necessary that the signature be at the bottom of the letter, if a signing at any other place was intended as a signature to the entire document, but since many statutes which require certain classes of contracts to be in writing require that they be "subscribed," signatures to such agreements should be in the usual position. It is scarcely to be doubted, however, that a signed letter followed by an unsigned postscript would be good in the case of an ordinary business letter. Yet, in the case of a postscript containing an important term of a contract required to be in writing, it will be much safer to have it signed, to avoid quibble on the point that it was not "subscribed."

* *

Where one giving a salesman an order for flour or other goods expressly or impliedly empowers the salesman to sign the contract for him, the signature is just as binding on the buyer as if it had been personally executed, decided the Massachusetts supreme judicial court in the case of Omaha Flour Mills vs. Santarpio, 134 N. E. 261.

EFFECT OF GOVERNMENTAL REGULATIONS*

SECTION 27. REGULATIONS IN GENERAL

In a decision handed down by the Massachusetts supreme judicial court in the case of Stein-Hall Mfg. Co. vs. H. M. Glossbrenner & Co., 145 N. E. 526, it was held that a contract to sell rice flour was illegal and not enforceable, because not in the form prescribed by the Food Administration when the contract was made.

* *

A Georgia statute provides that "all concentrated commercial feedingstuffs shall be in standard weight bags or packages of 50, 75, 100, 125, 150, 175, or 200 lbs each." In the case of Southern Flour & Grain Co. vs. Smith, 120 S. E. 36, it was held by the Georgia court of appeals that this statute was violated by a sale of "beet pulp" in bags of 88 lbs each. The official abstract of the decision also adds:

"Where the terms of a contract directly involve the infraction of a civil statute, not enacted for the purpose of raising revenue, and such infraction is penalized by a fine, or imprisonment, or both, the contract is void and unenforceable. . . . The recent case of Southern Flour & Grain Co. vs. Pillsbury Flour Mills Co., 29 Ga. App. 671, 116 S. E. 910, does not conflict with the ruling now made. In that case the violation of the interstate commerce act was independent of and did not enter into the contracts sued upon."

* *

That a contract for a sale of corn or grain may validly impose quality requirements in addition to the grade requirements prescribed by federal law and regulation was the principal conclusion reached by the Arkansas supreme court in the case of Hayes Grain Co. vs. Rea-Patterson Milling Co., 223 S.W. 390.

The opinion also threw light upon the legal effect of letters and telegrams transmitted contemporaneously with the making of a formal contract of sale. The court affirmed a judgment of the circuit court at Little Rock in favor of defendant mill.

Plaintiff grain company's suit involved a claim that the mill bargained to buy three carloads of No. 3 white corn for shipment to Coffeyville, Kansas, but refused to accept delivery. The mill was upheld by the courts in this refusal, on the ground that the corn tendered was not of the kind contracted for.

The facts of the case, as found by the supreme court, were as follows: Plaintiff had corn in transit to it at Fort Smith from St. Joseph and Omaha, but desired to get the corn off his hands. The mill's representative verbally stated that it needed no corn, using only such as would produce high grade meal, but that it would advise plaintiff further by wire next day. The next day the mill wired plaintiff an offer for "choice white milling corn," and plaintiff accepted. The mill's confirming letter specified "choice No. 3 white kiln-dried, shelled white corn." Inclosed were "purchase contract" forms, confirming purchase of "choice 3 white kiln-dried corn, . . . federal grades," etc.

Two cars from Omaha passed Coffeyville while these negotiations were being conducted, but the mill expressed willingness to receive them, and three others then on plaintiff's track at Fort Smith, on specified adjustment of freight charges. The offer, which was accepted

*For treatment in general of the subject of governmental regulations, see the preceding chapter. See, also, case cited in section 206 where contract contemplated future regulation.

by plaintiff, also specified "all corn to be good three white milling corn." Confirming this latter agreement, the mill specified "good No. 3 white shelled corn, kiln dried, suitable for milling purposes," and added: "You, of course, understand we buy white corn for milling purposes only, and expect a good quality of corn."

The salient parts of the supreme court's opinion are as follows:

"Appellee's [the mill's] offer was to buy milling corn, and the acceptance of that offer was unqualified. Appellant [the grain company] says, however, that as the term 'milling corn' does not appear in what it designates as the written contract, appellee cannot be heard to say that there was such a condition. Appellant says this result is reached by the application of the doctrine that antecedent propositions, correspondence, and prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject matter of such antecedent negotiations when it is free of ambiguity and complete.

"We think, however, that rule does not apply here, because the letters and telegrams are contemporaneous writings with the memorandum which appellant designates as the contract; and we think it manifest that the parties intended that they should be so considered. They were all in the hands of appellant before it shipped the corn. Besides, as we have shown, the final contract of sale was concluded the day after this memorandum of sale was signed by appellee and mailed to appellant.

"Moreover, the very memorandum itself described the corn as 'choice 3 white kiln-dried corn,' and the testimony shows that the corn in controversy was not choice kiln-dried corn, although it did, in fact, grade 'No. 3 white,' and ordinarily this fact would have justified appellee in refusing to accept the corn. Appellant says, however, that it was unlawful, under the United States grain standards act, for the appellee to purchase for shipment in interstate commerce under any designation except by grade, and that all other descriptive terms must be rejected as surplusage, and that the only question to consider is whether the corn would have graded 'No. 3 white' at the time and place of the proposed delivery.

"The Department of Agriculture was charged with the duty, under the act of Congress, of making and promulgating the necessary rules and regulations to govern the sale and shipment of different grains in interstate commerce; the purpose being that the wants and needs of all persons dealing in grain may be made known by the use of grades designated by the department, and corn was classified into seven grades.

"In the Service and Regulatory Announcements, promulgated by the Department of Agriculture, Bulletin No. 18, p. 4, in answering the question whether the term 'dry corn' might be used in connection with its grade designation, the department made the following ruling:

" 'Section 4 of the act requires as a condition to the shipment or delivery for shipment in interstate or foreign commerce of any grain for which standards shall have been established thereunder, which is sold, offered for sale, or consigned for sale, [that it] be one of the grades fixed therefor in the official grain standards of the United States.'

"Section 4 further provides: 'No person shall in any certificate or in any contract or agreement of sale or agreement to sell by grade, either oral or written, involving, or in any invoice or bill of lading or other shipping document relating to, the shipment or delivery for shipment, in interstate or foreign commerce, of any grain for which standards shall have been fixed and established under this act, describe, or in any way refer to, any of such grain as being of any grade other than a grade fixed therefor in the official grain standards of the United States.

" 'In the class of cases covered by the statute it appears that it is necessary, in stating the grade of the grain, to use the true designations of the official grain standards of the United States as prescribed therefor. It also appears that it would be a violation of the act to use, in addition to such designations, any term or statement in conflict or inconsistent with the official standards.

" 'On the other hand, it is the opinion of this office that, in addition to the true designations of grade according to the official grain standards of the United States, it would be permissible to include explanatory terms or statements independent of the grade of the grain. If the terms "crop 1916" and "dried corn," as they prima facie indicate, are used merely in this explanatory sense, it is believed that they may be added to the true grade designations without violating the act. However, these terms should not be made a part of the grade designation as in the example you cite of "No. 2 dried corn," but should be added in such a way as clearly to indicate their ex-

planatory nature, as, for instance, "No. 2 mixed corn, dried."'

"Of course, these departmental rulings are no part of the law; but we do not interpret the ruling as sustaining appellant's contention that the explanatory words 'choice' and 'kiln-dried' must be treated as surplusage. The department appears to hold that it is not a violation of the federal act to add prefixes or suffixes to the terms designating the official grade, provided such explanatory words are not false or misleading as to the official grade of the grain.

"This appears to be the fair and reasonable construction to give the act of Congress, as the testimony at the trial was to the effect that a wide difference may exist in corn falling within the same official classification or grade. The official inspector at Coffeyville, Kansas, who inspected the corn in question, testified at the trial and exhibited to the court three pans of corn, all of which graded No. 3 white; yet he explained that one pan was suitable for milling, and another pan was not, for the reason that it would color the meal.

"On Dec. 1, 1916, the Department of Agriculture was asked whether the following classification was permissible under the federal act: 'Yellow milling corn, subject to discount for moisture over 17½ per cent.' After expressing the opinion that the provisions of the act were applicable to transactions involving the delivery for shipment in interstate commerce of shelled corn that was sold or consigned for sale by any grade whatever, the department ruled:

"'It would seem that your transactions could easily be so framed as to state the grade of the corn involved, according to the grade of the official grain standards of the United States, and that at the same time you could make the specific requirements which must be met by corn of the designated grade for the purposes of your business.'

"We think this ruling conforms to our interpretation that it was not the intention of the statute to deprive persons of the right to contract for specific requirements, provided the specifications employed were not false or misleading, and conformed to the classifications previously adopted by the department.

"We conclude, therefore, that the requirement of the memorandum that the corn should be 'choice' and 'kiln-dried' did not offend against the provisions of the federal statute and [that the terms] are not to be disregarded as surplusage."

See, also, section 133.

As to the rights of neutrals in dealing with citizens of foreign countries at war with each other, see sections 370-374.

SECTION 28. PRE-EXISTING CONTRACTS

A decision of the United States district court for the western district of Washington dealt at length with the legal effect of the breaking out of the European war on pre-existing contracts directly or indirectly binding citizens of belligerent nations in mutual obligation. In this case —Lindenberger Cold Storage & Canning Co. vs. J. Lindenberger, 235 Fed. 542—a tripartite agreement between an English corporation, American corporations and a German firm was held not to violate the English "trading with the enemy" acts.

But the court held that contracts entered into prior to the war which, in their future performance, involved trading with the enemy, were rendered void by the outbreak of the war; that contracts which had been performed and under which an alien enemy had become indebted to a British subject prior to the war could be enforced by the latter in a British court; and that an alien enemy's right to enforce a contract with a British subject was suspended during the war.

Numerous English decisions handed down after hostilities began were cited to show the attitude of the British bench on the subject. In one of these cases it was decided that a contract of an English company to sell goods to a German firm was rendered void by the outbreak of the war, and not merely suspended until declaration of peace. In another case it was declared that payments made to a neutral constituted an unlawful dealing for the benefit of Germans where the effect was to diminish the obligations of such Germans, thereby augmenting their resources and diminishing those of Great Britain.

* *

"The war measures as embodied in the rules of the milling division of the United States Food Administration constituted no defense to the breach of the contract. As stated, the contract was made Aug. 2-4, 1917. The food regulations were made Sept. 10, 1917. Congress, in authorizing the establishment of such regulations, did not undertake to invalidate prior contracts, nor did it do so." (Kansas City court of appeals in case of J. C. Lysle Milling Co. vs. Sharp & Son, 207 S.W. 72.)

* *

A contract to purchase flour, entered into before the enactment of the food

control act, was not invalidated by such act.

This is the gist of the decision of the Arkansas supreme court handed down in the case of Rock vs. Deason & Keith, 225 S.W. 317. Plaintiff, as manager of the Millers' Exchange, Kansas City, joined with the Security Flour Mills Co. in a suit against defendants to recover damages for breach of contract to buy a car of flour and feed.

Defendants admitted that they gave to the mill an order for a carload of flour, which was to be shipped on Sept. 15, 1917, but alleged as a defense to the action that the national government took charge of the manufacture and sale of the flour, and prohibited its sale at the price they had contracted to pay for it, whereby they were prohibited, without fault on their part, from carrying out their agreement to purchase the flour.

The mill's travelling salesman took an order from defendants for a car of flour on Aug. 7, 1917. The price was named in the order, and the time of shipment was Sept. 15, 1917, or sooner. The order was subject to acceptance by the mill. The mill received the order from its salesman, and on Aug. 9, 1917, wrote to defendants accepting the order and asking for shipping instructions. Other correspondence passed between the parties, in which the mill insisted upon defendants performing their contract by receiving the flour, and defendants asked for a reduction in the purchase price, because in the meantime the price of flour had gone down. The mill refused to make any reduction.

Trial of the suit resulted in judgment in favor of the defendants, but it was reversed by the supreme court on appeal, for the following stated reasons:

"The decision of the chancellor was wrong. The order signed by appellees on Aug. 7, 1917, constituted an offer to buy the carload of flour from appellants, and the acceptance by appellants on Aug. 9, 1917, constituted a completed contract. . . .

"In a case note to 3 A.L.R. p. 35, it is said that the war measures embodied in the rules of the milling division of the United States Food Administration constitute no defense to an action for the breach of the contract to purchase flour, such regulations not operating, nor being intended to operate, to invalidate prior contracts, and the case of J. C. Lysle Milling Co. vs. Sharp (Mo. App.), 207 S.W. 72, is cited in support of the text. That principle controls here.

"The act of Congress relating to the federal control or production of food and fuel was passed on Aug. 10, 1917, and the section which controls here . . . provides, in substance, that whenever the President shall find it necessary to secure an adequate supply of necessities for the support of the army or the maintenance of the navy, or for any other public use connected with the common defense, he is authorized to requisition and take over, for the use or operation by the government, any factory or plant, or any part thereof, in or through which any necessities may be manufactured or produced, and to operate the same.

"The section further provides that the President is authorized to prescribe such regulations as he may deem essential for carrying out the purposes of this section. It will be noted that the food control act was not passed until Aug. 10, 1917, and the rules were not promulgated by the President until Aug. 24, 1917. The section of the statute in question does not purport to act retroactively.

"As we have already seen, a binding contract between the parties was completed on Aug. 9, 1917. This being before the passage of the food control act by the Congress of the United States, the appellees could not excuse themselves from performing the contract. The fact that they had until Sept. 15, 1917, to give shipping directions, does not alter the case. The binding force of the contract took effect when the contract was completed, and that was on the day when the appellants accepted the offer of appellees for the carload of flour.

"W. A. Chain, the general manager of the Security Flour Mills Co., was a witness for appellants. According to his testimony the company received the order from Deason & Keith dated Aug. 7, 1917, and accepted it in a letter mailed to them on Aug. 9, 1917. The company asked for shipping instructions from Deason & Keith. The latter refused to give them or to receive the flour. The company was then compelled to sell the flour to other parties at a reduced price, so that it suffered a loss in the sum of $283.50. The chancellor should have found that the appellees breached the contract, and have entered a decree in favor of appellants for the loss suffered."

* *

In a suit to recover the agreed price of four cars of coal, defended on the ground that the contract called for the payment of a price in excess of that fixed by executive orders, Judge Valente, of the city

court of New York, made some observations having a bearing on the governmental control of food, as well as fuel, prices.

In this case (Majestic Coal Co. vs. W. J. Bush & Co., 171 N. Y. Supp. 662) it was shown that on Aug. 27, 1917, defendant agreed to buy the coal from plaintiff at $3.92 per ton. On Aug. 20 plaintiff, a jobber, had contracted with a mining company for delivery of six cars of coal a week until Sept. 15, at $3.75 per ton. Hence the price defendant agreed to pay plaintiff represented a profit of 17c, which was a proper profit under the President's order of Aug. 23. Aug. 21 another executive order fixed the price of bituminous coal at $2.41 per ton at the mines, exclusive of jobber's profit.

Although these orders were made after plaintiff actually contracted with the mining company for a coal supply on Aug. 20, at $3.75 per ton, defendant insisted that plaintiff could not validly charge defendant more than the government price of $2.41, plus a 17c jobber's profit, despite defendant's agreement of Aug. 27 to pay $3.92.

In overruling this claim of defendant's, the court held that the food and fuel control act of Aug. 10, 1917, and fuel regulations issued thereunder, did not purport to require a sale, at a loss, of coal bought before a fixing of prices under such regulations. It was further distinctly held by Judge Valente that an interpretation of the act and the regulations as requiring such sales at a loss would render the provisions void as an unconstitutional confiscation of property.

The controversy was intensified in this case because on Oct. 6, 1917, the fuel administrator issued an order to the effect that a jobber who held a contract for the purchase of coal when the President fixed prices, without having already sold or contracted to sell such coal, should not resell at a price in excess of that fixed by the President or fuel administrator.

"I cannot understand why the plaintiff should have to suffer a loss of $1.75 a ton on coal which it had bought, sold, and bona fide paid for, before the United States fuel administration's rule of Oct. 6, 1917, was promulgated, even assuming (without, however, conceding) that the fuel administration had the power to make such a rule," says the court.

"It seems clear to me that the plaintiff followed absolutely the provisions of the Lever act of Aug. 10, 1917, and the President's executive orders of Aug. 21, 1917, and Aug. 23, 1917, based thereon, when it fixed the contract price herein at the figure of $3.92, being its own purchase price of $3.75, plus the 17c jobber's profit allowed under the President's proclamation. In other words, plaintiff is selling this coal to the defendant at cost price, plus the small additional allowance of 17c per ton, out of which has to come all of plaintiff's overhead expenses, salesmen's commissions, etc. . . .

"I wish to add, however, that there is serious doubt in my mind of the validity of paragraph 11 in the rules and regulations issued by the United States fuel administration, above quoted [the order of Oct. 6]. In the instant case, I do not have to pass upon this issue, in view of the reasonable attitude assumed by both the United States fuel administration and the New York fuel administration.

"But in view of the uncertainty in the coal business, which this regulation of the United States fuel administration has occasioned, I think it is only proper for me to state that, in my judgment, such a regulation could not be deemed to be retroactive; but, if it is so unfortunately worded as to imply that it is retroactive, then and in that event it must be held void and illegal, and contrary to the congressional act of Aug. 10, 1917, and the executive orders thereunder.

"I have studied with some care both the congressional act and the executive orders of the President, but I cannot find anything in them which could compel legitimate jobbers in fuel to sell coal at prices less than the purchase prices bona fide paid by the said jobbers to the mines. If there were anything in them to that effect, it would be void and unconstitutional. Confiscation cannot be achieved under the guise of legislation."

As will be seen from the foregoing language used by Judge Valente, his reasoning supports a view that, regardless of the nature of any given commodity covered by the food and fuel control act, one who in good faith obtains or contracts for a supply cannot be compelled by any subsequently adopted regulation to sell it at a loss.

The city court of New York being one of the minor courts of the state, the decision cannot be regarded as a final statement of the law, but it is interesting as being apparently the only judicial declaration on the subject to date of its rendition.

SECTION 29. PRICE OF GRAIN

A decision of the Washington supreme court held the Ellensburg Mill-

ing Co. liable as for breach of a contract to buy wheat from the Jones-Scott Co. (199 Pac. 238.)

One of the grounds on which the mill resisted plaintiff's suit for damages was that the contract was invalid and unenforceable under the war-time food control act, as fixing a price in excess of the fair price fixed by the government for wheat. But the court held that the law was not susceptible to such interpretation; that "it merely provides, as far as wheat is concerned, for the fixing of a minimum price. The purpose of the act is very apparent: to encourage the production of wheat by the farmers of the country to meet the stress of war demands."

Another contention made under the same act was that the contract was invalid and unenforceable as providing an excessive price for necessaries. But the court disposed of this contention by showing that the United States Supreme Court has decided that the food control act was invalid as to its provisions against excessive prices.

SECTION 29A. VIOLATION OF LAW

False billing of goods, to obtain a lower freight rate than actually applicable to the shipment, although a misdemeanor under the interstate commerce act, does not vitiate a contract to sell the goods made by the violator, according to a decision of the Georgia court of appeals. The decision, however, is not to be understood as necessarily meaning that a contract of sale would not be vitiated by a false billing pursuant to mutual agreement of the parties. The general rule is that any contract is invalid that mutually contemplates violation of law.

A mill sued for damages for breach of purchase contracts. The defense, unsuccessfully pleaded, was that the subject of contract was a low grade of flour carrying a higher freight rate than "wheat feed"; that the goods were stamped, tagged, billed and invoiced as wheat feed to procure a lower freight rate; that had defendant taken up the bills of lading it would have aided the mill in violating the interstate commerce act; and that, therefore, it was not bound to accept the shipments. (116 S. E. 910.)

CHAPTER III

MUTUAL ASSENT AS ESSENTIAL OF A VALID CONTRACT

SECTION 30. IN GENERAL

STRANGELY enough, one of the simplest and fundamental rules of sales law gives rise to more controversies in connection with the sale of mill products than any other legal principle. It is the rule that mutual assent to the essential terms of an agreement is a prerequisite to the making of a valid contract to buy or sell.

As declared by the Tennessee court of chancery appeals in the case of College Mill Co. vs. Fidler, 58 S. W. 382, an offer must be accepted, unconditionally, as it is made, and the acceptance must be prompt, unless, under the terms of the offer, it is left open for a definite time; and especially is a prompt acceptance required when the property offered for sale is subject to daily or rapid fluctuations in price.

* *

Because a milling company's telegraphic acceptance of an order for flour introduced conditions not embodied in the order, the Indiana appellate court decided, in the case of Ismert-Hincke Milling Co. vs. Burkhart, 146 N. E. 334, that no binding contract was made. It also found that the sending of a written contract for execution, embodying numerous conditions, further indicated a lack of meeting of the minds of the parties on a contract of sale. Accordingly, the court decided that plaintiff's suit to recover damages for wrongful refusal to receive flour was properly dismissed.

The suit rested on two telegrams. The defendant wired plaintiff: "Ismert-Hincke Milling Co., Kansas City, Mo., Book 350 bbls of flour, half I. H. and half Thunderbolt. Harry Burkhart."

Plaintiff replied by wire: "Harry Burkhart, Peru, Ind. Have entered 175 bbls I. H. $12.45 and 175 bbls Thunderbolt $11.85, cotton ½'s, shipment within 60 days. Ismert-Hincke Milling Co."

Disposing of the case, the appellate court said: "It is well settled that a valid contract can be made by correspondence, whether by mail or telegrams, provided such correspondence contains a specific offer which is unconditionally accepted (Corydon Milling Co. vs. Noblesville Milling Co., 69 Ind. App. 491, 122 N. E. 362). The question to be determined is as to whether the telegrams constituted such an offer and final acceptance. We hold that they do not. Additional terms for negotiation were suggested by appellant's [the mill's] telegram, the price, the containers, and the time. These were for appellee's acceptance or rejection. That appellant did not consider the telegrams within themselves as constituting a contract that was final is evidenced by the fact that it thereafter sent a written contract to appellee to execute. It is true that appellant says that this was but to confirm the telegraphic contract, and produced some evidence to that effect, but it seems that the trial court believed that a contract, with terms and stipulations covering 13 pages of the record, must have been intended to accomplish more than merely to confirm the contract of a few words by wire."

* *

In the case of Adams-Childers Co. vs. Diamond Mill Co., 217 S.W. 176, plaintiff company sued to recover $800, as damages for defendant's refusal to deliver a car of flour and meal to be sold to plaintiff. Trial of the suit was followed by judgment in plaintiff's favor, but this was set aside by the court of civil appeals on review of the proceedings, and judgment in the mill's favor substituted.

Plaintiff wrote defendant mill: "If you see fit to handle our account on fall terms, we will appreciate a line from you to that effect. However, it will be at least 30 days before we will need a car of flour."

A few days later—March 26, 1917—the mill replied: "We have no objection to giving you one or two cars of flour on fall terms, but the only basis on which we could quote you would be 'regular.' In other words, we would not book flour

for a longer period than 30 days. We suggest that you book a car of flour now at the present price of $9.50 basis, since it is your idea that you will need a car within 30 days. This price will be net, 30 days, interest at 8 per cent after 30 days. . . . Please let us have immediate advice if the booking we mentioned above is agreeable, as we will put out a basis of $9.80 or $10 if cash wheat advances a few cents more."

The day that this letter was received the mill's representative called at plaintiff's office and obtained an order. This order stated, in substance, that the mill had sold to "Adams & Childers" (this was the name of a partnership which, unknown to the mill, shortly before had been succeeded by plaintiff corporation) one car of mill products, flour basis, $9.50, with specifications to follow. It was further provided that the goods were to be shipped in 30 days, f.o.b., Sherman, freight allowed to destination. There was a blank space on the order for the terms of payment, but this blank was not filled out, and no stipulation was contained in the order as to the terms of payment. The order contained the following printed clause:

"This order is subject to our acceptance. Read your order, as all conditions must be expressed in writing."

The order was not signed by the buyer, but was signed by the mill's representative, who transmitted it to the mill at Sherman.

Plaintiff claimed in the litigation that the letters mentioned above and the order constituted a binding contract, the order being regarded as an acceptance of an offer made in the mill's letter of March 26. The court of civil appeals rules otherwise.

The next step in the negotiations was a letter from the mill, acknowledging receipt of the order, and stating that if it was plaintiff's understanding that it should pay for the goods in 30 days or take a 1 per cent cash discount the mill would accept the business. The letter also requested an immediate reply, noting that flour and wheat values were advancing every day. But plaintiff denied receipt of this letter written March 30. A week later the mill wrote another letter, calling off negotiations for lack of response to this communication.

There was no further negotiation until April 19, when plaintiff wrote, demanding immediate shipment of a car of flour and meal, and authorizing draft with bill of lading attached.

Holding that there was no contract perfected, the Texas court of civil appeals says:

"It is elementary in the law of contracts that, where it is sought to complete a contract by the acceptance of an offer, it must be shown that the acceptance was in substantial accord with the proposal, and that, where there is any material variation or deviation from the terms of the offer, no contract will result. In legal effect the purported acceptance in such event becomes a counter proposition, and the contract is not closed, unless the proposer agrees or accedes to the change in terms. This is but another way of stating the familiar rule that there can be no binding contract without a meeting of the minds of the parties. In this case did the minds meet, and was a contract consummated?

"The letter of March 26, relied upon as a proposal, suggested the booking of a car of flour by plaintiff, named the basis price, and specifically stated the terms of payment. The purported acceptance was given upon an ordinary order blank used by defendant's salesman, who booked the goods in the usual manner. It will be noted that this order stated the name of the seller and of the buyer, the time within which shipment was to be made, the stipulation as to loading and freight, the basis price, and was for one car of mill products, with the right to later forward specifications, but it is silent as to the material and important point of the terms of payment. It is an undisputed fact that, when the order was given, no mention of terms was made by plaintiff or the salesman. The order, upon its face, expressly provides that it is subject to the acceptance of the seller, and the buyer is cautioned to read the order, as all conditions must be expressed in writing.

"It is also undisputed that, upon receipt of this order, defendant wrote a letter to plaintiff, refusing to accept the order because it did not contain the terms of payment, and in effect requesting plaintiff to signify its intention to be bound by the terms in the letter of March 26, or a cash discount. It is true that the testimony shows this letter was not received by plaintiff, but that is immaterial. Failing to receive any reply, defendant notified plaintiff that it would call off all negotiations. In these circumstances we think it must be held that there was no meeting of the minds of the parties, and that no contract resulted.

"There is another view to be taken of this matter. The order relied upon as

constituting an acceptance was given in the usual manner and upon the customary order blank, and was given in response to the question of the soliciting salesman to plaintiff's representative to the effect whether he desired to book a car of flour. The order upon its face notified plaintiff that it was subject to the acceptance of defendant, and we think this stipulation was binding upon plaintiff. By its very terms it could not have the effect to close the contract without the acceptance of defendant, which, as we have shown, was never given. For this reason, also, we hold that no contract was ever completed. . . .

"Upon the third question raised upon this appeal, to the effect that the proposal, if any, was made to the partnership of Adams & Childers, and not to the corporation, and that the order itself purported to be a sale to Adams & Childers, and not to plaintiff, defendant cites cases which strongly tend to support its contention. . . . In the view we take of this case, however, it is not necessary to decide that question, and therefore no opinion is expressed upon it."

A preliminary question of jurisdiction was disposed of by the court adversely to the mill. The mill objected because the suit was brought in the county of plaintiff's domicile, rather than that of defendant's. But the court holds that, under the Texas statute, authorizing suit to be brought against a corporation in the county where the cause of action or part of it arose, this suit was properly brought in the county where the order was taken for the mill products, and to which county they were to be shipped.

* *

A typical transaction calling for application of the fundamental legal principle that acceptance of an offer creates no contract unless unconditional in its terms was involved in litigation disposed of by the Indiana appellate court (122 N. E. 362).

In this case the Corydon (Ky.) Milling Co. failed to make out a cause of action against the Noblesville (Ind.) Milling Co. for breach of agreement to sell a quantity of flour. The decision turned on the point that correspondence between the two companies fell short of showing a final agreement on sale terms.

Plaintiff, the Corydon mill, wrote the defendant Aug. 11, 1914, that it was in the market for from 500 to 1,000 bbls soft red winter wheat flour. Six days later defendant mailed a quotation for delivery at Corydon within certain months, but "subject to your wire acceptance reaching us at once, and then only subject to change of the market." On receipt of this letter, and the following day, the plaintiff wired instructions to book 600 bbls "at price and shipping dates specified in your letter, . . . subject to our inspection and approval of baking sample to be forwarded at once by you. Answer at once by telegram."

In a letter confirming this telegram, plaintiff stated that report would be made on inspection of the sample on its receipt. The defendant immediately wired back: "Market three cents higher at ten-thirty; sending sample; if on receipt satisfactory, will try and trade on market basis." Two days later plaintiff telegraphed that the sample was satisfactory, and insisted on booking of 600 bbls at the originally quoted price "plus market advance to date of receipt our order by you." Confirmation was requested but not given, and here the negotiations ended.

Determining that no contract was formed by this correspondence, the Indiana court says: "It is well settled that a valid contract may be made by correspondence, provided such correspondence contains a specific offer which is unconditionally accepted. . . . But care must always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. . . . No contract can be said to have been created between the parties where their minds have not agreed on one and the same thing. . . .

"An examination of this correspondence clearly discloses that the negotiations were not finished. Plaintiff's order of 600 bbls flour, subject to inspection and approval of baking sample to be forwarded at once, was not an absolute and unconditional acceptance of the defendant's offer, and before plaintiff sent its last letter [telegram] of acceptance, which, by the way, shows a variance as to the price, defendant had withdrawn its original offer, and then agreeing only that, if the baking sample was satisfactory, it would try to trade on a market basis. There was no acceptance by either party, and, such being the case, there was no contract."

* *

In Warner Mfg. Co. vs. Jacobs, 177 N. Y. Supp. 182, it was decided by the appellate term of the New York supreme court that where an order for goods was placed, containing a recital that the date of delivery was "to be decided," the proposed seller's acknowledgment of the order, accompanied by a statement that de-

livery would be made "as soon as possible," constituted such failure of the minds of the parties to agree on time for delivery as thwarted a binding contract. The court says on this point:

"The defendant's [buyer's] stipulation that the time of delivery was 'to be decided' did not permit plaintiff [the seller] to decide that matter for defendant. The mere fact that the plaintiff's 'soon as possible' may, in many situations, be deemed to mean 'within a reasonable time,' . . . does not alter the case, as we are not to presume that defendant would have been content with such a construction. He may have required delivery in an unreasonable time, and it was his obvious right to name any period whatever as a condition."

It was further decided that there was no binding contract, for the independent reason that the order called for delivery of a specified quantity of goods, whereas the purported acceptance of it recited that "an excess or shortage of not more than 10 per cent will be considered in filling the order." There was no final agreement as to the quantity of goods to be delivered.

"It is of no importance," says the court, "that it may have been extremely probable that ultimately the parties would have reached an agreement."

* *

The appellate term of the New York supreme court has also held that where goods were ordered for shipment "as soon as possible," f.o.b. destination, no enforceable contract was formed by an acceptance calling for delivery f.o.b. place of shipment, with deduction of freight charges from the purchase price, and a statement that the proposed seller could give no definite shipping date. The court said:

"The law is too well settled to require citations that, in order to establish a legal contract through the medium of correspondence, it must be made to appear that there was not only a plain, unequivocal offer, but that the acceptance of such offer was equally plain and free from ambiguity. That there must have been an exact meeting of the minds of the contracting parties in respect to every detail of the proposed contract, and if the precise thing offered has not been accepted, or if the acceptance was in any manner qualified by conditions or reservations, however slight they may have been, the universal rule is that no enforceable contract is thereby established, but that such acceptance must be treated as a rejection of the offer." (165 N. Y. Supp. 261.)

But it is generally held by the courts that where the party to whom the acceptance is sent signifies his assent to the terms which qualify the original offer, then there is a binding contract, since there is a final meeting of minds.

* *

In Humphry vs. Farmers' Union & Milling Co., 190 Pac. 489, a California suit to recover damages for nondelivery of beans, defendant unsuccessfully advanced a contention that an interchange of telegrams fell short of consummating a final contract of sale. The facts as to this branch of the case were that defendant offered the beans at $6.35, f.o.b., Stockton, the shipping point, but subject to delay and confirmation, it being stated that the prospect of prompt shipment was unfavorable. Plaintiff replied with an acceptance, which, however, required shipment within the current month, one half gone. But three days later, defendant wired that a car was then obtainable and asked that plaintiff have his bank guarantee payment of draft with bill of lading. Plaintiff's bank at Evansville, Ind., telegraphed such guaranty, "subject permission inspection on arrival."

The California court of appeal held that plaintiff's first telegram so far departed from the terms of defendant's offer as to constitute no contract, because defendant offered to sell subject to delay, while the acceptance required delivery within the month. But defendant's next telegram, stating that car was obtainable, removed that condition, merely adding the new condition that payment of the draft be guaranteed. The only question left in the case on this phase of the controversy was as to whether the requirement in the last acceptance, "subject permission inspection on arrival," injected such new condition into the terms of purchase as to avoid meeting of minds on all the provisions of the agreement.

The court held that no new condition was brought into the negotiations, and that there was therefore a binding contract. This holding is of special importance as laying down the general proposition that where an acceptance specifically states a condition that would have been implied in any event, it does not qualify the terms of the offer. On this point the opinion says:

"This was a meeting of the minds of the parties upon the same terms and conditions, save and except that the last telegram referred to had in it these

words, 'subject permission inspection on arrival.' The matter of delay in shipment had been eliminated, the request that the bank guarantee payment had been accepted, and all conditions imposed by defendant had been met, qualified by the added suggestion that the beans would be subject to inspection on arrival. It is the claim of counsel for appellant that it never assented to the plaintiff's request that the beans should be shipped subject to inspection; but, as the learned judge of the trial court observed, the law would have added these words to the contract, even if they had not been inserted in the telegram.

"Section 1771 of the Civil Code reads: 'One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable.'

"Section 1785 of the Civil Code reads: 'On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it, and may rescind the contract if the seller refuses to permit him to do so.' . . .

"We are of opinion that the telegrams passing between the parties resulted in a contract between them."

Another angle of the question as to whether a contract was finally entered into is indicated by the further extract from the California court's opinion: "The defendant's telegram of Nov. 18, wherein it says, 'wire received too late, entire matter is canceled,' was sent after the bank had telegraphed its guaranty of payment of the draft, and after all the terms and conditions imposed by defendant had been accepted, and was too late to prevent the consummation of the contract. The wire accepting defendant's offer took effect on its deposit at Evansville for transmission. . . . It was deposited at Evansville, Ind., before the defendant's telegram of Nov. 18 was sent."

* *

In Heffernan vs. Neumond et al., 201 S.W. 645, decided by the St. Louis court of appeals, plaintiff sued for damages for nondelivery of feed. The first defense made against the suit was that the contract was void for want of mutuality. This point was based on the fact that the agreement contained no express provision binding the plaintiff to buy the feed covered by the contract, within the well-settled rule of law that a contract is not enforceable if it purports to bind one party and at the same time place no reciprocal obligation upon the other. But the court of appeals disposed of this point as follows:

"Though the contract does not, in explicit words, recite that plaintiff agrees to purchase and pay for the same, this is clearly implied by the acceptance of the contract by plaintiff through the signing of his name thereto. . . . And if the contract could be said to have been originally deficient in this respect (which we do not concede), the subsequent correspondence between the parties, and the part performance of the contract according to its terms, sufficed to render the contract mutually binding and enforceable."

See, also, the decision of the South Carolina supreme court in the case of Melchers & Co. vs. Springs, Heath & Co., 33 S. C. 279.

SECTION 31. CONDITIONAL ORDERS

In the case of Guthrie Mill & Elevator Co. vs. Union Macaroni Co., 236 S.W. 553, the Texas court of civil appeals at Beaumont denied the right of plaintiff to recover damages as for breach of contract by defendant to accept and pay for a car of flour. The decision rests on a finding by the court that no binding contract was concluded between the parties.

Dec. 12, 1919, defendant gave to W. G. Thomas, plaintiff's travelling salesman, an order for a car of flour to be shipped within 60 days. The order was written on the miller's uniform sales contract form. It, therefore, embodied the following quoted clauses:

"This contract is made subject to the terms and conditions printed on the back hereof, which terms and conditions are binding on both parties to the contract."

"(3) Contract not Subject to Change.—That there are no conditions, representations, or warranties, oral or otherwise, and that there shall be no assignment or cancellation of this contract except as herein stated, and that no agent or representative has authority to modify the printed terms of this contract.

"(4) Shipment within 60 Days.—That the commodities specified in this contract shall be shipped within 60 days from the date of confirmation by the seller unless a shorter time is herein expressly provided, and that delivery by seller to carrier at initial point is shipment."

When the order was received the salesman delivered to the buyer the following quoted memorandum: "I agree to write Guthrie Mill & Elevator Co. that Union Macaroni Co. is heavily stocked

today on a basis of present business conditions in Beaumont, but if conditions come back to normal before shipment of this car of flour, they can use the car, otherwise they will not be able to use same."

Instead of so writing to the mill the salesman wrote as follows: "Promised to mention to you that Union Macaroni factory state if the strike conditions in Beaumont do not improve they will not be able to use the flour within 60 days and if the strike is not settled at all so that usual business will return, they will not be able to use the flour in their factory, but will place it elsewhere."

Dec. 17, 1919, the mill confirmed the order with the last-quoted memorandum attached. On being notified by defendant that such memorandum did not state the true agreement made with the salesman, the mill refused to confirm in accordance with the memorandum delivered to defendant buyer. Thereupon defendant directed the mill to cancel the order.

Disposing of the case on appeal, the court of civil appeals said: "As we view the record, there is but one question to be determined, viz., Was there any contract? One of the essential elements of a contract is the mutual assent of the parties. There can be no contract unless the parties assent to the same thing in the same sense, and the assent must comprehend the whole proposition. If there is any misunderstanding as to any of the material portions of it, there will be no contract. Summers vs. Mills, 21 Tex. 78.

"In the instant case the agent offered to sell and the defendant agreed to buy on the conditions expressed in the written memorandum agreed to and signed by the agent, which he promised to send to plaintiff with the printed order. The contract, in any event, had to be confirmed by plaintiff, and under the law, when confirmed, it must be confirmed as a whole.

"The agent, without the knowledge or consent of defendant, sent with the printed order to plaintiff a different memorandum, omitting entirely the terms and conditions agreed upon with defendant, expressed in the memorandum signed by said agent and left with defendant, and plaintiff attempted to confirm the order as sent in by its agent, but when informed by defendant of the true conditions of the agreement made by its said agent with defendant, plaintiff then refused to confirm same, and insists on the sale as per the terms of the printed contract, minus the agreement in writing given by the agent to the defendant.

"This was a rejection of defendant's offer to buy, and plaintiff's insistence upon the terms of the printed contract is an attempt to substitute a different agreement. Under the facts the minds of the parties never met, and hence no liability on the part of defendant is shown. . . .

"Furthermore, the printed instrument, without the memorandum agreed to and signed by the agent of plaintiff, cannot evidence the whole agreement made by the parties, nor can it constitute liability. It takes the printed instrument and the memorandum signed by the agent to express the whole agreement between the parties. Bank vs. McAnulty, 31 S.W. 1096.

"The instrument was not delivered to the agent as a present contract, nor was it intended as such when delivered to said agent, unless confirmed by the seller [plaintiff], including the conditions and stipulations contained in the written memorandum signed by the agent. In other words, the instrument, except in the event set forth in the written memorandum, was not to become a contract.

"The proof shows that same was not confirmed, and also that defendant canceled or withdrew its offer to buy, which it had the right to do at any time before acceptance by the plaintiff. The order was a conditional one, and could not become a binding contract until confirmed by plaintiff, and not then until the coming into existence of the conditions named in the written memorandum, which, upon confirmation, would become a material part of the contract."

See, also, section 39.

SECTION 32. SUBJECT OF SALE

Disposing of the case of Moultrie Grocery Co. vs. Charleston (Mo.) Milling Co., 102 S.E. 31, the Georgia court of appeals held that plaintiff failed to establish a right to delivery of flour on the following mentioned state of facts:

A broker at Albany, Ga., offered defendant mill booking of 2,000 bbls flour for sale to the plaintiff, "basis Eclipse brand, plain, sacked, delivered Moultrie," at $5.85. To this telegraphic offer, dated July 18, 1916, the mill replied: "Decline Moultrie. Will book School Days $6.40; Eclipse, plain $6.10, self-rising $6.30; Queen South, self-rising, $5.20. . . . Have understanding all contracts prorated monthly, and give specifications first car immediately; needing prompt shipping order; market still advancing."

The next day—July 19—the broker wired: "Book Moultrie per your message Eclipse $6.10; Daisy self-rising $6.10; Queen of South $5.20." July 22 the mill notified the broker by telegram: "Moultrie booking declined account price Daisy self-rising; quotations all made subject to confirmation as advised, especially on such a radically advancing market."

The court of appeals, affirming a judgment of a trial judge dismissing plaintiff's suit, which was apparently brought to recover damages for nondelivery of flour, says:

"It appears from this correspondence, as well as from the undisputed evidence adduced on the trial, that not only was there a substitution by the broker in his telegram of acceptance of 'Daisy self-rising, $6.10,' for 'School Days $6.40,' as contained in the telegram making the offer, but that the latter brand of flour was not a self-rising flour, whereas the one substituted in lieu thereof was a self-rising flour. . . .

"While a contract may be made by telegram, the telegrams which were the basis of this suit did not constitute a complete contract between the Moultrie Grocery Co. and the Charleston Milling Co., since the broker's offer was not accepted by the seller unequivocally, unconditionally and without variance. There was no mutual assent of the parties to the same thing in the same sense. . . . The trial judge therefore did not err in granting a nonsuit.

"Under the above ruling it is unnecessary to pass upon the fifth ground of error set out in the bill of exceptions, in which it is alleged that the defendant waited an unreasonable length of time to repudiate or refuse to accept the order made by the plaintiff for the sale and purchase of the flour."

* *

In the interesting case of Reynolds vs. Hunter-Robinson-Wenz Milling Co., 64 Pa. Super. 325, an attempt was unsuccessfully made to show that no final contract was formed by negotiations had under these circumstances:

Plaintiff wired defendant: "Offer $21.25 a ton New York 10 cars Huntleigh [bran] your option September or October delivery." Defendant telegraphed back: "Have booked 10 cars Huntleigh our option September or October at $21.25 per ton. Offer 10 cars season bran at $21 a ton and 10 cars Sunshine bran at $22.50, subject to your immediate reply by wire."

Plaintiff did not accept the offer as to season or Sunshine bran, and defendant refused to deliver the Huntleigh. Plaintiff sued for damages for such nondelivery, and defendant apparently advanced the position that the acceptance of plaintiff's offer to buy Huntleigh was coupled with a proposed sale of 20 cars of other grades. But the court decided that the telegrams must be interpreted as showing an absolute agreement for sale of Huntleigh, with an independent offer by defendant to sell additional quantities of other bran, rejection of which offer did not affect the negotiations concerning Huntleigh.

SECTION 33. TIME FOR DELIVERY

In the case of W. S. Hoge & Brother vs. Prince William Co-operative Exchange, 126 S. E. 687, it appeared that a buyer's order for meal was accepted conditionally. The order called for shipment "when ordered." The seller's confirmation slip read "when ordered prior to Oct. 1, 1920," and contained a further provision that "if unable to fill this order by reason of causes beyond our control, it is understood and agreed that we shall not be liable to you in damages for nondelivery of the same." The Virginia supreme court of appeals said:

"The minds of the parties never met. The change in the date of shipment was a material variation."

* *

One of the issues involved in the case of Lawrenceburg Roller Mills Co. vs. Chas. A. Jones & Co., 85 So. 719, was whether, apart from a question of the mill's right to terminate agreements to sell flour on account of intervening federal regulations adopted as war measures, valid contracts had been formed. On this phase of the case the Alabama supreme court said:

"The alleged contract, declared upon in count three as amended, was of date Aug. 6, 1917, for the purchase by defendant of plaintiff of 1,500 bbls of flour at $12 per bbl. 'Time of contract shipment: Aug. Sept. Delivered: Birmingham, Ala. Terms: Sight, or sight on arrival, draft with bill of lading attached. Millers' National Federation package differentials govern. Quantity, 1,500 bbls; brand, Town Talk; pkg., cotton; price, $12. Buyer accepts this contract for shipment within Aug. Sept., and assumes all risk of modification due to government regulation.' Provided, that it should not become effective unless 'signed by the seller at its Lawrenceburg or Boston office. No verbal condition or modifications can alter this contract.'

"It was further averred that such contract was duly confirmed in writing by plaintiff at its Lawrenceburg office. The proof as to such confirmation was a letter written by plaintiff to defendant, dated Aug. 8, 1917, containing, among other matter, the statement that—

" 'We confirm contract with you under date of the 6th inst. . . . for August-September shipment, our option subject to any government food control regulations, 1,500 barrels of Town Talk flour, in car lots, at price $12 per barrel cotton basis delivered Birmingham. Usual sight draft terms.'

"Was this a confirmation of the original order, or did it embody different and material provisions? We are of the opinion that it was a material modification thereof, to the extent that shipments were to be made in August and September at 'our (seller's) option.' The original contract contained no such reservation for the seller's benefit, but the right of direction of shipment for delivery at Birmingham during said month was with the buyer; that is to say, the letter did not accept or confirm the order on the terms that the 'buyer accepts this contract for shipment within Aug. Sept., and assumes all risk of modification due to government regulation,' but that shipments ordered during August-September were at seller's 'option' and 'subject to any government food control regulations.'

"This was not an unqualified acceptance in writing of the original written order as required by its terms; it was a new offer by plaintiff to sell flour to defendant on different terms indicated. Defendant's acceptance of the contract, so extended or modified, is not shown by the evidence. To the contrary, it is shown that defendant insisted that he had no such contract of purchase with plaintiff, and was not bound thereby. The time of shipments, whether they were to be made only at the direction of the purchaser, or whether at the discretion or convenience of the seller, was an important and material provision of the contract. . . .

"When the alleged confirmatory letter was offered in evidence, due objection was made by defendant, and the variance between allegation and proof was called to the attention of the court. There was error in admitting in evidence said letter or written confirmation of the original contract as required by its terms.

"The contract declared upon in amended count four is of like purport as that on which count three is rested, with the exception that it was only executed by plaintiff (not by defendant), and indorsed, 'Attached wire confirming,' before the word 'buyer.' The record does not show that such 'confirmatory wire' was attached thereto, nor was such confirmation introduced in evidence. The evidence discloses that the alleged contract of Aug. 8, 1917, was made through plaintiff's agent, M. F. Johnson, at Montgomery, over long-distance telephone with a flour broker, S. C. Johnston, at Birmingham, a conversation between the latter and Charles A. Jones, of defendant company, and a telegram of acceptance sent M. F. Johnson by W. G. Vail, clerk for defendant. This was evidence tending to show ratification of the original contract and the telephone conversation to which the witnesses made reference. . . . However, the telegram was not attached to the contract of date Aug. 8, 1917, nor is it found in the bill of exceptions. The allegations and proof must conform, and for this reason there was a variance."

* *

No binding contract was formed by an offer to sell 90,000 to 120,000 bags to be shipped at the option of the seller from the latter part of November to Feb. 1, and by the buyer's expressed willingness to accept shipment in car lots of equal quantities in November, December and January, covering the seller's entire output up to 120,000, no bags to be sold by the seller elsewhere until performance of the contract. This is the holding of the United States circuit court of appeals, eighth circuit, in the case of Mente vs. De Witt Rice Mill Co., 251 Fed. 252, in conformity to the general principle of law that an acceptance of an offer must meet the terms of the offer in order to constitute a binding contract.

The court also holds that the fact that the defendant seller may have originally refused to carry out the contract on an assigned ground that the agreement was conditioned upon the making of another contract which was never finally entered into did not preclude the seller from afterwards relying upon the point that there was no meeting of minds on the first-mentioned contract.

It is further decided that where contract negotiations are conducted for one party through an agent who must refer the agreement to his principal for confirmation, the other party's agreement must be regarded as a mere offer until accepted by the other party. In the meantime its effect will be defeated by the latter imposing new conditions.

The Indiana appellate court affirmed a verdict of the St. Joseph County superior court at South Bend, in which it held for the defendant in a suit brought by the Shane Bros. & Wilson Co., flour millers, of Minneapolis, against John C. Barrett, of St. Joseph County. Alleged breach of contract in the sale of flour and feed was the issue.

At the close of the plaintiff's evidence in the lower court, the presiding judge directed a verdict for the defendant. In its review of the testimony the supreme court found that Mr. Barrett sent a telegram to the milling concern in January in which he said:

"I hereby confirm order [details of order set out] delivered here prior to June 1, as ordered out by me."

The Shane Bros. & Wilson Co., according to the transcript of the evidence, answered by letter, giving details and saying ". . . for scattered shipment, February to May, inclusive." Afterwards, the testimony indicated, the company wrote Mr. Barrett, urging that he quickly order the February quota, as on scattered shipments the shipments were to be divided about equally for the several months.

The decision of the supreme court says that this is a showing that the minds of the parties never met, as the phrase "ordered out by me" has a definite trade meaning, and, although the "scattered shipment" and so forth does not have a definite trade meaning, the milling company put a construction on it different from the meaning of the phrase, "as ordered out by me."

In conclusion, the court says that, as there was no contract, due to failure of the minds of the parties to meet, there could be no error in the exclusion of the offered evidence nor in instructing to find for the defendant. (124 N.E. 780.)

See, also, cases cited in section 30.

SECTION 34. PRICE AND TERMS OF PAYMENT

In J. C. Lysle Milling Co. vs. John W. Sharp & Son, 207 S.W. 72, plaintiff sued for damages for nonacceptance of flour, and question was raised whether there was a meeting of minds on a contract. The order given by defendants was for flour at $13.20 in 48-lb packages and at $13.30 in 24-lb packages. The acceptance of the order confirmed on "a basis of $13.20 . . . in 48's."

Holding that there was no variance between the offer and the acceptance as to price, the Kansas City court of appeals said:

"There was, in the letter of acceptance, no changing of the terms of the contract as embodied in the order and offer. The latter says, 'Ship to Moberly, Mo.,' and also, 'All goods f.o.b., mill, freight allowed to destination,' and the former changes nothing in this regard, merely showing that the plaintiff was to pay the freight to Moberly, as the order contemplated. The phrase in the letter, 'a car of Gilt Edge flour . . . on a basis of $13.20 for Gilt Edge in 48's,' is exactly in harmony with the order.

"In trade usage, shown to be well known and thoroughly understood, that phrase meant that the basic and minimum price of the flour was $13.20 per barrel in packages of 48 pounds each, but if the flour is desired in smaller packages of 24 pounds each, 10 cents additional is required to pay for the cost of the extra sacks. This corresponds exactly with the order, and the letter changed nothing when it said the offer was accepted on that basis. The term 'Gilt Edge' was clearly a name of a certain brand of flour, and so known and understood by the parties."

* *

In the case of Richardton Roller Mills vs. H. J. Miller Co., 170 Pac. 357, the Washington supreme court held that there was no binding contract formed under the following stated circumstances:

Jan. 11, defendants telegraphed the mill: "Will handle 2,000 bbls January, February, March cover us price must be low as we are filling contracts." The same day the mill replied with an offer to deliver 2,000 bbls, assorted grades, at various prices, not specifying quantities as to any brand. Jan. 13 defendants wired: "Book us 2,000 bbls Jan. Feb. and Mar. shipments expected lower quotations."

The mill answered that it had booked 2,000 bbls of the various brands mentioned in its previous telegram, but stating higher prices ranging from $5.65 to $6.65, whereas the original quotations had ranged from $5.45 to $6.45. The defendants rejoined by letter, stating that they would not pay more than $6.15 and unless a sale should be booked on that basis, they would not buy. The court said of these negotiations:

"If the contract claimed to be so evidenced had been executed by the shipment and receipt of flour answering to some one or more of the descriptions of the kind mentioned in the telegrams, it could probably be said that such a shipment and receipt of the flour would have rendered appellants liable for the purchase

price thereof according to the prices named in respondent's [the mill's] second telegram of Jan. 13, above quoted, in so far as the quantities of each kind were shipped and so received; but to say that these telegrams and letter evidence with sufficient certainty a contract for the breach of which damages may be recovered by either of the parties against the other is quite a different matter.

"These telegrams and letter do not tell us how much of each particular kind of flour was to be purchased, and this manifestly is an important matter in view of the fact of the different prices being quoted for the different kinds of flour. Besides, it is plain that respondent did not intend to consummate a sale at the prices named in its telegram of Jan. 11, though appellants' telegram of Jan. 13 seems to evidence a willingness to purchase the flour at the prices named in respondent's telegram of Jan. 11.

"The trouble with respondent's position is that it is now seeking to recover upon the breach of a contract at prices named in its telegram of Jan. 13, which are higher than its former named prices, and which appellants never agreed to. Indeed, in their letter of Jan. 15 appellants expressly declined to agree to such increased prices. Plainly, we think the minds of the parties never met in the making of the alleged sale contract for the breach of which respondent seeks recovery.

"It seems to us that as an unexecuted contract these telegrams and letter wholly fail to evidence with sufficient certainty a contract for which damages may be recovered for the violation thereof by either of these parties as against the other, and to allow the jury to so find is merely to permit speculation upon the question of the intention of the parties."

The court holds that this conclusion is not to be affected by the facts that, after the negotiations mentioned above, defendants ordered 365 bbls of flour from the mill at $6.65, and received and paid for it; and that defendants afterwards asked that 1,635 bbls—making 2,000 bbls in all, including the 365 delivered—be shipped by the mill and placed in storage at Seattle and to be bought and paid for as defendants might need it, which the mill refused to do. The court remarks that these facts merely show that the parties placed variant interpretations upon the effect of the telegrams and letter as a contract for a sale of 2,000 bbls of flour.

See, also, cases cited in section 30.

SECTION 35. QUANTITY TO BE DELIVERED

Not long ago a controversy involved legal angles formed by a mistake made by a telegraph company in transmitting a message requesting quotations on mill products.

It is understood from reading the telegraphic correspondence, which was partly in code language, the buyer, in the first telegram, as delivered for transmission, asked prices "one eight flour midds seven bran five standard midds," etc. As transmitted, the telegram called for prices "on eight flour midds seven bran five standard midds," etc. The seller wired quotations as follows: "Standard bran twenty-one dollars pure bran twenty-two fifty standard midds twenty-two fifty flour midds twenty-eight," etc.

The buyer replied with an order for quantities of bran, etc., specified as "eight," "seven," and "five," respectively, omitting to designate "cars," "tons," or other measure of quantity. The seller, on the same day, acknowledged order and confirmed booking of "eight cars," "seven cars," and "five cars," respectively. The buyer immediately telegraphed back that the order was for "tons not cars." In the meantime, the seller bought in the feed required to fill the order as booked by it.

The buyer disclaimed any contract, for failure of the seller to book one assorted car, and the third party, from whom the seller contracted to buy in the 20 cars of feed, refused to cancel short of a round sum of money.

In my opinion there was no valid claim on the part of the seller against the buyer, for the latter never agreed to buy "cars" of feed. I believed he should have explicitly mentioned "tons" in his request for quotations, and in his order. But his failure to do so did not render him legally liable; it merely left his telegrams vague as to the quantities he had in mind. I failed to see where the seller was justified in being sure that the buyer meant "cars."

The seller replied with quotations which manifestly were intended to refer to "tons." Then when the buyer ordered "eight," "seven" and "five," the seller should have assured himself that "cars" were intended, before buying in on that basis. The seller took proper steps to obtain this assurance by sending the confirming telegram, which, it seems, was the first time that the word "cars" was introduced, and within the same afternoon the buyer replied that he did not order "cars," but "tons."

Here was a plain failure of a meeting of the minds of the parties on the quan-

tities to be delivered, avoiding the consummation of a valid contract. The regrettable disadvantage under which the seller found himself, as to the contract to buy in from the third party, was due to no fault of either the original buyer or the telegraph company, but rather to the original seller's own undue haste in buying in before the original contract was completely confirmed.

As to the liability of telegraph companies for mistakes in handling messages, see the chapter on Telegraph Companies, Chapter LXI.

* *

Where an order for three carloads of goods was received, and the seller replied that one car would be shipped within 10 days "and possibly three," there was no obligation to deliver three cars, holds the North Carolina supreme court (104 S.E. 531), which remarked:

"The words 'possibly three' are too indefinite and uncertain to constitute a binding contract. It is well settled that where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is a mere expression of willingness, and is not a definite agreement to perform. . . . In order to construct a contract there must be a proposal, squarely assented to. . . . There must be a meeting of two minds in one, and the same intention, in order to constitute a contract, and an acceptance of an offer, varying its terms, is a rejection of the offer."

* *

In the case of College Mill Co. vs. Fidler, 58 S. W. 382, the Tennessee court of chancery appeals held that an offer to sell an unspecified quantity of bran was converted into a binding contract on acceptance of 50 tons. That this decision is sound or supportable by authoritative court decisions in other jurisdictions may be doubted.

See, also, cases cited in section 30.

See, also, Richardton Roller Mills case, referred to in the preceding section.

SECTION 36. IDENTITY OF DEBTOR

A mill's travelling salesman, being indebted to a customer for the price of an automobile sold to him individually, took an order for flour to be shipped to the customer, but to be charged to the salesman. This order was received by the milling company, together with another order for the same bill of flour, but the last-mentioned order, which did not direct that the flour be charged to the salesman, was a forgery.

The mill, being unwilling to fill the first order on the salesman's account, shipped under the forged order, but gave the customer no notice that the first order was rejected. The customer, supposing that the flour was charged to the salesman, received and resold it. Afterwards, the circumstances of the forgery became known to both the customer and the mill, and the latter sued the customer for the price of the flour received by him.

The trial court decided that the mill was entitled to recover, but the Mississippi supreme court, on the customer's appeal, reversed the judgment, stating that the mill must lose.

Although the higher court does not specify the reasons for its decision, it is inferable that the forged order was regarded as having no effect against the customer, and that the mill should have notified the customer of its unwillingness to ship on the salesman's credit. (Felder vs. Acme Mills, 73 So. 52.)

SECTION 37. FINE PRINT CLAUSES

The New York City court's decision in the late case of Cohen vs. Walworth, 158 N. Y. Supp. 1081, shows that ordinarily the rights of a buyer of goods are not controlled by fine print conditions appearing on the seller's billheads, letterheads, or other stationery, in the absence of any showing that they have been drawn to the buyer's attention or incorporated into the particular contract under which dispute arises.

This holding was announced in a case where the seller relied upon a detached clause printed in small type at the top of an order form, to the effect that corrections in the terms of the order must be made within 10 days, and that the order was accepted subject to a limit of credit determinable at any time by the seller. Finding that there was nothing to show that the buyer's attention had been called to the clause, the court refused to give effect to it against him.

As supporting the decision, reference is made to a decision of the United States Supreme Court that "the contract being clearly expressed in writing, the printed billhead of the invoice can, under no well-settled rule, control, modify, or alter it."

* *

That notations on statements, invoices, etc., have but limited legal effect is shown by the decision handed down by the St. Louis court of appeals in the case of Wilder vs. Cake Cone Co., 259 S. W. 503. The court said:

"At the time the merchandise was delivered to plaintiff, or shortly thereafter, defendant rendered plaintiff a bill for same, at the foot of which was indorsed the following clause, 'All claims must be made within five days after receipt of goods,' and defendant contends that, since plaintiff did not give notice of his claim within five days from receipt of the goods, he is not entitled to recover.

"The clause in question was no part of the original contract of sale. The contract, with all its terms and conditions, was fully agreed upon when the merchandise was ordered. The condition inserted in the bill rendered was not mentioned. The merchandise was delivered pursuant to this contract. It was not in the power of the defendant to modify the original contract of sale by inserting in the bill rendered for the merchandise a qualification or condition not in the original contract. This is especially true, since the undisputed evidence shows that the clause in question was not called to the attention of the plaintiff at the time of the delivery of the goods, and was never observed by him."

SECTION 38. INVITATION TO NEGOTIATE DISTINGUISHED FROM OFFER

"The principle is also announced in a number of cases that circular letters sent out by manufacturers or dealers to the trade, giving their price list, does not amount to an offer to sell at the prices stated, which will bind them by an order for their goods sent by letter or telegram. The reason given in these cases is that this class of letters is in the nature of an advertisement, to attract the attention of those interested in the business indicated by them, and not an offer to sell, by which the parties were to be bound, by a letter or telegram for any amount of the goods price listed, where the party to whom addressed might see proper to order." (Tennessee court of chancery appeals in the case of College Mill Co. vs. Fidler, 58 S. W. 382.)

* *

Negotiations for sale of flour or grain are affected in an important aspect by the holding of the supreme court of Nebraska that a letter stating that the writer has a quantity of goods on hand and "wants" a certain price for them must be regarded as a mere invitation of negotiations for a purchase from him, and not such an offer of sale as may be turned into a binding contract of sale by the act of the addressee of the letter in treating it as an offer and in accepting it as such. This must especially be true, the court decides, where the letter states that the quantity of goods on hand is "about" a specified quantity, and the purported acceptance is of the stated quantity.

Defendant wrote plaintiff that he had 1,800 bus of millet seed, "or thereabouts," for which he wanted $2.25 per 100 lbs. Plaintiff, regarding the letter as stating an offer, communicated an acceptance for 1,800 bus. Defendant refusing to deliver, suit was brought as for breach of contract, and the trial judge said that there was a valid offer and acceptance, creating a contract, but, on appeal, the supreme court decided otherwise, holding that the letter must be treated as a mere circular inviting an offer, especially since defendant could not be expected to sell more or less millet than he had on hand, which might have been more or less than 1,800 bus. (Nebraska Seed Co. vs. Harsh, 152 N.W. 310.)

SECTION 39. CONDITIONAL OFFERS AND ACCEPTANCES

A conditional offer to sell is not binding until the condition is met, howsoever unreasonable it may be, according to the decision of the Louisiana supreme court in the case of Standard Milling Co. vs. Hoffpauir, 72 So. 748.

Defendant agreed to sell the mill a quantity of rice at a fixed price, upon condition that the rice be loaded by the next morning on two cars standing on a near-by track, those being the only cars available. This condition was not complied with; and defendant refused to complete the sale, whereupon the mill sued to enforce it. In deciding the case in defendant's favor, the court said:

"Whatever may have been defendant's reasons, whether good or bad, from the point of view of another person, the fact remains that he made it a condition that the rice should be loaded in the two cars in question and should be moved out of the warehouse that evening or next morning, and, at the last moment, gave Wright [plaintiff's agent] to understand that there was to be no sale unless he should be able to comply with that condition, from which it follows that, as Wright was unable to comply with the condition, or even to load the rice upon other cars within the time contemplated, there was no sale."

* *

But see the decision of the Rhode Island supreme court in the case of George Tomlinson & Son Co. vs. Lennon, 125 Atl. 266, to the effect that booking

a flour order waived delay in accepting an offer of sale.

* *

Not long ago I was called on to express an opinion on a case stated as follows: May 1 a British importer cabled a Canadian mill an offer to buy 1,000 bags of flour at a fixed price. No time for shipment being specified, the mill treated the offer as requiring prompt delivery. May 3 the mill replied that it would "try to cable acceptance in a day or two," considering the offer open for that length of time. May 5 the mill again cabled, in code, "We accept your offer, shipment first half June." The importer did not reply, but booked the purchase without further correspondence. Later the importer found that the mill had booked no sale for want of confirmation from the buyer.

The question was presented, Was a binding contract of sale entered into? And it was very aptly suggested that this question is one of general interest, since "any buyer or seller might get caught on it any time."

In my opinion the question turned squarely on the point whether the mill injected a new term into the negotiations by accepting the offer subject to shipment the first half of June. If it should appear from all of the circumstances of the case that the buyer reasonably might have contemplated earlier shipment when he made his offer, we are of the opinion that no binding contract was made. And the fact that the mill seemingly took this view of the negotiations goes a long way to support this conclusion.

The controversy really resolved itself, primarily, into a question whether the mill's cablegram of May 5 was an unconditional or a conditional acceptance of the buyer's offer.

It is fundamental law that no contract is formed until the parties have mutually signified their unqualified agreement to the essential terms; and that a qualified or conditional acceptance of an offer is no real acceptance at all, but, rather, a counter proposal. The following is an authoritative statement of rules recognized by the courts of the United States, Canada and England:

"An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. This is true, for example, where an acceptance varies from the offer as to time of performance, place of performance, price, quantity, quality, and in other like cases." 13 Corpus Juris, 281.

One of the cases cited in support of the above stated proposition, that an acceptance which introduces a new condition as to time for delivery is merely a counter proposal, is Oppenheimer vs. Brackman & Ker Milling Co., 32 Canada Supreme Court Reports, 699. In that case it was decided that no contract was formed by a purported acceptance of an offer to deliver hay within six months, where the buyer's reply to the offer read: "We will accept your offer. . . . Please ship as soon as possible the orders you already have on hand, and also get off the seven cars as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight," etc. And in a reported English case it was decided that an offer to buy a house and take possession July 28 was not converted into a contract of purchase by the seller's acceptance of the offer on condition that possession be given Aug. 1.

But where a purported acceptance of an offer specifies a condition which has already been implied by the offer, there is no new condition introduced and the acceptance forms a binding contract, excepting where it is mutually understood that no final contract is to be regarded as entered into until some further formality is gone through—such as preparation and execution of confirmations or formal documents.

If the uniform course of dealings between Canadian mills and British importers shows that shipment of flour within the first half of June is reasonably prompt shipment under an offer to buy made May 1 and accepted May 5, the buyer in this case would have very substantial ground for contending that the cablegram of May 5 formed a binding contract and required no acknowledgment.

If, however, the British buyer reasonably might have contemplated shipment before June 15, to which day the mill might have validly delayed shipment under the terms stated in its cablegram, we cannot avoid a conviction that the cablegram should be interpreted the same as if it read: "We accept your offer subject to your indicating that you will agree to accept shipment made not earlier than June 1 and not later than June 15."

In other words, the cablegram would deviate from the implied condition in the buyer's original offer, that shipment be made with reasonable promptness, and therefore fall within the same principle on which the courts have decided that since an offer to sell real estate implies that payment is to be made at the seller's place of residence, in the absence of specification to the contrary, a purported acceptance of the offer stating that payment is to be made at the buyer's place of residence is not an acceptance, but a counter offer.

* *

The Massachusetts supreme judicial court ordered judgment in favor of the Kehlor Flour Mills Co., St. Louis, against Linden & Lindstroem, Gothenberg, Sweden, in a suit brought by the mill to recover damages for breach of a contract to buy 40,000 sacks of flour pursuant to negotiations had in the fall of 1914. (119 N.E. 698.)

The main point involved in the case was whether the parties entered into a final and binding contract, that being denied by defendants. A further controversy arose as to the time as of which the mill's damages should be assessed, if there was a valid contract.

After an extended review of the various letters, telegrams and cablegrams which passed between the parties, the mill acting through agents in Christiania, the supreme judicial court determined that the defendants made a final and valid agreement to buy the flour in question. The decision lays down the following general principles of law governing the formation of binding agreements:

"The transactions consisted of offers made by the defendants to purchase flour of the plaintiff, and replies made by the plaintiff or its agents to these offers. An offer made by one party must be accepted without qualification, or, if any variation from that offer is made by the accepting party, that variation in turn must be unequivocally adopted by the party making the first offer, before a contract can be made. Ordinarily, the annexing of a condition to the acceptance of an offer is regarded as the rejection of the original offer and the making of a new counter offer. Such counter offer must be accepted without departure from its terms, or there is no contract. . . .

"The written intercourse here in issue took place within a few weeks after the outbreak of the great war. In general the court will take judicial notice of disturbance of the commercial relations thereby caused between neutral countries dependent upon navigation in the zone affected by that war."

The court applied the rule that where a written contract is unambiguous in its terms and involves mere interpretation as to its legal effect, as distinguished from a disputed point of fact, there is nothing for the consideration of a jury. It is for the judge or judges passing on the contract to say what it means. This line drawn between the provinces of judges and juries is an important one, since the findings of juries on disputed questions of fact are usually regarded as conclusive both upon the trial judge and a court reviewing the case on appeal.

But where only a matter of interpretation is involved, a litigant is enabled to take the judgment of an appellate court on the point, regardless of the proceedings in the lower court. Said the supreme judicial court:

"The material negotiations . . . were all by letter, telegraph or cable. Being thus in writing and no ambiguous words or terms being employed, and the circumstances not being in controversy, the question whether a contract was made is one of law, and not of fact. . . . The writings, taken together, must be so plain in their meaning and effect as not to be open to reasonable misunderstanding, in order that there may be a contract. If they are thus plain, it is of no avail for either party to say that they were not understood."

In the course of reviewing the correspondence, the court shows that an acceptance of an offer communicated after expiration of a time limit set by the seller is insufficient to constitute a contract. The defendants telegraphed to the mill's agents an offer to buy "against reply here within Saturday, September twelfth." The mill's agents did not reply until Sept. 13, and then by a telegram which did not reach defendants until the next day, although the message confirmed a sale.

"It is plain that if the communications had ended here, there would be no contract," said the court. "The time limit of the offer by the defendants to make the purchase expired on Sept. 12, and the acceptance of that offer by the plaintiff, although unequivocal in terms, was not sent by the agents until Sept. 13, and was not received until Sept. 14. This was two days after the offer of the defendants expired, according to its express terms. But the communications did not end here."

And then the court goes on to show that

subsequent negotiations manifest a mutual intention of the parties to conclude a contract, and that their understanding to this effect was supported by the facts that the mill made purchases of wheat to supply the flour, and that the defendants took steps toward performance on their part by making efforts to secure American exchange and by engaging space in a vessel for transportation of the flour.

For a discussion of this case from the standpoint of silence as an acceptance, see section 42.

See, also, section 31.

SECTION 40. ACCEPTANCE BY MAIL AND TELEGRAPH

Mailing of an acceptance binds the other party only when he has sanctioned a reply by letter. A telegraphic offer is usually held to require a telegraphic acceptance, in the absence of mutual understanding to the contrary, in which case delay in receipt of a letter from the addressee of the offer would warrant the offerer in treating the telegraphic offer as having been rejected.

There is an interesting and important general rule of law that makes a distinction between the mailing of a letter containing an offer to buy or sell, and the mailing of a letter accepting an offer. It is generally held that an offer contained in a letter is deemed to have been made to the addressee when he receives it, and not when it is posted. So, if the offerer places no time limit on an acceptance and the addressee accepts it promptly on receipt, the offerer must bear the consequences of any delay in delivery of the offering letter.

To illustrate, in one case it appeared that an offer was made by letter dated Sept. 2, to sell goods, subject to "answer in due course of post." Through misdirection in address, the letter was not received until Sept. 5, when the addressee promptly replied by letter accepting the offer. In the meantime the other party sold the goods elsewhere. It was decided that there was a valid contract, and that the offerer was liable for nondelivery, there having been no withdrawal of the offer before its acceptance.

When an acceptance is properly made by letter, it is binding on both parties the instant the letter is posted, properly stamped and properly addressed. This general rule rests on an assumption that the person who has made the accepted offer expressly or impliedly authorized acceptance by mail, in which case the mail is deemed to be his agent for the purpose of transmitting the acceptance, as well as for the previous transmission of his offer. The courts of Massachusetts have departed from what seems to be an otherwise universal rule by holding that one mailing a letter containing an acceptance takes the risk of any loss or delay of the letter in the mails.

A qualification of this statement of the rule is required in a case where the offer carries a condition for actual receipt of the acceptance, as where a mill offers to sell a quantity of flour subject to "receipt" of acceptance by a given time. In such case, a holding that the acceptance was binding when mailed would not accord with the mutual intention of the parties.

A letter posted may be reclaimed by the sender through the post office authorities before its actual delivery, as provided for by the postal regulations. Thus it appears that, although an acceptance once posted is not revocable by another letter going forward in the same post, or by a telegram, it may be revoked by reclaiming it from the mails.

* *

It was decided by the Tennessee court of chancery appeals, in the case of College Mill Co. vs. Fidler, 58 S. W. 382, that an unqualified acceptance by one party of the terms of sale proposed by the other completes the contract, and the contract is consummated the moment the letter of acceptance is deposited in the mail, or the telegram of acceptance is delivered to the telegraph company for transmission; and this although the letter or telegram may be delayed in transmission or may never be delivered, excepting as the offer requires actual receipt of the acceptance.

* *

In the case of Netherwood vs. Raymer, 253 Fed. 515 (affirmed, 257 Fed. 284), the United States district court for the western district of Wisconsin applied the rule of law that where any offer to buy or to sell is made by letter, impliedly inviting an acceptance by mail, a complete contract is formed the instant an acceptance is deposited in the mails, properly addressed to the person who made the offer. No delay of the communication by the postal department in delivering the letter, nor even failure of the letter ever to reach the addressee, can affect the validity of the contract so formed.

But, as also noted in the same decision, the acceptance is without force as forming a binding contract, whether received by the addressee or not, if it does not unqualifiedly accept the offer on which it

is based. If a condition be attached to the acceptance, it converts the communication into a counter offer.

Yet the mere fact that the writer of the letter relied on as constituting an acceptance requests some modification of the other party's terms (e. g., that payment be made at some other place than that mentioned in the offer) does not deprive the letter of its legal quality as a binding acceptance; the communication being so worded as to show that the writer does not insist upon such modification.

SECTION 41. ACKNOWLEDGMENT OF ORDER AS ACCEPTANCE

Although a letter acknowledging receipt of an order for goods, and withholding action generally on the order, leaves the seller free to reject, an acknowledgment will be treated as a conditional acceptance when the letter as a whole indicates the seller's purpose to accept subject to the condition specified.

This principle was applied by the Alabama supreme court in the case of Gilmer Brothers Co. vs. Wilder Mercantile Co., 88 So. 854. In this case plaintiff's salesman took an order from defendant. Plaintiff acknowledged receipt of the order, stating that the same was having prompt attention, but that since this was defendant's first order it was being held a "few days pending completion of credit investigation," and that "just as soon as we receive this information, we will advise you as to accepting your order."

Later plaintiff advised defendant of booking part of the order, and that, pending the credit investigation, the remaining goods had been withdrawn from sale. Plaintiff's right to do this became the subject of litigation in which it was worsted in the supreme court.

SECTION 42. SILENCE AS ACCEPTANCE

In a preceding section there was discussed a case where a British importer on May 1 offered to buy flour, without specifying time for delivery. A few days later the mill to which the offer was cabled replied by cable, "We accept your offer, shipment first half of June." The importer treated this as an acceptance of his order by booking the flour, but failed to confirm the purchase. The mill never booked the sale, deeming the importer's silence a rejection of its conditional acceptance.

In expressing an opinion on this phase of the case, I observed that some one might suggest that, even if the mill's cablegram was a counter offer and not an acceptance of the buyer's offer, the buyer's failure to object to the time for delivery fixed by the seller must be held to be an acceptance, and especially since the buyer booked the flour as purchased. This was a close question on which different courts might well differ. But, in the light of English judicial authorities bearing on the subject, I incline to the view that silence did not give assent in this case.

Assuming that the cablegram is to be taken as a counter offer, we encounter the following general rule well established by court decisions on both sides of the Atlantic:

"An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." 13 Corpus Juris, 276.

As long ago as the reign of Edward IV (1461-83) an English judge said, in overruling a contention that, where property was offered at a certain price subject to the buyer being pleased with it on inspection, title passed on the buyer's approval of it, regardless of his communicating the fact of his approval to the seller:

"It seems to me that the plea is not good without showing that he had certified to the other of his pleasure; for it is trite learning that the the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact." (Year Book, 17 Edward IV, 1.)

One of the leading modern English precedents on the question as to whether "silence gives consent" is found in the case of Empire Assurance Corporation, Law Reports, Chancery Appeal Cases, vol. 6, p. 266. There it was decided that, where attempt was made to transfer the business of one corporation to another and shareholders were notified that their shares had been transferred to the new company in exchange for shares in the latter, such shareholders did not assent to the transfer by mere silence. The court said:

"Somerville has not authorized anybody to put his name down to anything except the City and County Company. He knew that he had an opportunity of taking shares in the Empire if he thought fit. But he did nothing; he remained

silent, and did not accept the bargain. He was simply told that his name was written down, taking it for granted that he had assented to the bargain. But no authority can be found for holding that a person, by simply doing nothing, may be rendered liable.

"The mere fact of standing by and being told there is something done which you have not authorized cannot fix you with the heavy liability which shares in a joint stock company would create. We are all subject to have things sent to us at our houses by persons with whom we have nothing whatever to do, and I think that the mere writing to this gentleman, telling him that something had been done, was not enough to fix him."

In another English case—Felthouse vs. Bindley, 11 Common Bench Reports, New Series, 868—it appeared that there had been verbal negotiations between a nephew and his uncle for a sale of a horse by the former to the latter. The nephew demanded 30 guineas and the uncle offered 30 pounds. The uncle wrote Jan. 2, offering to "split the difference," and stating that if he did not hear anything more he would consider the horse his. Under these circumstances the court said:

"It is clear that there was no complete bargain on the 2nd of January: and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s unless he chose to comply with the condition of writing to repudiate the offer."

In the New York case of White vs. Corlies, 46 N.Y. 467, it was decided that, where defendant wrote plaintiff that upon his agreeing to finish fitting up offices within two weeks he might commence work at once, plaintiff's uncommunicated intention to so agree did not form a contract. Hence it was held that defendant could withdraw the offer. The court of appeals said:

"We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be, in the usual course of events, in some reasonable time communicated to him. . . .

"In the case at hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act of the other party, is not an acceptance which will bind the other."

* *

A still stronger case is found in the decision of the New Hampshire supreme court in Prescott vs. Jones et al., 69 N.H. 305. There defendants, insurance agents, advised plaintiff that, unless instructed to the contrary, they would renew insurance for him for another year. Plaintiff did not reply, and defendants, without so notifying him, failed to renew the insurance. The property burned, and plaintiff discovered that he was without insurance. Deciding that defendants were not responsible to plaintiff for the neglect to reinsure, the court said:

"While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made and notice thereof, either actual or constructive, given to the maker, . . . it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him.

"But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that 'a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it.' . . . 'A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept.' . . .

"If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it merely because he did not communicate his intention not to accept it."

So it was held that if the plaintiff was not bound by the offer until he accepted it, defendants were not bound, because "it takes two to make a bargain," and as contracts rest on mutual promises,

both parties are bound, or neither is bound.

Therefore, assuming, in the case presented to us, that the mill's provision for delivery of the flour within the first half of June imported into the contract a limitation on time for delivery not covered by the offer to buy of the British importer,—and it seemed to me that this was true,—I was convinced that English and Canadian judicial authority required a conclusion that no binding contract was consummated by the buyer's silence.

As already intimated, the general rule that acceptance of an offer or counter offer is not to be implied from mere silence on the part of the offeree is recognized in the United States, as well as in England. One of the latest American legal works on contracts says:

"An intention to accept the terms of the offer as valid is ordinarily an essential element of a valid acceptance. Communication of acceptance is necessary. For want of both of these elements failure or omission to reject an offer is not equivalent to an acceptance. . . . Mere silence is not an acceptance unless the parties have agreed in advance that failure to reject shall be regarded as an acceptance. Accordingly, the offerer is not bound, even if the offeree is thus led to believe that he has a contract, as long as the offerer does nothing to mislead the offeree. . . .

"It has been suggested that where the offeree is apparently attempting to accept the offer, but there is a variance between the offer and the acceptance, the offerer should notify the offeree if he regards such variance as immaterial; and that if the offerer does not reject such counter offer, he is to be regarded as acquiescing therein. No reason appears for requiring an answer to a counter offer under penalty of being regarded as accepting it.

"Even if the party making the offer prescribes that a failure to answer shall be regarded as an acceptance, such failure does not amount to an acceptance.

"The party to whom the offer is made may, however, have agreed in advance that his silence shall be equivalent to an acceptance; and this agreement may be understood from the conduct of the parties." 1 Page on "The Law of Contracts," sec. 160.

But some American courts might say that the buyer in this case, having made the original offer, which was so nearly identical in terms with the acceptance, was in duty bound to notify the mill only in the event the delivery term of the acceptance was unsatisfactory.

Support for such argument may be found in the decision of the Tennessee supreme court in the case of Holloway vs. Cole-McIntyre-Norfleet Co., 214 S.W. 817, wherein it was held that acceptance of an order for meal might be inferred from unreasonable delay on the part of the addressee in signifying action on the order.

In that case it appeared that defendant's travelling salesman received an order for the meal March 26, 1917, to be ordered out by plaintiff buyer by July 31. Plaintiff heard nothing further from the order until May 26, when he was told, in response to a request for shipment, that the order was never accepted. The salesman had in the meantime called on plaintiff several times, but never mentioned that the order had been rejected, and the goods had advanced 50 per cent in value.

Plaintiff successfully relied upon a claim that the order was impliedly accepted, although the court refused to rest the decision on the mere ground that some jobbers in the locality uniformly filled orders not promptly rejected. The salient parts of the supreme court's opinion are as follows:

"The case, as it comes to us, is whether delay upon the part of defendant for an unreasonable time in notifying the plaintiff of its action upon the contract [order?] is an acceptance of its terms.

"We think such delay was unreasonable, and effected an acceptance of the contract. It should not be forgotten that this is not the case of an agent exceeding his authority, or acting without authority. Even in such cases the principal must accept or reject the benefits of the contract promptly and within a reasonable time. . . .

"Plaintiff's agent in this case was authorized to do precisely that which he did do, both as to time and substance. The only thing which was left open by the contract was the acceptance or rejection of its terms by defendant. It will not do to say that a seller of goods like these could wait indefinitely to decide whether or not he will accept the offer of the proposed buyer. This was all done in the usual course of business, and the articles embraced within the contract were consumable in the use, and some of them would become unfitted for the market within a short time.

"It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other

party. The acceptance, however, of such an offer may be communicated by the other party either by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself. When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketable by delay, delay in notifying the other party of his decision will amount to an acceptance by the offerer. Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves to himself to see if the contract will be profitable."

Howsoever much lay, legal and judicial opinions may differ as to whether a binding contract exists in a case of the kind here presented, it is believed that there will be a consensus of opinion on the point that business prudence dictates that where there is even but slight ground for misunderstanding between the parties to a proposed sale as to whether there has been mutual assent to all the terms of the sale, confirmations should be exchanged.

I cannot avoid a feeling that the British buyer should have promptly confirmed the purchase for delivery within the first half of June, inasmuch as he had never expressly assented to that arrangement; and that, on his failure to do so, the mill should have immediately called for confirmation.

* *

It was ruled by the Massachusetts supreme judicial court in Cavanaugh vs. D. W. Ranlet Co., 118 N.E. 650, that the fact that an offer is made in a memorandum stating that in the absence of a reply it will be treated as accepted does not necessarily constitute a binding contract on the addressee failing to reply, but that a finding that the addressee of the offer intended that his silence should indicate acceptance would create a valid agreement.

Mere omission to give notice of rejection of an order taken by a salesman does not warrant a presumption of intention to accept it so as to create a binding contract to sell, according to the view taken by the appellate division of the New York supreme court in the case of Senner & Kaplan Co. vs. Gera Mills, 173 N. Y. Supp. 265.

Defendant's salesman took certain orders for goods and transmitted them to defendant, who successfully avoided legal liability in damages for failing to fill them by taking the position that, while the orders were received by defendant, it never confirmed or accepted the same and, consequently, the orders never ripened into contracts.

The trial judge instructed the jury that it was the law that it is to be presumed that a seller will carry out an order taken by its salesman unless the buyer be notified within a reasonable time that the same is rejected; the reason being that it would work a hardship against the buyer, who would be bound by the order except as he might withdraw it before acceptance. Referring to this instruction, and ordering dismissal of the suit, the appellate division said, on an appeal taken by defendant from a judgment in plaintiff's favor:

"I think the court was clearly in error in instructing the jury as above quoted. I know of no presumption of law that, when a salesman offers goods to a prospective purchaser, and the purchaser agrees to take the same upon the terms and conditions offered, the order will be filled by the principal whom the salesman represents.

"The court correctly charged the jury that a firm, dealing with a buyer through its salesman, is not in law bound to accept the order which the salesman has taken; but the court incorrectly charged that a duty rested upon the seller, on receiving the order, to notify the buyer within a reasonable time that it would not accept the same, and that in the failure of the firm to so notify the buyer of its refusal it would be deemed to have accepted the order. . . . The travelling salesman is, at most, a solicitor of orders, and the prospective purchaser dealing with him understands quite clearly that he is not dealing with the principal, but with an agent whose acts must be accepted and ratified by the principal before they become effective. No burden rested upon the defendant to repudiate the order at any time. . . .

"In the instant case, defendant's salesman had no authority to make a contract binding upon the defendant. Until the orders taken by him had passed the merchandise department and the credit department of defendant's business, the plaintiff was in no position to compel the furnishing of the goods ordered."

It was found in this case that plaintiff understood from defendant's general practice that no order was accepted until it had passed the merchandise and credit departments. But the quoted extracts from the decision show that, even where the buyer does not know the seller's busi-

ness practice in this regard, still he is bound to take notice of the limited powers of the salesman, and cannot claim any fixed benefits under an order until it has been accepted by the salesman's principal.

It is not to be understood, however, that it is necessary that the seller formally indicate his acceptance. It seems to be sound law that any act upon the part of the seller which clearly shows a purpose to accept an order will be regarded by the courts as an acceptance. For instance, should a mill receive an order to manufacture 10,000 sacks of flour to be packed in a special kind of sack, the placing of an order by the mill with a manufacturer for the specially branded sacks would, it seems, be construed as a binding acceptance of the customer's order for the flour, without any formal notice to him of acceptance.

* *

A decision of the Texas court of civil appeals deals with an important question concerning the effect of a buyer remaining silent when the seller signifies intention to deliver flour of a different brand from that contracted for. (C. P. Ray & Co. vs. La Rue & Barron Co., 237 S.W. 336.)

Defendant company, having contracted to sell to plaintiff, wrote:

"We have you booked with 1,200 sacks of flour from G. B. Smith Milling Co. We find that we are unable to ship cars from the Smith Milling company to Kerens on account of them having an account there already. We are taking the liberty of booking for you instead a car of Arkadelphia Milling Co. flour, which is northern flour and is an excellent piece of goods in every respect. . . . If this is not entirely satisfactory, kindly let us hear from you."

The original memorandum of sale provided for confirmation. Referring to this memorandum and the letter above quoted, the court says: "Whether or not it may be essential to a disposition of the question presented in this appeal, we believe it proper to say that, as the evidence stands, the provision in the writing, conceding it to be a written contract rather than an incomplete memorandum of an oral contract, conclusively shows a confirmation of the transaction by appellee" [the seller].

"The writing indicates that it was subject to confirmation by letter. The letter of Jan. 26, 1920, states that appellee has booked 1,200 sacks of flour for appellants [the buyers], which its representative found could not be shipped, for the reason stated in the letter, and that in such circumstances appellee was taking the liberty to book a different kind of flour, indicating that it would be shipped instead of the flour mentioned in the original order if not unsatisfactory to appellants; and by using the expression, 'If this is not entirely satisfactory, kindly let us hear from you,' appellee clearly gave appellants to understand that, unless advices to the contrary were received, the shipment as changed would go forward.

"In other words, as we construe the letter, no answer to it was required unless the indicated change should be unsatisfactory to appellants. The terms of the letter exclude the idea that any reply was necessary if the indicated change should be satisfactory to appellants. Such being the case, there was ratification after alteration acquiesced in by appellants."

It is to be noted that in this case the contract is being sought to be enforced against the seller, who indicated a purpose to substitute brands on the buyers making no objection. The buyers thereby necessarily assented to the substitution.

Had the seller, instead of withholding delivery of the substituted flour, for which damages are claimed by the buyers, made shipment and attempted to enforce the contract against the buyers, a closer question might have been presented as to whether the buyers' failure to object to the substitution would have bound them. There are numerous authorities supporting the legal proposition that mere silence cannot thrust contract obligations on one, as where an offer to buy or to sell is coupled with a statement that in the absence of an express rejection the offer will be deemed to have been accepted.

As to the effect of failing to object to the terms of written confirmation of sales, see section 45.

SECTION 43. REJECTION OF ORDERS

The familiar provisions in buyers' orders, that soliciting salesmen are not authorized to make contracts varying from those expressed in the printed order forms, and that orders are subject to approval at the seller's home office, were judicially scrutinized in a case before the Maryland court of appeals. The court holds that such conditions expressed in order blanks are reasonable and enforceable, and that where an order was disapproved by a home office within three days after being given to a salesman and check for a partial payment was returned

to the customer who signed the order, there was no obligation to fill it. (109 Atl. 439.)

The J. C. Lysle Milling Co., Leavenworth, Kansas, defeated a suit brought by Rumph & Tyson, Camden, Ark., for claimed breach of a contract to sell flour. (203 S.W. 850.)

July 13, 1916, the mill's salesman took an order from plaintiffs for two carloads of flour at specified prices, but there was express provision in the order form that the order was subject to confirmation by the milling company at its home office.

On receipt of the order by mail, the mill wrote plaintiffs that the salesman had made a mistake in quoting price on the flour delivered at Camden with freight paid to destination instead of the price f.o.b., Leavenworth, and that the order would not be accepted at that price, but that if the plaintiff would be willing to take the flour at the price quoted with freight added, and would so notify the mill immediately by wire, the flour would be shipped "if the market has not made material change." This letter was dated July 17. Aug. 4, plaintiffs sent the mill a letter, agreeing to the change in price, but by the time the letter was received the price of flour had advanced, and the mill refused to ship at the old price.

In plaintiffs' suit for damages the trial court awarded judgment in their favor, but it was reversed by the supreme court of Arkansas, the higher tribunal saying:

"The writing signed by appellant's salesman and appellees did not constitute a contract between the parties for the sale of the flour, for, according to the express terms of the writing, the order was subject to confirmation by appellant at its office in Leavenworth, Kansas. The writing merely constituted a proposal which was not binding on either party, and which might have been withdrawn at any time before confirmation by appellant within a reasonable time.

"Appellant declined to confirm the order at the price stated therein, and immediately notified appellees of such nonacceptance, but made a counter proposal to ship the flour on altered terms of sale, but this did not constitute a contract until accepted by appellees. . . . There was therefore never a time when the minds of the parties met on the terms of sale, and therefore there was no contract."

SECTION 44. LAPSE AND REVOCATION OF OFFERS

Slowness of a seller in accepting an order has often deprived him of the benefits of a good contract.

There is a very general misconception among business men that a customer is "sewed up" if his order bears some such statement as this, "Not subject to countermand." But there is no legal force back of such provision. The law does not sanction arrangements whereby one person is bound by an agreement without being the beneficiary of some reciprocal obligation in his favor, excepting in the case of options for which a consideration of some kind is given. A mill's customer may give the mill an option to deliver a certain quantity of flour at a stated price, or the mill may give the customer an option to buy at a specified figure, and the option will be enforced, provided that some consideration is given for it. But a naked order for goods may be withdrawn any time before it has been accepted.

"Where an offer is accepted before it is revoked, the contract is as obligatory as if both promises were simultaneous. Here, as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury. . . . An order given to an agent who has no authority to accept it, but only to forward it to his principal for approval, is revocable at any time before it is accepted by the principal and the acceptance communicated to the offerer. A bid at an auction, which is an offer to purchase the property put up, may be withdrawn at any time before the hammer goes down.

"The offerer may revoke his offer before it is accepted, even though he has expressly declared in it that he will not, or has, by the very terms of the offer, allowed the offeree a certain number of days within which to accept it, as in the case of options or refusals . . . unless the agreement to hold it open is supported by a consideration. But the offer is a continuing offer until it is withdrawn, and the withdrawal communicated; and if it is accepted, and the acceptance is communicated before the offer is withdrawn and notice thereof given, and within the time expressly or impliedly limited, the agreement is complete, and the offer is no longer revocable." 13 Corpus Juris, 293-294.

A more specific statement of the law, as applied to the sale of goods, has been authoritatively summed up in the following language:

"An offer to buy or sell becomes a binding agreement when the person to whom the offer is made accepts it and communicates his acceptance, or performs an act in compliance with the terms of the offer from which his acceptance may be implied. An offer, unless withdrawn, may be accepted within the time expressly limited. If the offer is rejected, either by an absolute refusal or by an acceptance not identical with the terms of the offer, or by a counter offer, it cannot afterwards be accepted. But if the offeree makes a conditional acceptance or a counter offer, and the offerer accepts the same, there is a binding agreement. An acceptance may be revoked by a communication to that effect before the acceptance is communicated, but not after." (35 Cyc. 52.)

According to a decision of the appellate division of the New York supreme court, which seems to be squarely in line with what courts generally hold, an option to buy goods, although evidenced by writing, is revocable by the seller any time before the buyer signifies an election to buy on the terms of the option, unless supported by some consideration moving to the seller as compensation for giving a binding offer to sell. (Finizio vs. American Steel Export Co., 183 N.Y. Supp.) This decision was affirmed by the New York court of appeals (135 N. E. 898.)

* *

An order for goods, taken "subject to confirmation," may be withdrawn before its unqualified acceptance, according to the opinion handed down by the West Virginia supreme court of appeals in the case of Allen vs. Simmons, 125 S. E. 86.

* *

But where an offer to sell goods is revoked by letter, but the letter is not received by the buyer until after he has mailed an acceptance of the offer, there is a completed contract of sale, although the revoking letter was mailed first. In reaching this conclusion in the case of Jennette Bros. Co. vs. Hovey & Co., 113 S. E. 665, the North Carolina supreme court followed a rule frequently adhered to by courts throughout the country.

It was held that where an offer is not coupled with a requirement for acceptance within a stated time, the person to whom it is addressed has a reasonable time within which to accept or reject. It was found that the buyer in this case mailed acceptance of the seller's offer within a reasonable time, without notice that there was any attempt to revoke.

Had the seller telegraphed notice of his withdrawal of the offer, and had the telegram been received by the buyer before mailing the letter of acceptance, a different result would have followed.

* *

The case of Green et al. vs. Denton Milling Co., Denton, Texas, as stated in an opinion of the Texas court of civil appeals sitting at Texarkana (204 S.W. 362), affords a practical example of the application of the general rule of law that there must be definite and timely acceptance of an offer to buy or sell before there can be a binding contract of sale.

The plaintiffs, merchants, unsuccessfully sued defendant mill for claimed breach of a contract to sell a quantity of flour, relying upon certain correspondence between the parties as showing a binding agreement.

March 26, 1917, plaintiffs wrote a request for quotations. March 28 the mill replied that, "based on today's market, we will book you a car of flour for $9.50 . . . for shipment within 30 days, . . . and hope to have your acceptance before we have another advance." The next day, plaintiffs replied by letter, accepting the offer, but on receipt of it the mill answered that the market had advanced 50c in the meantime. Still the mill said it was booking the car at $9.50, on condition that the car be ordered out within 15 days, because existing wheat supply would not warrant booking for 30 days, as previously offered.

April 2, the plaintiffs demurred to shortening the shipping limit, and asked 30 days. The next day, the mill replied that the 50c advance in the market before plaintiffs' acceptance of the offer was received came too late to be binding, but that the mill would ship at the quoted price, provided shipment be permitted within 15 days. Apparently, there was no reply to this letter until April 13, when the plaintiffs telegraphed instructions to immediately ship "flour as booked." The mill declining to recognize the existence of any binding contract, the plaintiffs sued.

The trial court awarded judgment, but the court of civil appeals reversed the decision, holding that, although the plaintiffs' acceptance of the original offer made by the mill was unconditional, it failed to bind the mill, because not signified before there was an advance in market values, a condition attached to the offer. The mill was, therefore, within its rights in imposing such additional con-

ditions as it might choose to impose. It chose to require shipment within less time than originally contemplated.

Had the plaintiffs promptly agreed to this, there would have been a binding contract. But they did not promptly so agree. On the contrary, they declined to consent to the 15-day condition, in a letter written by return mail. It was not until 10 days later that plaintiffs changed their minds and undertook to accept the condition by requiring immediate shipment. The court holds that the acceptance was not indicated within a reasonable time, and that the mill's last offer was impliedly withdrawn on the plaintiffs' rejection of it the day after it was transmitted.

Incidentally, the claim was made by the mill, under the laws of Texas, that it was entitled to have the suit brought in the county where its mill and place of business was situated, and not in the county where the plaintiffs resided and did business. In this contention the mill was upheld, the court finding that in no view of the case could there be said to be any understanding for the performance of the contract in the latter county, so as to make bringing of suit there proper under the Texas statutes.

* *

One of the leading cases in the law reports on the proposition that acceptance of an offer does not constitute a binding contract unless promptly communicated in conformity to a requirement in the offer is that of Eagle Mill Co. vs. Caven, 76 Mo. App. 458, decided by the Kansas City court of appeals.

Plaintiff mill invited an offer from defendant on wheat, and the latter made one on specified terms, adding in his letter of Oct. 4, 1896: "The excitement on wheat is running high, and this is the best I could offer at present. This is for a wired acceptance on receiving this letter, or no trade. Don't fail to wire if you want the wheat at price."

This letter was mailed from a point in southwestern Missouri to Memphis, on a direct line of railroad, and should have reached Memphis next day. Two days after the letter was mailed, plaintiff mill wired a purported acceptance of the offer, ordering two cars shipped "quick." Defendant refusing to recognize the existence of a binding contract, the mill sued for damages. The court of appeals affirmed judgment in defendant's favor, saying:

"The case was made to turn upon the point as to whether or not plaintiff duly accepted defendant's offer to sell the wheat. The court below construed defendant's letter of Oct. 4 as containing a proposition open only to plaintiff's acceptance by telegraph sent immediately on receipt of said letter. The construction of said letter and reply thereto was a question of law for the court. As to whether or not plaintiff replied by wire at once on receipt of the letter was a question of fact for the jury.

"The court, in substance, told the jury that defendant's proposition (Oct. 4) called for an answer by wire on Oct. 5 if received by plaintiff on that day—that said offer was not open for acceptance the next day, and this was proper. The letter read: 'This is for a wired acceptance on receiving this letter, or no trade.' As to whether or not the acceptance was wired on the same day the letter was received at Memphis, Tenn., the evidence was conflicting. This presented an issue of fact for the jury, and it was settled by the verdict adversely to the plaintiff.

"To constitute a contract by correspondence the acceptance must be in exact harmony with the proposal—must be in substantial accord with its terms."

* *

The J. C. Lysle Milling Co., Leavenworth, Kansas, secured an affirmance by the Kansas City court of appeals of a judgment against John W. Sharp & Son, Moberly, Mo., for damages for breach of a contract to buy flour; the defendants failing in an effort to have it declared that there was no valid contract formed. (207 S.W. 72.)

Through its travelling salesman, Aug. 2, 1917, plaintiff received an order from defendants for 105 bbls of Gilt Edge flour at $13.20 in 48-lb packages, and the same quantity in 24-lb packages at $13.30 bbl. The order recited, "All goods f.o.b. mill, freight allowed to destination," and "subject to confirmation at Leavenworth." Shipment to Moberly on Sept. 30 was called for. The mill confirmed by letter as follows:

"We are in receipt of the order you very kindly gave our Mr. Madge for a car of Gilt Edge flour for shipment on a basis of $13.20 for Gilt Edge in 48's delivered Moberly. We are very much pleased to receive this order," etc.

Sept. 10, defendants notified plaintiff that they would not accept delivery. The evidence showed that, whenever the mill contracted to sell a car of flour, it bought enough wheat the same day to manufacture the goods, and that after defendants broke their contract plaintiff

sold the flour elsewhere at the best price obtainable, but at a loss, to secure reimbursement against which the suit was brought. The trial judge, sitting without a jury, gave judgment for $336 in the mill's favor. In affirming it, the court of appeals said:

"The order and offer to buy signed by defendants, together with the letter of confirmation and acceptance, constituted a completed contract. After that the matter was beyond defendants' recall in the absence of any failure to perform, or remiss act, emanating from the other party thereto."

* *

Whether defendant, who had placed an order for flour and feed, was entitled to recall the order, on a theory that it had not been accepted, was the principal point involved in the case of Rock vs. Fisher, 216 Pac. 668, decided by the Oklahoma supreme court. It was found that defendant had precluded himself from withdrawing the order, through having treated it as accepted.

See, also, George Tomlinson & Son Co. vs. Lennon, 125 Atl. 266, holding that booking a delayed order waived the delay.

* *

An order for goods having been impliedly rejected by the seller, through signifying acceptance on terms variant from those stated in the order, cannot be made the basis of a valid contract, without the buyer's further assent, by afterward accepting it unqualifiedly. This important principle of sales law was reaffirmed by the Georgia court of appeals in the case of Winder Mfg. Co. vs. A. S. Pendleton Co., 108 S. E. 823.

* *

The following stated case was presented for an opinion as to the rights of the parties to a contract to sell bran. Dec. 26, X wired an order to Z for a car at $45, prompt delivery, furnishing shipping instructions the same day by mail. Two days later X received a mail quotation from Z, covering the same kind of bran at $42.75, the quotation being dated the same day as X's telegraphic order. Z's invoice dated Jan. 5 was received by X Jan. 7, calling for payment at $45. It was returned to Z for reduction to $42.75.

If it was intended to question the binding effect of X's offer to pay $45 a ton for the bran merely because the day the offer was made by telegraph Z sent a mail quotation of $42.75, I was of the opinion that Z was legally entitled to collect at the rate of $45. In other words, acceptance of X's offer to pay $45 before withdrawal of that offer constituted a binding contract, which was no more nullified by sending of the mail quotation than if Z had never mailed a lower quotation. However, X could have withdrawn his offer any time before its acceptance and made a binding contract by accepting Z's offer to sell at $42.75, if the quotation was made under such circumstances as to indicate making of a definite offer by Z to sell at $42.75, as distinguished from a mere invitation to Z to send in an order for bran at $42.75, subject to acceptance or rejection of the order by Z. (Mere quotations are generally regarded in the latter light.)

SECTION 45. VARIOUS ASPECTS OF CONFIRMATIONS

There have been numerous classic utterances on the value of silence. Some one has characterized it as the "sanctuary of prudence." Some one else has averred that "silence never yet betrayed any one." Shakespeare called it "the perfect herald of joy." Kossuth said that "the unspoken word never does any harm." But the Kansas supreme court shows that silence in business negotiations is not always prudent. The court gives a practical illustration of an old saying that one should be politic in his silence, and another that "there are moments when silence, prolonged and unbroken, more expressive may be than all words ever spoken."

The court holds that where one of the parties to a contract for a sale of grain writes a letter confirming the terms of sale, as orally agreed upon, or some supplemental understanding, and the other retains the letter without objection, he cannot afterwards assert that the letter stated a term not orally agreed upon.

"It is a proper function of the confirmatory letter to afford assurance, not merely that there has been no mistake by either party in catching the words of the other, for instance, concerning prices and amounts, but that they may have the same understanding as to the obligations in detail which each has assumed," says the court. "The benefit to the business world of the employment of such a device would be largely curtailed if the recipient of a purported confirmation of an oral agreement for purchase and sale could remain silent, and later successfully deny any force to one of its provisions, on the ground that the matter to which it relates had not in fact been previously mentioned." (Strong vs. Thurston, 191 Pac. 575.)

Effect of failure of one party to a verbal contract of sale to object to a confirmation sent by the other was considered by the Texas court of civil appeals in Early Grain & Elevator Co. vs. Kelsey, 206 S.W. 849. The suit having been brought at Amarillo on the theory that a valid written contract performable there had been entered into, defendant asserted a right to be sued in another county, in which he resided, on the ground that no written contract binding him had been entered into. This point was ruled against defendant.

The facts concerning this phase of the controversy are that, after telephonic communication between the parties had resulted in a verbal agreement on a sale, plaintiff grain company sent a letter of confirmation to defendant, who, however, failed to confirm on his part, although he did not object to the terms of plaintiff's confirmation.

Under these circumstances, the court holds that defendant was bound by a rule of the Texas Grain Association providing that "where only one party to a trade confirms, this confirmation shall be binding upon both parties unless objected to at the receipt of the same."

The question as to whether there was a contract in writing was particularly pertinent, in view of a statute in Texas which authorizes suit for breach of a written contract to be brought in the county where it was to be performed, regardless of the fact that the defendant may reside in another county in which, ordinarily, the plaintiff would be required to sue.

See, also, the decision of the Kansas supreme court in the case of Clark vs. Topeka Flour Mills Co., 198 Pac. 935.

On the effect of silence in the formation of contracts, see, also, section 42.

* *

In the case of Valdosta Grocery Co. vs. Cadick Milling Co., 126 N.E. 240, the appellate court of Indiana affirmed judgment in favor of plaintiff for damages for defendant's breach of a contract to sell flour.

The principal points laid down in the opinion on appeal relate to the necessity for strict conformity between orders and confirmations, to the effect of specified time for delivery, to the effect of trade customs, and to the right of a party to a contract to give afterthought reasons for not complying with an agreement.

The contract in question, dated Nov. 10, 1914, provided "Nov. and Dec." as "date of shipment." It also contained the following clauses:

"This sale is made subject to the terms and conditions printed on the back hereof, which are agreed to and are not subject to change or countermand without the consent of both parties. This order is taken subject to the confirmation of the Cadick Milling Co., Grandview, Ind. . . .

"Conditions governing sale of flour and feed, adopted by the Southeastern Millers' Association, Nov. 12, 1907. . . .

"(2) Unless otherwise specified, purchases must be ordered out within 30 days from date of contract, with a maximum possible limit of 90 days from date of contract. If not so ordered out within 30 days, or within contract shipment period, flour is without notice from seller subject to carrying charges of 5c per barrel per month, or fraction thereof, and feed 25c per ton per month or fraction thereof. . . . Failure to order flour out on demand of shipping instructions at expiration of the maximum 90-day period, or to pay accrued carrying charges on demand, gives seller the right to cancel contract or resell the goods for the buyer's account."

The contract was confirmed by the mill, "subject to the terms and conditions printed on the back hereof, which are agreed to." Then followed provisions, including those above quoted.

In suing, plaintiff admitted that partial deliveries were made under the contract in the months specified in the contract,—November and December,—but alleged that deliveries ordered out under the agreement in January and February were not made, the defendant mill refusing to deliver, and declaring that it considered the contract terminated.

"It is contended by appellant," says the court on the mill's appeal, "that the order and confirmation in question do not constitute a binding contract, as it does not apppear that there was a meeting of the minds of the parties thereto. Appellant asserts in support of this contention that there is a material variance between the alleged order and confirmation in the following particulars: (1) The order contains the statement, '5 cents a bbl. carry charges after Dec.,' which is not in the confirmation; (2) the confirmation contains the following: 'Ca-Mi-Co. Pat. S. R.' and 'Gold Dust Patent 5.85'—which are not in the order. We cannot concur with appellant's contention in this regard.

"True, as appellant asserts, the order contains on its face the statement, '5 cents a bbl. carry charges after Dec.,' which does not appear on the face of

the confirmation, but such provision, in effect, is contained in both the order and confirmation following the signatures thereto, which we assume are among the terms and conditions printed on the back of each and to which express reference is made on the face thereof. This being true, the statement in question found on the face of the order was not at variance with the confirmation, but merely served to call appellant's attention to the interpretation placed by it on the provisions on the back of the order to which express reference was made. . . .

"Nor can it be rightfully said that the words and figures, 'Ca-Mi-Co. Pat. S. R.' and 'Gold Dust Patent 5.85,' found in the confirmation, but not in the order, have the effect for which appellant contends. These words are a part of the printed form used in making the confirmation, which accounts for their presence therein. However, they can have no controlling significance, since there are no amounts [quantities] set opposite the same to indicate that any flour of the brand thus designated entered into such confirmation. The clear and unambiguous meaning of the confirmation in question shows that it was appellant's intention thereby to accept the order of appellee according to its terms, and it was the duty of the trial court to so declare and give it that effect."

* *

The Kemper-Fair Milling Co., Tonganoxie, Kansas, won a suit before the Arkansas supreme court against Cotton Bros., Leslie, Ark., based on the defendants' refusal to receive a car of flour and meal contracted for (215 S.W. 705).

The principal issue involved in the litigation was whether a definite contract for purchase of the goods had been entered into. A jury answered this question in the affirmative, and the supreme court finds that the evidence supports the verdict.

The order in question was taken by the mill's representative by long-distance telephone, and was confirmed by the mill. Shortly afterwards one of the members of defendants' firm signed a confirmation in his own name. Defendants sought to avoid obligation to accept delivery, on the grounds that no order was ever given, that the confirmation last mentioned did not bind the firm, and that it was obtained on an understanding that it should not be binding unless also signed by the other defendant.

The court sets forth considerable correspondence tending to show that the real reason why defendants refused to receive the flour and meal was that they had become overstocked.

As decided by the Kansas City court of appeals in the case of Consolidated Flour Mills Co. vs. Farmers' Elevator Co., 247 S. W. 480, where a complete contract has been evidenced by an exchange of letters or telegrams, a so-called letter later sent by one party to another, not assented to by the latter as a modification of the terms of such contract, is without effect.

CHAPTER IV

NECESSITY FOR WRITTEN AGREEMENT

SECTION 46. HISTORICAL AND GENERAL

THE statute of frauds has long constituted one of the most important pieces of legislation, from the standpoint of the seller and the buyer of goods. Nevertheless, its provisions are not generally understood and, because of their being overlooked, the benefits of many a bargain are lost.

Charles II was king of England when the original statute of frauds was enacted in 1676. Therefore, the law is still cited under his name in the English statutes, although when we think of the Merry Monarch we are more apt to think of him on account of his attentions to Nell Gwyn or Lady Castlemaine than on account of the statute of frauds.

A composite statement of the law as now enacted in most of the states, so far as sales of goods are concerned, is that certain contracts of sale are not enforceable unless evidenced by signed writing, setting forth the essential terms specifically or by reference, or unless there is partial delivery of the goods to and acceptance by the buyer, or unless he pays something on the price or to bind the bargain. In some states the law applies regardless of the amount of money involved, but perhaps in most of them $50 marks the minimum price that requires evidence of the obligation in writing. In a few of the states the limit is as high as $500.

At first blush it may seem grossly unjust to give one of the parties to a sales contract the right to avoid his agreement, the terms of which may be wholly undisputed, on the mere ground that the contract is not down in black and white, but a little reflection will justify the law in this regard. Human nature has not changed enough in the last 250 years to justify departure from the theory which brought the statute of frauds into existence—that frauds are facilitated and perjury tempted unless important business obligations are evidenced in writing.

As will be seen from the mention below of appellate court decisions which actually arose in the grain and milling trades, it is by no means required that a formal contract be entered into, garnished with "whereases," "know all men by these presents," etc. The ordinary interchange of telegrams or letters, leading up to mutual understanding that a contract has been made, will suffice. The ordinary order form is enough, if it is signed by the party to be charged.

In actual practice in the flour, feed and grain trades, noncompliance with the statute of frauds often arises through failure of a buyer to sign an order form or any other memorandum of his agreement to buy, or through the taking of orders over the telephone, without having them followed up by signed orders. Occasionally a mill is let out of obligation through having signed nothing, although usually it becomes bound through written acknowledgment and acceptance of an order.

See, also, the decision of the South Carolina supreme court in the case of Melchers & Co. vs. Springs, Heath & Co., 33 S. C. 279.

* *

Interpreting the New York statute, the appellate division of the supreme court of that state said in the case of Gordon vs. Witty, 190 N. Y. Supp. 381:

"It is now the law of this state that neither acceptance, receipt nor part payment need be contemporaneous with the making of the contract, but may occur at any time thereafter, if under the contract and prior to its revocation."

* *

In a case passed upon by the Minnesota supreme court (Union Hay Co. vs. Des Moines Flour & Feed Co., 198 N. W. 312), the decisive question was whether there was a sufficient memorandum of an agreement for a sale of flour to constitute a valid contract under the statute of frauds. Plaintiff established the validity of the agreement, and hence right to recover damages for defendant's refusal to accept delivery. In holding that there was a sufficient memorandum of the transaction to bind the buyer, the supreme court said:

"It is generally held that the memorandum is not the contract, but only the

written evidence of it which the statute requires. . . . Formerly the statute declared that, unless its provisions were complied with, the contract should be void. . . . The uniform sales act declares that the contract shall not be enforceable unless the requirements of the statute have been observed. . . . There is a difference between a contract in writing and a memorandum in writing of an oral contract. The subject of the statute is oral contracts for the sale of goods. The requirement of a memorandum presupposes the existence of such a contract. The memorandum must contain a statement of the terms of the contract. It need not consist of a single paper. It is sufficient if the terms of the contract can be gathered from other writings, if their connection is obvious, without resort to parol evidence."

* *

For a general application of the statute, see, also, the decision of the Oregon supreme court in the case of Bagot vs. Inter-Mountain Milling Co. (196 Pac. 824).

A contract to buy flour was not supported by such signed documents or performance on the part of the buyer as to make the contract enforceable against him, ruled the United States circuit court of appeals, third circuit, in the case of Northwestern Consolidated Milling Co. vs. Rosenberg et al., 287 Fed. 785. The court affirmed a decision of the United States district court, eastern district of Pennsylvania (277 Fed. 245).

Defendants agreed to buy the flour, but refused to receive it or pay for it on arrival. The market had dropped before the flour arrived. To plaintiff's suit for damages defendants pleaded the technical insufficiency of their agreement to legally bind them. Reliance was placed on the Pennsylvania statute of frauds. The mill's attorneys replied (1) that there was a sufficient writing signed by the defendants, and (2) that there was such part performance as made the contract valid under this statute.

It was not claimed that defendants had signed any formal contract or any document directly referring to the sale, but it was asserted that defendants sufficiently recognized the contract over their signature by applying to a warehousing company for a shipping permit, then required and mentioned in the written memorandum of the contract signed by the mill and sent to defendants but not signed by them. The mill's attorneys contended that the buyers' signed application to the warehousing company for a shipping permit constituted such written recognition of the contract to buy the flour as to bring the case within the established rule that several letters or papers may be read together as constituting a signed contract to buy or sell, provided that they bear internal reference to each other. The court said:

"The trouble with the plaintiffs' reliance . . . is that while 'the statute may be satisfied where the memorandum is made up of several papers,' the defendants' application for a permit, addressed to a third party, is not a paper which in any sense can be regarded as a memorandum of the agreement with the plaintiff. In it no terms are contained, promises made, obligations assumed, or anything done charging the defendants. Although it may be probable that the permit applied for and obtained had to do with the shipment of flour which the parties had in mind, it contains no 'internal reference' to the unsigned memorandum.

"While parol [oral] testimony may in a proper case be offered to identify and show the connection between separate writings which bear internal reference one to the other . . . and which together constitute the memorandum in writing required by the statute, this rule does not apply here because, first, neither writing bears internal reference to the other, and second, parol testimony would have to be admitted not merely to identify and show the connection between the two instruments but to show that each instrument, the one signed and the other unsigned [by the buyers], is a part of the oral agreement by which the defendants are charged."

On the second branch of the mill's contention, that involving a claim that there had been such acceptance and receipt of the flour as to validate the contract without any signed memorandum, the court of appeals said, in part:

"Although some courts have held that the terms 'accept' and 'actually receive' are synonymous, it may now be regarded as definitely settled that these terms have distinct meanings and that both acceptance and actual receipt, which imply delivery, are essential to take a case out of the statute. . . .

"To bring itself within the exception of the statute the plaintiff averred that it shipped the flour from Minneapolis to Philadelphia, where, upon arrival, it 'was duly delivered by the carrier, which was the agent of the defendants, to the Delaware Avenue stores of the Pennsylvania Warehousing & Safe Deposit Co., also the

agent of the defendants' and that when the flour was so delivered to the warehousing company, 'who received it on behalf of the defendants, the defendants, following receipt of notice of the arrival of the goods, called . . . and examined and accepted the flour.' . . . Whether this averment, so far as it affects the requirement of acceptance alone, is sufficient or insufficient, . . . the plaintiff failed to make an averment of the next requirement of the exception, that the buyer did 'actually receive' the goods.

"The only approach to an averment that the defendants actually received the goods was the plaintiff's statement that the goods were 'delivered' to the warehousing company, 'as agent of the defendants.' Yet this averment, feeble as it is, is made wholly nugatory by another, immediately following, to the effect that the defendants failed to pay the draft for the goods when presented, but requested the plaintiff for an extension of time; that the plaintiff granted the defendants an extension of several weeks 'with the understanding that the flour was to remain in the warehouse in Philadelphia until the draft was paid by the defendants.'

"Whatever force may be given the plaintiff's averment of acceptance of the goods, the plaintiff not only failed expressly to aver actual receipt, but, by the averment last quoted, conclusively showed that the defendants did not actually receive the goods because the plaintiff refused to allow the defendants actually to receive them until they had paid its draft. Furthermore, it appears that during this period of suspense the defendants acquired no actual control over the goods and that the plaintiff at all times retained actual control. . . .

"In examining the provisions of uniform sales acts, enacted in many states, it is clear that legislatures, following the English statute of frauds as a model, intended to prevent frauds, invited by the size and complexity of modern commercial transactions, by requiring that agreements above a named sum, to be enforceable, must be reduced to writing. This is a rigid requirement, rigidly enforced by the courts. A sensible exception is made when goods have been accepted and actually received by the buyer, for then the opportunity for fraud has largely disappeared and all intendments of law are in favor of making the buyer who has actually received the goods pay for them. And this is so whether the contract is written or oral, express or implied."

SECTION 47. STATUTE NOT DISFAVORED

Ruling that the courts do not disfavor the statute of frauds as a defense against liability for breach of an agreement, the Minnesota supreme court said in Upton Mill & Elevator Co. vs. Baldwin Flour Mills, 179 N.W. 904:

"Plaintiff asserts that the purpose of the statute is not to defeat honest litigants, but to protect them from fraud and perjury, and inferentially that a defense founded on the statute is not to be looked upon with favor. In other words, we are asked to treat the statute as an obnoxious one, and to restrict its operation by a rigid construction. Such was the attitude assumed by this court in the early case of Phipps vs. McFarlane, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743, but our later decisions evince no hostility toward a litigant who pleads the statute as a bar. . . . In this they are in accord with the decided weight of modern authority. 25 R.C.L. 689. As was aptly said in the O'Donnell case, this court should not be controlled by the consequences following upon an application of the statute, or deem obnoxious a law which the legislature has placed in the statutes and allowed to remain for many years."

"A learned court has said: 'The statute of frauds has been pronounced by high authority (Kent's Comm., 2 V., 494), to be, in many respects, the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights. Its benefits it is believed will be most effectually secured by rejecting refined distinctions, overlooking the supposed equity of particular cases, and adhering steadily to its language as the best exponent of the intention of the legislature.'" (Indiana supreme court in Hudnut vs. Weir, 100 Ind. 501.)

SECTION 48. EFFECT OF CONFLICTING TRADE CUSTOMS

A legal hazard attaching to verbal contracts for sale of goods is indicated by the Rhode Island supreme court in the case of Webster-Tapper Co. vs. Eastern Hay Co., 98 Atl. 50, in a decision which denied right to recover for breach of an oral contract to buy 10 carloads of grain.

In an attempt to show that compliance with the Rhode Island statute had been waived by defendant, plaintiff sought to show a custom of grain dealers throughout the country of conducting their transactions orally and without regard to the statute mentioned, and that the parties to the suit had had numerous dealings of

the same kind, in which neither party had questioned the validity of their verbal agreements. The court held, however, that these facts established no waiver, except as to consummated dealings.

See, also, chapter 6, which deals particularly with trade customs.

SECTION 49. CONTRACTS TO SELL AND CONTRACTS TO MANUFACTURE DISTINGUISHED

One of the leading authorities on the validity of flour sales agreements not evidenced in writing is the decision of the Arkansas supreme court in the case of Cape County Milling Co. vs. Morris & High, 208 S.W. 792. Plaintiff's claim for damages for refusal to receive a quantity of flour was dismissed. The contract, having been made in Arkansas, was governed by the following provisions of the statute of frauds of that state:

"No contract for the sale of goods, wares and merchandise, for the price of $30 or upward, shall be binding on the parties unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof."

The mill, in suing, admitted that the contract in question was merely verbal in character, but averred that the company, on the faith of the agreement, bought the necessary wheat and expended the necessary labor in manufacturing the flour ordered, and that, by reason of a decline in market values, the 250 bbls were worth $1.25 less than defendants agreed to pay when the contract was broken by defendants' refusal to accept delivery. Suit was brought for reimbursement against this loss.

The issue presented to the courts by the suit was whether the contract was, as successfully claimed by defendants, one for a sale of goods within the terms of the statute above quoted, or whether, as claimed by the mill's attorney, the agreement was one for the performance of labor to be performed by the mill in manufacturing flour from wheat, and not within the purview of the statute.

Affirming a judgment of the Lonoke County circuit court, dismissing the suit, the supreme court said: "The complaint alleged a verbal order by the defendants from plaintiff of 'one car of Gold Leaf and None Better flour, . . . to be delivered on the option of the defendants to Oct. 1, 1917, and that the contract price was $12.75 per bbl.'

"These allegations show that the contract was only for the sale of merchandise and within the statute supra. The further allegations 'that, in reliance upon said order, appellant bought the wheat necessary to grind same, and expended the necessary work and labor to produce and manufacture said 250 bbls of flour,' etc., do not show what the contract was, but only what the appellant did in reliance upon the contract.

"Allegations showing what appellant relied on and what it did in performance of the contract make quite a different proposition from allegations stating what constituted the contract itself.

"The appellant relies upon a line of decisions in New York and some other states in the Union which hold that a verbal contract 'for the sale of any commodity not in existence at the time, but which the vendor is to manufacture, or put into a condition to be delivered (such as flour from wheat, not yet ground, or nails to be made from iron in the vendor's hands), is not a contract (of sale) within the meaning of the statute.' . . .

"But the doctrine of the above cases does not apply here, for the reason that the facts alleged in the complaint constituting the contract do not show that the 250 bbls of flour ordered were to be manufactured by the appellant from wheat not yet ground or that appellant was to perform any other work and labor necessary to manufacture and put the flour in barrels in the condition in which it was ordered. The contract was an order, of date July 31, 1917, for 250 bbls of flour existing in solido, to be delivered at the option of the appellees to Oct. 1, 1917.

"The facts stated clearly show that the work and labor to be done or expenses to be incurred in the manufacture of the flour did not enter into the consideration for, and were not to be embraced within, the contract. Therein lies the distinction between a contract of sale of merchandise and a contract for work and labor to be performed or expenses to be incurred in bringing the subject matter of the contract into existence and putting same in condition for delivery. When the latter is the case, it is not a contract of sale within the meaning of the statute. But here, as we construe the allegations of the complaint (as already stated), it is a pure contract of sale, and not one for work and labor. The contract is therefore within the statute."

* *

A similar conclusion was reached by the California district court of appeal in the case of Golden Eagle Milling Co. vs.

Old Homestead Bakery, 211 Pac. 56. That court said:

"It cannot be fairly said that the plaintiff in the case at bar manufactured the flour specially for the defendant and that it was not an article suitable for its general trade. The fact that the plaintiff, owing to the uncertainty of the demand for this particular flour, took the precaution of procuring orders before milling it, makes no essential difference. It had bought a quantity of barley sufficient to make 3,000 bbls of flour, and its salesman was soliciting orders for the sale of this quantity, and sold to the defendant 1,000 bbls thereof. It was an article manufactured by the plaintiff according to its own formula and for the general market; and if in the present instance the armistice of Nov. 11, 1918, had not intervened the plaintiff could have readily disposed of the flour to other customers. We conclude that the trial court correctly held the contract in question to be a sale within the statute of frauds."

SECTION 50. PARTIAL DELIVERY

Under the statute of frauds a verbal contract is validated by the buyer's acceptance of the goods in whole or in part. It was attempted to apply this principle under the Pennsylvania statute in the case of Northwestern Consolidated Milling Co. vs. Rosenberg et al., 275 Fed. 878, decided by the United States district court, eastern district of Pennsylvania. It seems that plaintiff sued for damages for breach of an oral contract to buy goods. In sustaining one of the objections made by defendants to plaintiff's claim, the court said:

"It is set up as another ground of demurrer that the statement of claim fails to allege delivery either to the defendants or to a carrier within 60 days as required by the terms of the alleged contract. There are, however, averments in the statement of claim of requests by the defendants granted by the plaintiff for extension of time for payment of the draft, and the plaintiff contends that such extensions at the defendants' request constitute a waiver on their part, and, through having induced the plaintiff to allow the merchandise to remain in a warehouse for a considerable length of time at their request, the defendants are estopped from setting up the statute as a defense.

"The plaintiff further contends that such conduct on the part of the defendants constituted an acceptance of the merchandise. The statement of claim does not contain sufficient averments either of acceptance or receipt of the goods by the defendants to establish the plaintiff's contentions as matter of law."

* *

In the case of Peck vs. Abbott & Fernald Co., 111 N.E. 890, the Massachusetts supreme judicial court denied plaintiff's right to recover for breach of an agreement to buy grain for future delivery, it appearing that the agreement was not evidenced in writing nor supported by any payment or delivery. The court holds that plaintiff could not bind the defendant by setting the grain apart for the latter after defendant had announced its repudiation of the contract.

* *

The suit of Cavanaugh vs. D. W. Ranlet Co., 118 N.E. 650, passed on by the Massachusetts supreme judicial court, was one to recover damages for nondelivery of the fourth car of oats called for by defendant's contract to sell. Apparently, the validity of the agreement was attacked by defendant because not reduced to writing, but the court decided that, since the agreement for a sale of four cars was an entire transaction, any original invalidity of the contract because of insufficient memorandum of the sale in writing was cured by complete execution of the agreement by both parties as to three carloads.

* *

Where a single contract calls for delivery of two kinds of commodities,—e.g., flour and feed,—delivery of one validates the contract as to the other. This principle was involved in the case of New Richmond Roller Mills Co. vs. Arnquist, 174 N.W. 557, decided by the Wisconsin supreme court. The mill sued for damages for nondelivery of barley, and the defense was interposed that there was no written contract to sell. It appeared, however, that the contract also covered a quantity of wheat, which was delivered and accepted. This the supreme court holds validated the verbal contract. Reversing a judgment of nonsuit that had been entered by the trial judge, the court observed:

"The contention of respondent in support of the nonsuit is that, because the price of wheat and barley was fixed, the contract was severable, and that the delivery of the wheat did not take the agreement for the sale of the barley out of the statute of frauds. . . . The statute relied upon by respondent, section 2308, provides:

" 'Every contract for the sale of any goods, chattels or things in action for the

price of fifty dollars or more shall be void unless: (1) . . . (2) Unless the buyer shall accept and receive part of such goods or the evidences or some of them of such things in action.'

"The contract under consideration in this case was one transaction. It was a contract for the purchase of wheat and barley, and the fact that the price of each was fixed did not make separate contracts. It was one single transaction and one contract of purchase, hence the delivery of part of the property purchased took the case out of the statute."

* *

The Missouri statute was called in question before the Kansas City court of appeals in the case of Fox-Miller Grain Co. vs. Stephens, 217 S.W. 994, in which the plaintiff sued to recover damages for nonfulfillment of a contract to sell two cars of wheat. Defendant delivered one car, but failed to deliver the other. The point was disposed of by the court of appeals in the following language:

"But it is said that no cause of action was stated in the petition, in that it appears the contract, not being in writing, was nonenforceable under the statute of frauds. It is alleged in the petition that a part of the wheat, to-wit, one carload, was delivered by defendant. It is true that, in the absence of a written contract and of a part payment, the statute requires that there shall be a delivery by the seller and an acceptance and receipt by the buyer, and in view of that requirement by the statute it would have been proper pleading at the outset to have expressly alleged an acceptance and receipt of a part of the wheat. But as the record stands, considering the time of the attack on the petition, we think an acceptance and receipt may necessarily be inferred from what is alleged."

* *

The Missouri statute controlled the decision handed down by the Kansas City court of appeals in the case of Kemper vs. Adams, 208 S.W. 632, in which plaintiff was permitted to recover damages for breach of defendant's oral contract to deliver 3,000 bus of corn.

Two wagonloads of corn were delivered under the contract, but defendant contended that because plaintiff at first refused to receive these two loads on the ground that the corn was too sappy, or too green, and finally accepted it only on defendant agreeing to allow 75 lbs to the bushel instead of 70, the two loads must be held to have been accepted under a new agreement, and not under the original contract. But the court refused to adopt this view, deciding that the corn accepted must be referred to the original contract, which was thereby validated, although not in writing.

The opinion cites another Missouri case in which it was adjudged that an acceptance of wheat under an oral contract satisfied the statute in question, although some of the grain may have been unfit.

This angle of the statute of frauds was considered by the Nebraska supreme court in the case of Kenesaw Mill & Elevator Co. vs. Aufdenkamp, 183 N.W. 294. Plaintiff sued for damages for defendant's failure to complete delivery under a contract to sell 5,000 bus wheat. The defense unsuccessfully interposed was that the contract was unenforceable as to the undelivered grain, because it involved a price in excess of $50, and there had been no part delivery or part payment such as would make the agreement valid under the Nebraska statute of frauds.

Originally, defendant delivered 998 bus to plaintiff for storage, and later for sale to plaintiff at a specified price. Subsequently a verbal agreement was made for a sale of 5,000 bus, it being understood that the 998 bus previously delivered by defendant to plaintiff should be applied as part of the larger quantity to be delivered. The court holds that plaintiff's acceptance of the 998 bus previously stored with it as part delivery, on the verbal agreement to sell and deliver this quantity plus 4,002 bus more, was enough to satisfy the requirements of the statute of frauds.

* *

But in the case of Golden Eagle Milling Co. vs. Old Homestead Bakery, 211 Pac. 56, decided by the California district court of appeal, it appeared that in shipping a larger quantity of flour to defendant bakery, under a previous and independent contract, at $11.30 bbl, the mill included 20 bbls intended as a partial delivery under the particular contract, at $11.75. On defendant receiving the invoice, it refused to pay the higher price for the 20 bbls, denying that it had contracted to buy the 1,000 bbls in controversy. The mill then agreed to reduce the price on the 20 bbls to $11.30, and the bakery retained this flour. On this branch of the case, the court of appeal said:

"The trial court took the view that the defendant's refusal to pay for these 20 bbls at the price named in the order was in effect a repudiation of the order, and that its consent to retain them and pay for them at a reduced price could not be

construed as an acceptance under the terms of the original order. As an inference to this effect might well be drawn from the testimony, it follows that the lack of writing signed by the party to be charged was not cured by its retention of the 20 bbls."

SECTION 51. DELIVERY TO CARRIER

The general rule that delivery by a shipping seller of goods to a railway company for transportation to the buyer does not constitute such delivery to the buyer as saves a verbal contract of sale or purchase under the statute of frauds was given specific application to the flour trade in the case of Denmead vs. Glass et al., 30 Ga. 637.

Plaintiff sued for the price of flour bargained to be sold to defendants. He relied on a verbal contract by defendants to buy under circumstances from which it might be inferred that the sale was intended to be for delivery f.o.b. the shipping point. Affirming a judgment of nonsuit, the Georgia supreme court said:

"To make a sale of goods, wares and merchandise, for the price of ten pounds sterling or upwards, good, under the seventeenth section of the statute of frauds, the buyer must accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain must be made and signed by the parties to be charged by such a contract, or the agents thereto lawfully authorized.

"There has been no compliance with the statute in this case. The railroad by which the flour was shipped was not the agent of the purchaser [for the purpose of accepting delivery], and if the goods were not received and accepted by Glass, Laws & Co., no right of action accrued to the plaintiff."

* *

The Washington statute of frauds entered into the case of Peacock Mill Co. vs. Honeycutt, 55 Wash. 18, in connection with an interesting tax question. The mill sued to restrain collection of taxes levied on wheat as belonging to it March 1, 1907. It was decided that, in equity, the mill was not liable for the tax, because "the evidence shows that, in the latter part of February, 1907, the appellant offered the respondent Reser a definite price per bushel for 13,500 sacks of wheat delivered f.o.b. cars at Walla Walla, then in store in the warehouse in that city; that about Feb. 29, 1907, the offer was accepted; that at that time there was no payment made upon the purchase price, and the entire contract rested in parol [unwritten]; that the first delivery was made on March 7, and the delivery was completed some time in April following.

"The evidence further shows that the words 'delivered f.o.b. cars' at Walla Walla mean in that community that the grain is to be delivered by the vendor on board of cars before any title passes. . . . Indeed, it would seem that the term itself could have no other meaning. The contract when made was within the statute of frauds and not enforceable. . . . The title remained in the vendor until there was a delivery."

* *

In the case of Spedding vs. Griggs, Fuller & Co., 162 N.W. 956, the Michigan supreme court holds that delivery of the goods contracted for to a railway company to be transported to the buyer cannot be regarded as such receipt of them by the latter as to validate the verbal contract, especially where the shipment is made under an order bill of lading. The carrier cannot be regarded as having authority to bind the buyer by his acceptance of the goods, within the provisions of the law in question, unless specially authorized.

This holding shows one of the exceptions engrafted upon the general rule of law that delivery to a carrier is delivery to the buyer, where the seller has not contracted to make delivery at the destination.

In this case, it appears that defendant's representative orally agreed to buy certain goods, but that defendant refused to receive them, and the court finds that plaintiff was not entitled to recover damages as for breach of the contract to buy.

See, also, section 50.

SECTION 52. DELIVERY TO PARTNERSHIP

In Big Horn Milling Co. vs. Sneider & Wallace, 200 Pac. 1011, there was a denial of existence of a partnership relation between defendants in the purchase of mill products from plaintiff, and on an unsuccessful appeal taken from judgment in plaintiff mill's favor, counsel for defendants sought to invoke the Wyoming statute of frauds. Speaking of this contention, the Wyoming supreme court said:

"They do not contest the rule that a delivery or partial delivery and receipt and acceptance of the goods takes the case out of the statute. . . . No contention is made, and it could not well be, that the goods were not actually delivered to, and received and accepted by, Wallace in some capacity. They contend, however, that there is no evidence

in the case that he received the goods in his capacity as partner, or in his individual capacity, but that it is shown that he received and accepted them in his capacity as manager of the Stone Front Grain Co. In other words, they seem to contend, if we understand them correctly, and their objection must mean, that, in order to satisfy the statute of frauds, it is necessary to show by evidence entirely distinct from any previous contract, authority, or order that the delivery in this case was made to the defendants in their capacity as co-partners.

"They cite no authority on this point. An implied contract to pay may, of course, arise from delivery, receipt, acceptance, and retention of goods, and counsel evidently are under the impression that, in the absence of a memorandum in writing, such an implied contract is the only one that can be relied on in a case like this. In any event that is the effect of their contention. If such were the law, failure of justice would result in a large number of cases. In such event, responsibility could never be fastened, for instance, upon a person ordering goods to be delivered to a third party.

"The contention, however, is not warranted. The statute refers to and contemplates the existence of prior oral contracts, but, in order to prevent perjury, provides that they shall not be enforceable, except only under the conditions mentioned, namely, delivery of the goods to the buyer and receipt and acceptance thereof. It imposes upon the party suing thereon the necessity of not alone proving the oral contract, but also that it has been ratified or performed by receipt and acceptance of the goods, and puts, accordingly, a substantial obstacle in the way of false swearing. . . .

"The test, in a case like that at bar, is as to whether there has been shown an oral contract, and a delivery, acceptance, and receipt pursuant thereto. If these facts appear, then the requisites of the statute are fulfilled. . . . If there is a contract for delivery of goods, and a subsequent delivery thereof is made, and the goods are received and accepted by the purchaser, then the conclusion may be warranted that delivery was made pursuant to the contract. So, if a contract is made with a partnership, and a delivery is made to one partner, accompanied or followed by receipt and acceptance of the goods, then, too, the same conclusion may be warranted, because delivery to and acceptance by one partner is a delivery to and acceptance by the partnership. . . .

"In the case at bar, defendants seek to deprive plaintiff of the very means of proof which the statute of frauds contemplates and provides as at least part of the means by which a sale may be taken from out its operation. That cannot be done. All the facts and circumstances tending to identify and fasten responsibility upon the real purchaser, his relationship to the party to whom the goods are delivered, and the capacity, individual or otherwise, in which the defendant made the contract are admissible in evidence."

SECTION 53. PARTIAL PAYMENT

One of the most interesting decisions on the question as to when there is such part performance of a verbal contract, or earnest payment, as will save the agreement under the statute of frauds was handed down by the Indiana supreme court in the case of Hudnut vs. Weir, 100 Ind. 501. The specific point decided was that a verbal contract for purchase of corn was not saved under the statute of frauds, so as to be enforceable against the purchaser, by reason of the fact that he delivered to the seller sacks to the value of $100, or more, for use in delivering the corn.

Plaintiff seller, in suing for breach of the contract, averred that after defendant furnished the sacks plaintiff shelled the corn, put it in the sacks, and delivered it in good order at the place stipulated, but that defendant refused to accept delivery. Deciding the controversy in defendant's favor, and holding that the complaint stated no cause of action, the supreme court remarked:

"No note or memorandum in writing having been made, as required, and no part of the corn having been delivered and received under the contract, it is conceded that the contract was void, unless the fact of the delivery by the purchaser to the seller of the sacks in which to deliver the corn took it out of the statute.

"Where no written memorandum is signed by the party to be charged, and no part of the property sold is delivered, then, in order that the contract may not fall within the statute, it is necessary that the party alleging it shall furnish unequivocal proof that something of value was delivered to the seller, either 'in earnest, to bind the bargain, or in part payment' of the price to be paid for the property which was the subject of the alleged contract.

"The giving of something of value as 'earnest,' or the part payment of the price, are considered as facts, independent of the contract, which are susceptible of parol proof, and when the proof of either is added to the parol proof of the contract, it is regarded as a sufficient safeguard, so as to admit of the dispensing with the other requirements of the statute. . . .

"The contract as it is averred in the complaint in this case is that the 'defendant agreed to pay the sum of fifty cents per bushel for said lot of corn,' and as a 'part of the consideration for said sale, the defendant agreed to furnish the sacks in which to put said corn.' It is then averred that 'in pursuance and in part performance of said contract,' the defendant delivered the sacks.

"The substance of the transaction as the complaint exhibits it is that the appellant purchased the appellee's corn at a stipulated price, and agreed to furnish his own sacks to the seller in which to deliver it. In pursuance of this agreement he delivered the 1,500 sacks which were to be returned to him with the corn. We think it cannot be said that this was a part payment of the price of the corn.

"At section 194 of 1 Benjamin on Sales, it is said: 'There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller "on account" or in part satisfaction of the price will be equivalent to part payment.'

"The sacks continued the property of the appellant after, the same as before, they were delivered to the seller. The appellee took no property in them, nor other right, except to fill them with corn and return them."

SECTION 54. TERMS MUST BE DEFINITELY STATED

The practical importance of a definite statement of the essential terms of an agreement in contractual correspondence is illustrated by a decision announced by the appellate term of the New York supreme court in the case of Lipschitz vs. W. R. Grace & Co., 171 N.Y. Supp. 330. Plaintiffs sued for damages for nondelivery of rice under a contract evidenced in writing as follows:

"New York, Dec. 7, 1916. Sold for account of Messrs. W. R. Grace & Co., of San Francisco, Cal., to Messrs. S. Lipschitz & Co. of N. Y., 1,200 pkts of Siam usual at 2.90 per pocket of 100 lbs gross and 97 lbs net, f.o.b. Seattle, in double pockets. Terms as had. Shipment December from Hongkong.—I. Silverberg Comm. Co., Brokers."

Plaintiffs lost their case because the court found that indefiniteness of the clause, "Terms as had," rendered the contract an insufficient statement of essential terms in writing as required by the New York statute of frauds. The appellate court said:

"For the purpose of this appeal we may assume that the I. Silverberg Commission Co. were brokers authorized by the plaintiffs [defendants?] to sell Siam rice in their behalf, and with the usual authority of brokers to sign memoranda of sales made by them. Such memoranda must, however, contain all the essential terms and conditions of the agreement, and the parties cannot supply such terms by parol [oral] evidence.

"In the present case it is to be noted that the contract contains the names of the parties, a description of the goods sold, the price, and the place and time for delivery, but contains no other terms, except the words 'Terms as had.' If these last words had been omitted from the memorandum, it might well be claimed that the memorandum was complete in itself and contained all the essential terms of a contract, for the law would imply that payment was to be made at the time of delivery.

"By the insertion, however, of the words 'Terms as had,' the memorandum itself shows that there were other terms agreed upon by the parties, and resort must be had to evidence dehors the instrument to determine what these terms were. . . . It is impossible to determine from a reading of the memorandum itself what the words 'as had' are intended to signify, except that presumably they mean that the present contract was made upon the same terms as had governed some previous transaction or transactions of the parties.

"These words may refer to terms of payment, or to all the terms of some previous contract or contracts between the parties, and the parties may have intended that such terms, whether in regard to time and manner of payment or other matters, were to be determined as arranged in a written contract upon the last previous sale of Siam rice by these defendants to these plaintiffs, or were to be determined by general course of dealings between them in the past. . . .

"The memorandum itself, therefore, does not contain all the essential terms of the agreement; but oral testimony would be necessary in order to permit the court to find out what the actual contract between the parties was, and under these circumstances the memorandum is not sufficient to satisfy the statute of frauds."

* *

It was decided by the Mississippi supreme court in the case of Rector Provision Co. vs. Sauer, 69 Miss. 235, that the requirement of the statute of frauds of a memorandum, signed by the party to be charged, is not satisfied by telegrams containing an order for the purchase of goods, and a reply, unless the telegrams, taken together, and without the aid of testimony by word of mouth, show the substantial terms of the bargain, including the price.

In this case plaintiff sued for damages for claimed breach of a contract to sell 500 bbls of flour. Defendants, a firm of wholesale flour dealers, denied that there was a valid contract entered into, and the court upheld this contention. The facts of the case were that plaintiff's representative, one Rector, made an offer to defendants' broker at Vicksburg, one Gray, to purchase 500 bbls of a certain brand of flour, at $4.30 bbl. Nothing was said as to the time of payment, but there was a showing of a trade custom allowing 30 days' credit. Gray communicated the offer to defendants, and shortly afterwards went to Rector with a telegram in his hand, saying, "Here is a telegram from my house confirming the sale."

This telegram was not put in evidence at the trial, but a communication from defendants to Gray, asking for shipping instructions for the "Rector lot" of flour, was introduced. Plaintiff gave defendants shipping instructions, requesting draft on them for the price at 30 days. No reply being received, plaintiff again demanded shipment. To this letter defendants replied that the order as communicated by Gray contemplated cash payment. Plaintiff then authorized draft at sight, flour values having in the meantime advanced. Defendants refused to ship, and the suit for damages followed. Holding that the trial judge correctly ruled that there could be no recovery, because there was no valid contract under the statute of frauds, the supreme court said:

"As the telegram sent by Gray to the appellees [sellers] was not put in evidence, the admission or declaration made by Gray to Rector that he had a telegram from his house 'confirming the sale,' was insufficient to satisfy the statute of frauds, because it does not show the terms of the sale, which is necessary. It fails to show what sale was confirmed. . . .

"If the telegram sent by Gray to the appellees, and which counsel for the appellees treat as being in evidence, was before the court in connection with all the correspondence between the parties, it would appear that the 'note or memorandum in writing of the bargain,' made and signed by the party to be charged, was insufficient; for, if it be assumed that the declaration of Gray to Rector is evidence of a memorandum in writing, made and signed by his principals, it would be held that they accepted the offer conveyed by Gray's telegram, and that is insufficient to charge them, because the two telegrams together failed to 'show the substantial terms of the bargain, so that it may be seen and understood from the writing, and without the aid of parol testimony.' . . .

"There is no mention in the telegram sent by Gray of the price of the article, which is the essential part of the contract, and that which gave rise to this controversy. . . . So, in any view of this case, the action of the circuit court in instructing [directing a verdict] for the defendants was correct.

"The presumption invoked by counsel for the plaintiff, to the effect that the declaration by Gray that he had a telegram confirming the sale, should be accepted as evidence of a sufficient memorandum (one containing all that is necessary) to charge the parties, cannot be indulged. It cannot be held to prove anything more than that some sale was confirmed, and it devolved upon the plaintiff to show what sale was confirmed, and it was not sufficient to prove it by parol evidence.

"The plaintiff had the telegram sent by Gray, and interrogated witnesses about its terms. If that had been put in evidence, it would have appeared that the writings signed by the parties sought to be charged were insufficient, and it is not allowable to obtain by intendment the result which should be reached by direct evidence, and which it plainly appears could not be thus reached in this case."

* *

The importance of definitely reducing sale contracts to writing through correspondence or a formal agreement is illustrated by a decision announced by

the Indiana appellate court in the case of Henderson Elevator Co. vs. Graham, 111 N.E. 332.

Feb. 1, defendant wrote plaintiff asking an offer on 15,000 bus of white corn loaded at place of shipment. Oral negotiations followed. March 22, plaintiff wrote: "Referring to conversation had today with you over the phone, we are pleased to confirm the purchase from you of 10,000 bus white corn," on certain terms. March 25, defendant wrote a request that the elevator company send a representative to load the corn.

These facts are held by the court to be insufficient to show a valid contract under the statute of frauds on defendant's part to sell, although it was undoubtedly sufficient to bind the plaintiff to buy, for there was no written promise on defendant's part to sell, and he had not made delivery of any part of the corn and had received nothing on the price. The appellate court said:

"The memorandum relied upon to take the transaction out of the statute of frauds may consist of letters or other writings signed by the party to be bound, and may be aided by other writings constituting a part of the contract, but the memoranda so relied on, whether consisting of a single writing or different writings thus made one, reference from one to the other, must contain all the essential elements of the alleged contract, and in a suit to recover on such contract, recourse to verbal evidence is not allowed to supply any essential element of the contract. . . .

"Where it is sought to enforce a contract alleged to be evidenced by a memorandum sufficient to take it out of the operation of the statute of frauds, or to hold a party liable in damages for a breach of the alleged contract, and the party against whom liability is sought to be enforced has not signed any memorandum containing the essential elements of the contract, but has signed another instrument or writing in which it is claimed such reference is made to the former as to amount to an adoption and acceptance of the terms thereof to be sufficient under the statute, the signed memorandum or instrument must contain a clear and definite reference to such other instrument or writing, and so identify it as to make its provisions a part of the signed memorandum or instrument relied on."

* *

Wright vs. Seattle Grocery Co., 177 Pac. 818, decided by the Washington supreme court, involved the local statute of frauds. It was contended by defendant that there was no compliance with this statute; that the agreement in question was partly oral and partly in writing. But the supreme court said that defendant's counsel had misconceived the effect of the statute; that "the requirement is not that contracts of this sort must be in writing, but is that some note or memorandum . . . be made by the party to be charged. If, therefore, the note or memorandum shows the bargain, it is sufficient, even though all of the details of the agreement be not stated therein."

* *

As to the necessity for stating time for delivery, see Jones-Scott Co. vs. Ellensburg Milling Co., 183 Pac. 113, cited in section 56.

SECTION 55. MUTUALITY OF OBLIGATION UNNECESSARY

It is not required that both parties sign before one can enforce it against the other, but it cannot be enforced against one who has not signed. So it is possible that a mill, through having signed an acceptance of an order, may be bound to deliver, although the buyer could escape obligation to accept delivery, because he never signed any agreement to buy.

* *

The distinction between invalidity of a contract on the ground of lack of mutuality in agreement and unenforceability against one of the parties, because he has failed to sign a written obligation, is pointed out by the Minnesota supreme court in the case of Bowers vs. Whitney, 88 Minn. 168.

Plaintiffs sued for damages for nondelivery of rye, relying on a memorandum, signed by defendant, "I hereby agree to deliver at Cable eight hundred bushels of No. 2 rye to Bowers Bros., on or before September 25, 1901. Price to be 36 cents per bushel." To prove a mutual agreement, plaintiffs offered proof of a verbal understanding that plaintiffs would buy on the terms stated in the memorandum. This was objected to on the ground that an oral agreement could not be engrafted in this way on a written memorandum, but the supreme court said:

"It is the contention of the defendant that the memorandum was the contract of sale itself, and, being in writing, could not be modified by parol evidence, and that it was without consideration and void for want of mutuality. It is true that oral evidence is not admissible to

supply any omissions in the written memorandum which are essential to charge the party signing it. . . .

"An oral contract for the sale of chattels exceeding in value $50 is void, unless 'a note or memorandum of such contract is made in writing and subscribed by the party to be charged therewith.' . . . The statute indicates a difference between a contract in writing and a note or memorandum in writing of an oral contract. It concerns oral contracts only, and applies to their enforcement when the party to be charged has subscribed a memorandum thereof. It is only necessary for the party to be charged to sign the memorandum. . . .

"The statute does not provide that the contract for the sale of goods exceeding in value $50 shall be void unless it is in writing. The sole condition is that there must be a written note or memorandum thereof, subscribed by the party to be charged. Hence the writing in this case was not the contract between the parties. Their contract was the oral one which the plaintiff sought to prove, and the writing the memorandum thereof signed by the party (the defendant) to be charged. The contract of the parties was not unilateral and without consideration, for the plaintiffs agreed to receive the rye and pay therefor the stipulated purchase price.

"At most, the remedies of the parties for the enforcement of the contract were not mutual, because the plaintiffs took the precaution to secure the signature of the defendant to a written memorandum of the contract, while the defendant did not take one from the plaintiffs. This, however, did not make the contract itself void for want of mutuality. . . ."

* *

A decision with a bearing on everyday transactions in the grain and milling trades was handed down by the Springfield (Mo.) court of appeals in the case of Riddle et al vs. Castner, 209 S.W. 127. It related to the binding character of a memorandum of sale or purchase signed by but one of the parties and to the effect of provision for optional delivery.

Defendant signed a memorandum reciting the sale of 750 bus corn to plaintiffs at a specified price f.o.b. destination, "to be delivered at option of the buyers, from this date to March 1, 1917." Some time afterwards one of the plaintiffs wrote an antedated acceptance of the terms on the back of their copy of the memorandum, without defendant's knowledge or consent.

When sued for damages for nondelivery of the corn, defendant relied on defenses that the contract was unenforceable because one-sided, in that when the negotiations were had plaintiffs never bound themselves to accept delivery; and that the memorandum signed by defendant was nullified by the subsequent indorsement made on it by one of the plaintiffs, above referred to, within the rule of law that a material alteration of the written terms of a contract without the consent of both parties to it nullifies it. Upholding verdict in plaintiffs' favor, the court of appeals lays down these rules of law generally recognized by the courts:

A contract is not rendered invalid as being one-sided because signed by one party only, so far as affects his liability on the agreement, although by reason of the other party's failure to sign the agreement, it being within the classes of contracts required by statute to be evidenced in writing, the agreement might not have been enforceable against such other party.

An agreement for delivery by a seller between certain dates, at the option of the buyer, does not make it optional with the latter to refuse to accept delivery at all; the option is to specify a time for delivery within the specified period.

Where one of the parties to a contract of sale has originally failed to sign the memorandum covering the transaction, the fact that he subsequently does so, though without the other party's knowledge or consent, does not amount to a wrongful alteration of the writing. The only effect of this belated signing is to validate the agreement as against him; thereby benefiting rather than prejudicing the other party.

The statute of frauds does not require that the signature be affixed at the time of the making of the agreement.

* *

The Washington statute of frauds was involved in the case of Wright vs. Seattle Grocery Co., 177 Pac. 818, a suit to recover damages for nondelivery of a car of flour. The Washington supreme court said:

"This memorandum was not signed by the plaintiff, and under the statute . . . the contract was unenforceable against the plaintiff. The defendant seizes upon this fact as a basis for arguing the lack of mutuality in the contract, and contends that, if it is unenforceable by the defendant, it must likewise be unenforceable by the plaintiff. While there is a conflict in the decisions of the courts upon this point, it is settled by the great

weight of authority that a written memorandum of a sale of goods is sufficient as against the defendant in a suit, though it be signed by him alone. This seems to be rested on the theory that the statute is in the nature of a rule of evidence, necessitating written in place of parol [verbal] proof.

"Under other provisions of the statute, the contract would be enforceable, in the absence of any writing, if it had been partially performed by either party or anything done to bind the bargain. The term in the statute, 'the party to be charged,' is construed by the courts as being used with reference to the contracting party whom it is sought to hold liable in the courts, and as authorizing action by a purchaser who did not sign against a seller who did sign the memorandum."

SECTION 56. CONTRACTS SHOWN BY CORRESPONDENCE

It is now well-settled law that binding contracts for the sale of goods may be formed through letters or telegrams, as decided by the Tennessee court of chancery appeals in the case of College Mill Co. vs. Fidler, 58 S. W. 382.

* *

In the Washington case of Jones-Scott Co. vs. Ellensburg Milling Co., 183 Pac. 113, a letter from defendant to plaintiff, stating, "If you will give me time I will take the wheat bought from you in August. You can ship one car about Nov. 1 and draw sight draft. Will take balance as fast as I can," was held sufficient recognition of a contract according to terms set forth in plaintiff's letter dated two months before, confirming sale of wheat to defendant. The Washington supreme court said in this case:

"It is argued by respondent [defendant buyer] that the writings set forth above, relied upon by the appellant, do not constitute an enforceable agreement under the statute of frauds, for the reason that no memorandum was signed by the respondent, containing the terms of the alleged contract, nor were the terms contained in the writings signed by the appellant ever accepted or agreed to in writing by the respondent. There can be no doubt of the rule that a written contract may be gathered from letters passing between the parties. . . .

"As was said [by the United States Supreme Court] in Ryan vs. United States: 'The principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.'"

Concluding that the letters in this case sufficiently evidenced a written contract for the purchase of the wheat by defendant, the Washington supreme court adds: "It is true the contract set out in these letters does not state the time at which the wheat should be delivered, but where no time is stated in the contract, delivery may be made within a reasonable time."

* *

Orders for flour verbally given were sufficiently confirmed by the buyer through letters to constitute a binding contract, decided the Oklahoma supreme court in the case of Rock vs. Galoob et al. (211 Pac. 73). The supreme court observed:

"It appears that the orders placed by the defendants for the cars of flour and feed were orally made with the Thomas Milling Co., but the same were confirmed by letters, and this having been done, removed the contract from the operation of the statute of frauds, if it be concluded the contract was within the statute when the orders were placed with the milling company. The Thomas Milling Co. wrote defendants advising them in detailed statement of what it understood the order to be, and requesting them to notify the company if the orders were not as stated in the letters. The only reply made to these by the defendants was an acknowledgment that they had ordered the cars of flour. In the first letter of the defendants, they requested that the flour be not shipped until the milling company was notified by them. It is clear that these letters operated to constitute sufficient memorandum to take the contract out of the statute of frauds."

On the other hand, it was decided by the Pennsylvania superior court in the case of Northwestern Consolidated Milling Co. vs.Allebach, 82 Pa. Super. Ct. 563, that a verbal order was not sufficiently recognized. There defendant gave a verbal order to plaintiff mill's agent for some flour and middlings on certain terms as to price and delivery. A written order form was sent to defendant for his signature. It changed the shipment from "rush" to "prompt," and contained 11 clauses setting forth terms and conditions not shown to have been the subject of oral agreement. One of the clauses sanctioned delivery within 60 days. Defendant did not sign the order. On the con-

trary, he wrote across the face of it, "Please cancel and oblige A. T. A." (his initials).

"In our opinion," said the superior court, "this was not an unequivocal or unambiguous recognition that an oral contract had been entered into on the terms set forth in the written order; it was only a cancellation of the verbal order, not a recognition that it conformed as to terms and conditions with the written form presented for his signature."

* *

In the case of Westbrook Brothers vs. Kingfisher Mill & Elevator Co., 192 Pac. 209, in which the Oklahoma supreme court affirmed judgment in favor of plaintiffs for nondelivery of the full quantity of flour defendant had bound itself to deliver, question was raised as to whether there was sufficient memorandum to charge defendant with obligation to deliver. It seems that the mill's only confirmation of the sale was evidenced by a telegram to its broker, who had secured plaintiffs' order. The supreme court, holding this to be sufficient, said:

"There is no merit in the contention that the contract is void under the statute of frauds. Section 941, Rev. Laws 1910, provides in substance that a contract for the sale of personal property exceeding $50 in value cannot be enforced, unless it is in writing and signed by the parties to be charged. The words 'the party to be charged' have been generally defined to mean the party against whom the contract is to be enforced. The defendant, being the vendor, is the party to be charged, and its contract was in writing and is enforceable. A contract is not prohibited by the statute of frauds where evidenced by telegram, and it is sufficient if addressed to the writer's agent."

* *

One of the leading decisions in the flour and grain trade cases under the statute of frauds is that of the Colorado court of appeals in Crystal Palace Flouring Mills Co. vs. Butterfield, 61 Pac. 479. Plaintiff sued for nondelivery of grain, and defendant relied, in part, on the statute of frauds. The court of appeal holds that this defense was not good; that a valid contract in writing was evidenced by the parties' mutual correspondence. The opinion says:

"The statute requires that every contract for the sale of chattels, for the price of $50 or more, if no part of the goods is accepted and received by the buyer, and no part of the purchase money is paid by him, shall be evidenced by a note or memorandum in writing subscribed by the parties to be charged, . . . but it is not necessary that the terms of the agreement shall all be contained on one piece of paper. The memorandum may consist of several writings, and so the contract which the parties have made may be gathered from letters which have passed in correspondence between them. . . .

"Referring to the correspondence before us, we find that the defendant proposed to sell wheat to the plaintiff at 76½c per bu, delivered at Weatherford, Texas; that the offer was accepted; and that the plaintiff ordered, and the defendant agreed to ship, 3,000 bus on those terms, during the week of Oct. 20, 1896. Here was a complete contract. It was definite as to the number of bushels sold, the price to be paid, and the time of delivery. It is difficult to see how there could have been a more complete compliance with the demands of the statute."

* *

In the case of Serhant vs. Gooch Milling & Elevator Co., 148 N.W. 911, passed upon by the Nebraska supreme court, defendant was held to have become bound by the memorandum there involved. The mill's salesman, J. J. Langer, took an order on a printed form, showing the essential terms of a sale. Although the form contained a statement requiring the buyer's signature, it was signed only by the salesman. It also recited that it was subject to confirmation by mail.

This order was acknowledged by the mill's secretary, who wrote a summary of the terms of the order and added: "We thank you for this order, and it shall have our careful attention. We await shipping instructions from you for our next car, and hope you will be able to give them to us soon." Deciding the case adversely to the mill, and holding that there was sufficient written evidence of the contract, signed on the part of the mill, to bind it, the supreme court says:

"We think it is clear that, if there were no statute of frauds, the contract would be enforceable. The petition very clearly and explicitly alleges that the contract was a contract of sale by defendant to plaintiff of 400 bbls of flour at $4.70 per bbl; that plaintiff purchased the flour for the purpose of filling its contracts with its customers, which fact was well known to the defendant; that, by reason of the great advance in the price of flour during the month of de-

livery, defendant refused to deliver, as agreed, and alleges the price which plaintiff was compelled to pay in the open market in order to fill its contracts. This stated a valid and enforceable contract, if the requirements of the statute of frauds were met. . . .

"We think the memorandum constitutes a sufficient compliance with the statute. There are authorities holding that, in order to constitute a compliance with such a statute, the memorandum must be signed by both parties; but the clear weight of authority is against the holding. . . . When Langer sent the written order to his principal, the defendant, without the signature thereto of the purchaser, and defendant wrote plaintiff the letter of Jan. 20, 1909, above set out, it waived the printed requirement in the memorandum that 'all orders must be signed by the purchaser.'"

One of the judges of the Nebraska supreme court dissented from the conclusions reached by the majority of his associates, taking the view that the mill's letter was not intended to recognize the existence of a subsisting contract until the buyers should give shipping instructions (150 N.W. 1023). It is to be inferred that the majority of the members of the court regarded it as an erroneous view that the mill intended the shipping instructions to operate as a sort of confirmation of the contract of purchase. This view seems to be sound, for it is reasonable to suppose that the mill would have expressly called for confirmation if that is what it desired before obligating itself to ship.

* *

In the case of Allen vs. Burnett, 92 S.C. 95, plaintiff sued for damages for breach of a contract to buy flour; defendant having refused to accept delivery on a declining market. One defense relied on was that there was no sufficient written contract on defendant's part to buy, but this contention was overruled by the supreme court of the state. There was a memorandum signed on the seller's part. The opinion of that tribunal, in part, is:

"The record shows that when attorneys for plaintiff offered in evidence the memorandum referred to and testified to as made by R. E. Allen, Jr., defendant's attorneys simply objected to the introduction of the memorandum and stated no grounds of objection. In addition to this, the defendant in his evidence admits purchasing the flour, and the letters of defendant to plaintiff, three in number, admitted by the evidence of defendant, established the fact that the defendant purchased the flour. Defendant while testifying admitted that he had purchased the flour, and his reason for not taking it was that he was overstocked.

"In the case of Louisville Co. vs. Lorick E. Lowrance, 29 S.C. 533, 8 S.E. 8, it was decided that there was a memorandum made by the salesman and afterwards there was a letter written by the defendant countermanding the same, and that the two papers together constituted a sufficient writing to take the case out of the statute of frauds.

"Here we have the memorandum made out to the Spartan Grain & Flour Co. instead of the Spartan Grain & Mill Co., but we have the admission of the defendant in his testimony that he was the Spartan Grain & Mill Co., and that he purchased the flour. We have in evidence letters from the defendant company referring to and admitting the contract to purchase the flour. Also, letters from the plaintiff to defendant calling on defendant to order the flour out and inclosing a bill for the flour. This is sufficient compliance to take it out of the statute of frauds."

* *

In the case of Elmore vs. Busseno, 161 N.Y. Supp. 533, the appellate division of the New York supreme court refused to hold defendant liable on an asserted agreement that he would buy four carloads of oats, because the sale involved more than $50 and there was no partial delivery or payment and no evidence of the agreement in writing, within the meaning of the New York statute which makes such oral contracts unenforceable.

It was sought to hold defendant on the theory that a letter written by him to plaintiff canceling "a future order standing in your house" constituted a sufficient memorandum when connected with a letter previously written by plaintiff confirming the sale, but the court finds that there was no legal proof of defendant's receipt of the letter of confirmation.

It is decided that proof of the mailing of a properly addressed and stamped letter raises a presumption of receipt by the addressee, but that, in this case, the mere fact that a letter confirming the sale was written, signed by plaintiff's manager, and handed to an office boy whose duties required him to put the letter in a proper envelope, and seal, stamp and mail it, was not legal evidence that the letter was in fact mailed.

* *

In Peirson-Lathrop Grain Co. vs. Barker, 223 S.W. 941, it was decided that

an exchange of letters may constitute a binding written contract of sale, by implied reference to each other.

Plaintiff sued for damages for nondelivery of a car of corn and a car of oats under separate contracts. The contracts were evidenced by letters written by plaintiff, confirming the purchases pursuant to telephone conversations, and a letter written afterwards by defendant referring to the procuring of cars in which to ship "the corn I sold you," and "the oats I sold you."

It was first claimed by defendant, in defense of the suit, that there was no binding contract for the sales, because there was no written agreement. It contended that defendant's letter did not constitute a binding link forming a contract, because it did not state the terms of any agreement and did not refer to those stated in plaintiff's confirmatory letters. Plaintiff did not claim that defendant's letter of itself was sufficient, but contended that it impliedly referred to plaintiff's confirmatory letters, thereby embodying the terms of the latter, and the court upholds this contention.

However, the court holds that there was no such sufficient proof as to mailing of the confirmatory letters by the purchaser as to establish a presumption of their receipt by defendant. On this point, which should interest the manager of every large business office, the court says:

"Mr. Sullivan, plaintiff's agent in charge of the matter of the purchase of the grain, testified that he wrote the letters, or rather that he instructed these letters to be prepared, and before they were mailed out they were given to him for his 'O.K.' They were then turned over to Mr. Peirson for plaintiff's signature. The witness instructed them to be mailed, but did not see them mailed. All this was done in accordance with the usual practice of the office. We think that this evidence is not sufficient to show such a mailing as raises a presumption of receipt by the addressee in due course of mail. . . . It has been held that testimony that a letter was 'mailed' was sufficient to raise the presumption. . . .

"In order to show a mailing it was necessary for plaintiff to produce the person who mailed the letters. . . . The law does not require impossibilities, and we can imagine, where a business firm is doing a large amount of correspondence, the person mailing the letters of the concern might not remember the mailing of a particular letter, and under such circumstances it ought not to be necessary to require any distinct recollection, but if a person actually doing the mailing should testify that it was his general and invariable practice to deposit in the mail all letters of the firm received by him, and this is connected up by a showing of an invariable custom of the writer or writers of letters to deliver them to such person for mailing, such testimony ought to be sufficient. . . .

"There is no evidence on the part of the person whose general and invariable practice it was to receive the letters from Sullivan, or to receive them from the place where Sullivan deposited them for mailing, that the letters were actually mailed, nor did Sullivan see them mailed."

* *

"A contract to sell or a sale of any goods . . . of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods . . . so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"The provisions of this section shall apply to every such contract of sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be required for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

This statute was given practical application to the flour and feed trade by the Minnesota supreme court in the case of Upton Mill & Elevator Co. vs. Baldwin Flour Mills, 179 N.W. 904. It was decided that a certain letter did not recognize a contract as subsisting.

Suing for damages, as for breach of a contract by defendant mill to sell plaintiff dealer five carloads of flour and feed, plaintiff was nonsuited, and the supreme court affirmed this decision in defendant's favor. The defense successfully inter-

posed by the mill was that it had never delivered any part of the goods called for by the contract, nor received payment of any part of the price, nor signed any contract of sale, or memorandum thereof.

To show a sufficient written contract, plaintiff relied on a letter to defendant, confirming purchase of the flour and feed on specified terms, and on defendant's reply. The reply acknowledged plaintiff's letter, but specifically refused to confirm, and denied the mill's salesman's right to make any such sale. Disposing of the case on appeal, the supreme court says:

"Plaintiff contends that the two letters constitute a sufficient memorandum of the sale contract to take it out of the operation of the statute. The first letter contains a statement of all the essential terms of a contract of sale and, if defendant had given the confirmation which plaintiff requested, there would be no doubt that the statute had been complied with. The contention advanced is that by its letter defendant admits the making of, but repudiates the contract.

"If that is the proper interpretation of the letter, there is authority to support the proposition that there has been a sufficient compliance with the statute. The doctrine may be thus stated: If the writer of a letter, after reciting the terms of the bargain, goes on and repudiates it or countermands an order he admits he gave and the terms of which are sufficiently stated or referred to, such letter may be a sufficient memorandum to satisfy the requirements of the statute.

"We are unable, however, to spell out of defendant's letter an admission that a contract of sale had actually been made. It refers to the transaction of Dec. 20 as an order for flour and feed and refuses plaintiff's request for a comfirmation of the alleged sale. As reasons for not accepting the order, it states that it cannot furnish the flour and feed ordered, and that Carlson had no authority to make a sale.

"Under the statute one cannot be charged as the seller of goods, although all the terms of the sale are set forth in a letter written by the buyer, unless his letter in reply contains an admission that a contract was actually made. We find no such admission in defendant's letter, which must be read in connection with the letter from plaintiff asking defendant to confirm what plaintiff evidently understood to be a sale agreed upon by Carlson, as defendant's representative.

"The request was a recognition by plaintiff that the agreement would be unenforceable unless confirmed in writing by defendant. Defendant's reply refers to a conversation over the telephone between plaintiff and Carlson as an order given by plaintiff, and uses the word 'sale' in connection with its refusal of the requested confirmation and its reasons for refusing.

"If the second paragraph in defendant's letter is disconnected from the first and read alone, it tends to support plaintiff's contention. But the letter must be read as a whole and, when so read, is not fairly open to the construction plaintiff seeks to place upon it. We think the language used falls short of an unequivocal admission by defendant that a sale had in fact been made, and hence he cannot be charged upon the alleged contract."

* *

The proposition of law, inferentially decided by the Minnesota court, that a letter admitting the making of a verbal contract makes the contract binding under the statute of frauds, although the admission be followed immediately by a repudiation of the agreement, is supported by the decision announced by the Kansas City court of appeals in the case of Rodney Milling Co. vs. Farmers' Elevator of Smithton, 237 S. W. 205. The question involved was whether defendant had sufficiently recognized in writing its contract to sell a carload of wheat, so as to make the agreement binding on it.

Nov. 25, 1919, defendant, by telephone conversation, agreed to sell plaintiff mill a carload of wheat, on stated terms. The same day the mill mailed defendant a written confirmation of the purchase. Defendant did not reply. Dec. 6, plaintiff by letter requested information as to when defendant could "ship car of wheat under contract." Dec. 20, defendant wrote:

"About the 18th of October we bought a car of bran from you, and a little later sold you a car of wheat. Some time ago we told you by telephone we didn't feel like fulfilling our part of the agreement unless you did yours, and as we have waited as long as we can for the bran, we hereby cancel all agreements with you to date, and hold ourselves ready to start anew."

Defendant persisting in refusal to deliver the wheat, the mill sued for damages. Judgment in its favor was affirmed by the court of appeals.

The decision turned on the section of the Missouri statute of frauds which pro-

vided that "no contract for the sale of goods . . . for the price of $30 and upwards shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized." Specifically, the question was whether defendant's letter of Dec. 20 sufficiently recognized the existence of a valid contract at the time of the purported cancellation.

Omitting reference made to other decisions cited by the court, the opinion reads as follows: "It is well settled that a contract may be made by telegrams and constitute a contract under the statute of frauds. . . . One of the specific objections urged by defendant against the sufficiency of defendant's letter of Dec. 20, 1919, is that said letter does not contain the terms of any contract or reference to any memoranda which does constitute a contract, and that said letter expressly repudiates any agreement with plaintiff.

"We are not in accord with this view. It is only necessary to quote from said letter to determine that reference is therein made directly to the contract for the sale of a carload of wheat, viz., 'About the 18th of October we bought a car of bran from you, and a little later sold you a car of wheat.'

"So far as the record discloses, there is only one car of wheat in controversy. Taking the quotation, supra, from defendant's letter of Dec. 20, 1919, and construing it together with plaintiff's letters of record, there would seem to be no chance for a misunderstanding as to what carload of wheat was meant. . . .

"In the case at bar, defendant's said letter of Dec. 20, 1919, is an attempt to repudiate the oral contract entered into over the telephone; yet in the first sentence thereof there is an acknowledgment that such contract had been made, and, further, the letter states that, because plaintiff had not shipped defendant some bran that previously had been ordered, 'we didn't feel like fulfilling our part of the agreement unless you did yours.'

"There is no contention by defendant that the contract for the bran and the sale of the carload of wheat in controversy are not parts of one and the same transaction, and, under the facts in evidence, we so consider it. Defendant cites Fowler Elevator Co. vs. Cottrell, 38 Neb. 512, 57 N.W. 19, in support of its contention. We have examined that case and find there is this distinction: In that case there was no acknowledgment of the alleged parol agreement, but, on the other hand, an express repudiation thereof. In the case at bar, defendant, in the first sentence of its letter in question, specifically refers to the parol agreement, and then attempts to repudiate the same on the ground that plaintiff had failed to perform its part of an entirely separate agreement.

"Under the rule announced in the Peirson-Lathrop Grain Co. case, supra, there is no question that the letters of record in the case at bar contain all the necessary elements to support an enforceable contract of sale under the statute of frauds, which said letters were received, respectively, by plaintiff and defendant, as shown by the agreed statement of facts."

* *

The Pennsylvania statute was invoked by defendant in the case of Northwestern Consolidated Milling Co. vs. Rosenberg et al, 275 Fed. 878, decided by the United States district court, eastern district of Pennsylvania. It is to be inferred from the report of the case that the mill sued for damages for breach of an oral contract to buy goods, and that it sought to avoid a defense that there was no enforceable contract under the statute for want of written agreement or partial delivery, by relying on the fact that defendants had recognized their contract as being subsisting by applying to a third party for a shipping permit and by requesting that the mill extend the time for paying drafts and permit the merchandise to remain in its warehouse. Ruling against the mill, the court says:

"In the affidavit of defense, it is set up as a bar to the suit that the alleged contract sued upon is unenforceable, because it is not based on a note or memorandum in writing of the contract or sale signed by the party to be charged; i.e., the defendants, or their agents in that behalf, as required by the sales act of May 19, 1915 (P.L. 543).

"The application for the shipping permit is made to a third party, and not to the plaintiff, and it would require oral evidence to connect it with the unsigned memorandum. Moreover, the unsigned memorandum contemplates on its face that it is to be signed by the purchaser and returned to the seller, and that it is subject to confirmation by the seller. In

their contention that the unsigned memorandum and the signed shipping permit are not sufficient in themselves to support an action, the defendants are supported by the authorities."

* *

See, also, Delaware Mills, Inc., vs. Carpenter Bros., Inc., 193 N. Y. Supp. 201, decided by the appellate division of the New York supreme court (affirmed by the court of appeals, 139 N. E. 713), and cases cited in section 54.

SECTION 57. SUFFICIENCY OF SIGNATURE

Holding that a printed signature on an order blank was not sufficient where a "By ————" under it was not filled out, the Minnesota supreme court observed in the case of Upton Mill & Elevator Co. vs. Baldwin Flour Mills, 179 N.W. 904:

"Defendant had blank order forms to be filled out in duplicate, one to be sent to purchasers of flour or feed when a sale was made. There were two of these forms in use. One was called a deferred delivery sale slip, and the other a confirmation of sale slip. At the bottom of the latter these words were printed: 'Baldwin Flour Mills, By ————.' Defendant testified that these blanks were filled out each day by an order clerk in his office to cover the transactions of the day's business; that when he went to his office on Dec. 21 he found that a set of each of these forms had been filled out to cover the transaction with plaintiff; that the confirmation slip was not signed by any one, and that he destroyed all the slips when he wrote plaintiff declining to confirm the alleged sale.

"Plaintiff contends that these slips when filled out constituted a sufficient memorandum to satisfy the statute, and that the form with 'Baldwin Flour Mills' printed on it was sufficiently signed to charge defendant, although he did not actually write his name on the slip.

"Reliance is placed upon a line of cases holding that a printed signature upon a sale memorandum may answer the requirements of the statute if there be sufficient evidence of its adoption by the party to be charged. Drury vs. Young, 58 Md. 546, and Wright vs. Seattle Grocery Co., 105 Wash. 383, go as far as any of the decisions to sustain plaintiff's contention. It is unnecessary to express approval or disapproval of the cases.

"We think it is perfectly plain that by printing 'Baldwin Flour Mills, By————' on the forms, the signature of defendant or his authorized agent upon the blank line was necessary to complete the memorandum. The unsigned slip had no more effect than would an unsigned letter written by a stenographer employed by defendant and destroyed before it was sent to plaintiff."

* *

In the case of Wright vs. Seattle Grocery Co., 177 Pac. 818, a suit to recover damages for nondelivery of flour, defendant seller attempted to avoid the contract, under the Washington statute of frauds, on the ground that there was no actual signature by it or its agent, but the Washington supreme court disposed of this phase of the controversy by saying:

"The record shows that defendant's authorized agent negotiated the sale with plaintiff, and entered the terms of the sale on a blank form used by defendant in dealing with its customers, which contained at its top the name of the defendant as the acting party. . . . The use by the party to be charged of his written or stamped name to indicate his joinder in the contract set forth is a sufficient signature under the statute."

* *

In a suit to recover damages for breach of a contract to buy goods (Fort vs. Cummins, 128 N. E. 624), defendant buyer pleaded lack of any written contract on his part to buy, within the requirements of the Indiana statute of frauds. But the appellate court of that state held that a writen confirmation by the broker who negotiated the contract, representing both parties in consummating the sale, was sufficient to create a valid agreement.

See, also, Bay State Milling Co. vs. Saginaw Baking Co., 196 N. W. 204, decided by the Michigan supreme court; Riddle vs. Castner, 209 S. W. 127, cited in section 55; and Serhant vs. Gooch Milling & Elevator Co., 148 N. W. 911, cited in section 56.

SECTION 58. MODIFICATION OF WRITTEN CONTRACTS

The statute of fraud occasionally gives rise to some misunderstanding concerning the validity of agreements by word of mouth which purport to qualify obligations under existing written contracts. Such misunderstanding occurred in the case of Albert Mackie & Co., Ltd., vs. S. S. Dale & Sons, 84 So. 453, decided by the Mississippi supreme court.

By proper contract in writing, defendants agreed to deliver six cars of goods to plaintiff. To plaintiff's suit for damages for nondelivery of the six cars, de-

fendants answered that the parties orally modified the agreement by reducing the number of cars to be delivered to three, but that plaintiff afterwards refused to accept three cars only. Deciding the case in defendants' favor, and referring to the statute of frauds.—the statutory rule above referred to,—the supreme court says:

"'A subsequent change of a contract can be shown orally to defeat recovery on the original agreement. . . . An entire rescission of a contract is provable by parol [oral evidence] by way of defense.'

"Many authorities can be found supporting this general statement, while a few may deny the proposition. . . .

"At the time plaintiff refused to accept the three cars it was impossible, according to the testimony, for defendants then to secure the other three cars. Their failure to secure the three cars is justified by the verbal understanding. There is much authority to the effect that a strict performance of a written contract within the statute of frauds may be waived by a verbal understanding or by words and acts inconsistent with an intention to require performance where the other party has been misled or kept from performing. It has been frequently stated that the statute of frauds may not be used to perpetrate a fraud. . . .

"The general rule that a contract required to be in writing cannot be altered or modified except by agreement in writing may be conceded. It is particularly to be noted in the present case that there is no effort to change . . . any of the terms of the contract as to quality . . ., the price, or time and place of performance. The simple contention is made that the purchaser agreed to accept one half of the property contracted to be delivered and waive performance as to the other half. It is immaterial whether this action be termed a waiver, modification, or release. The parties acted upon the verbal agreement, and, if the testimony on behalf of defendants be true, it would be very inequitable to award damages in this case."

* *

In the Iowa case of Neola Elevator Co. vs. Kruckman, 171 N.W. 743, it was decided that a written contract for delivery of corn was not invalidated by a verbal agreement extending the time for delivery beyond that fixed in the written agreement.

* *

Under the express provisions of a California statute, a written contract is not affected by a verbal modification of its terms by the parties, as where there is an oral contract extending the time for delivery of goods, so long as the verbal agreement remains unexecuted, according to the decision of the California district court of appeals in Donlan vs. Meyer, 169 Pac. 447.

* *

The validity of an agreement extending the time for delivering a quantity of milo maize was successfully questioned in the case of Morton vs. Albers Bros. Milling Co., 226 Pac. 809, decided by the California district court of appeals.

Plaintiff sued for damages as for breach of defendant's contract to purchase. A written contract between the parties called for delivery by Dec. 1, but plaintiff claimed that on Nov. 25 it was verbally agreed with one Prenot, defendant's assistant branch manager, that the time for delivery should be extended to Dec. 25. Holding that plaintiff seller was not entitled to rely upon this agreement, the district court of appeal said:

"With respect to the validity of the oral agreement, respondent is confronted with two and only two alternatives: Either he must take the position that the arrangement which he testified he made with Prenot was an unexecuted oral agreement altering a written contract by extending the time for performance, or he must contend that it was a parol [verbal] waiver of a provision inserted in the written contract for the benefit of the buyer. If the first alternative be adopted, then it much be held that the oral agreement is void under section 1698 of the Civil Code. . . . If the second alternative be espoused then, while there seems to be authority for the proposition that section 1698 does not prevent a valid oral waiver of a written provision inserted for the benefit of the party waiving it, . . . there is no evidence that Prenot had authority to waive any provision of the written contract. . . .

"Prenot was not a general officer. He was only an assistant manager for appellant at one of its branch offices. It possibly may be inferred from the evidence that he was authorized to do certain things which were necessarily incident to the performance of the written contract, such, for example, as seeing to it that proper tests were made to determine whether the milo measured up to the requirements of the contract. But authority in an agent to carry out or to perform a contract already made by his principal does not include authority to

change the contract or to waive any of its provisions, especially where, as here, the provision is one which was intended for the benefit of the principal. Presumptively, an agent is employed to acquire interests, not to give them up."

* *

Question as to the validity of a written order for mill products, on being modified pursuant to verbal agreement, was raised under the following stated circumstances: An Oklahoma district manager of a Kansas mill received a signed order for flour through a subordinate. The order called for $13.50 bbl as the price, and was subject to confirmation by the mill at its home office.

The market having advanced, the district manager telephoned the buyer that the contract would not be confirmed at less than $14. The buyer replied that he desired the flour and instructed the manager to change the price to $14, which was done. The mill confirmed the contract as so changed, notifying the buyer by written confirmation. Later, he directed the mill to cancel the order, making no reference to the terms of the contract. The mill brought suit, and the trial court sustained the buyer's demurrer to the plaintiff's petition.

"Questions of law presented," wrote a correspondent, "are whether a written offer can be altered by oral agreement or whether the oral agreement to make the change brings the contract within the statute of frauds. In Oklahoma the law provides that a written contract cannot be modified, except in writing. Do the above circumstances bring the contract within this provision of the law?"

In my opinion, the facts stated showed a contract binding on the buyer to take the flour at $14.

The document received by the district manager through his subordinate was nothing more than an order, or offer to buy on the terms stated in it, and it did not and could not become a contract until it was accepted or confirmed by the mill. It is true that the form used in this case—National Federation Uniform Sales Contract form—speaks of itself throughout as "this contract," rather than as an "order." But this cannot make it a contract until it becomes such by mutual assent.

"It is an elementary principle of law that it is essential to a contract for the sale of a chattel, like every other contract, that there must be a meeting of the minds and an agreement by both of the parties to the sale and purchase; that is to say, upon the one part there must be an intention and offer to sell, and on the other part an acceptance of such offer and an intention to buy." 35 Cyc. 50.

It is manifest that the standard sales form referred to contemplates its complete execution as a prerequisite to making it a "contract." In any event, we see no reasonable ground for asserting that the document is anything more than an "order" until the mill signifies its confirmation of the sale.

It is equally clear, on the facts presented, that the buyer constituted the district manager his agent for the purpose, not of modifying an existing contract, but of modifying an offer to buy flour before its final submission to the mill for acceptance.

There is no room for serious contention that the buyer could not validly constitute the mill's district manager his own agent for the limited purpose of altering the terms of the order. 2 Corpus Juris, 448.

It was necessary that the buyer sign a written agreement to buy the flour, but it was not necessary that he do it personally, as distinguished from making the contract through an agent, and it seems that there is no statute in Oklahoma taking the case out of the general rule that an agent may be verbally authorized to make or modify a written order or contract for the sale or purchase of goods.

"It is generally held that oral authority is sufficient to enable an agent to execute a written contract or memorandum, as required by the statute of frauds, for the sale or purchase of personal property." 2 Corpus Juris, 450.

"In the absence of a statutory provision to the contrary, an agent's authority to sign a memorandum of a contract within the statute of frauds is not required to be in writing any more than in any other case of agency." 20 Cyc. 276.

It also seems that the laws of Oklahoma are the same as of most other states in the respect that, while certain contracts relating to real estate cannot validly be executed by agents unless the authority of such agents is evidenced in writing, there is no such requirement as to contracts for the sale or purchase of goods.

The Oklahoma law providing that a written contract can be modified only by agreement in writing has no application, because no written contract was modified in this instance. All that was done was to modify an order before it either reached the hands of the seller for acceptance or became a contract. From a legal standpoint, the transaction is no

different than if, before handing the order to the mill's salesman, the buyer had discovered that through mistake he had signed an order for flour at $25 bbl, and had directed his own employee to strike out that figure and insert $13.50 or $14.

As having some bearing on this case, the following statement from a standard legal authority may be cited:

"The rule against parol evidence to vary or contradict a written instrument does not preclude evidence to explain an alteration in a written instrument and to show that it was made under such circumstances as not to vitiate the instrument. . . . Evidence is also admissible to show the fact that an alteration has been made, and the person by whom and the circumstances under which it was made." 22 Corpus Juris, 1147.

If, as has already been shown, an agent may be verbally authorized to make an entire written contract, stating the terms and signing the instrument, for much stronger reasons he may be verbally authorized to make a specified change in an order given by the principal.

In addition to what has been said, it is to be noted that the buyer's failure to object to the mill's confirmation of the contract furnishes reasonable ground for a finding that he not only authorized the change made in his order, but also ratified that change.

* *

The right of the parties to a written contract for sale of goods to cancel it by verbal agreement was recognized by the Texas court of civil appeals in the case of Smith Bros. Grain Co. vs. Street (274 S. W. 643).

* *

In Bay State Milling Co. vs. Saginaw Baking Co., 196 N. W. 204, the Michigan supreme court held that the price of flour stated in a written contract of sale could be validly changed by verbal agreement.

* *

A clause validly may be written into a contract after signing of the instrument, if both parties assent, held the Michigan supreme court in the case of Montana Flour Mills Co. vs. Lawrence, 194 N. W. 489.

See, also, the following chapter, which deals with the conclusiveness of written agreements, as against claims of additional or contradictory verbal understandings.

SECTION 58A. AGREEMENTS TO PAY ANOTHER'S DEBT

A clause of the statute of frauds requires a promise to answer for the debt of another to be in writing. But this clause does not apply where goods are sold and delivered to one person on the credit of another, but it does make voidable a verbal agreement to pay a third person's debt already accrued or to guarantee payment of another's debt.

The provision was applied by the Pennsylvania superior court in the case of the Washburn Crosby Co. vs. Budzowski, 84 Pa. Super. Ct. 74, where plaintiff sued to recover the price of flour. Defendant filed an affidavit of defense, denying that it bought the flour, and alleging that it was sold to a baking company. It was admitted that defendant orally guaranteed the payment of the purchase price, before the flour was delivered. The court ruled that the affidavit stated a valid defense, saying: "If the allegations mentioned are true, (a) he neither bought nor received the flour; and (b) he cannot be compelled to pay the debt of the vendee, because his promise was not in writing, as required by the statute of frauds."

CHAPTER V

CONCLUSIVENESS OF WRITTEN CONTRACTS

SECTION 59. THE GENERAL RULE AND ITS REASONS

WRITTEN contracts furnish at least one important example of instances in which there may be strong moral obligations, without a legal obligation. It is the policy of the law to minimize opportunities for the working of injustice through false testimony, imperfect recollection of witnesses, and inability to produce witnesses because of their death or absence.

To put this policy into effect, it is generally held that where a written contract purports on its face to be a complete statement of the mutual understanding of the parties concerning the subject matter of the agreement, neither party will be permitted to materially alter the terms of the writing by showing some additional or contradictory oral understanding entered into at the time of, or before, the signing of the written contract.

The courts take the position that more injustice will be apt to result from permitting one who has carelessly entered into a written agreement, without satisfying himself as to the completeness or accuracy of the statement of terms in that contract, to patch the contract out with proof of verbal understandings, than in permitting the other party to repudiate some oral promise which moral obligation might require him to fulfill.

The point is illustrated by the decision handed down by the Mississippi supreme court in the case of Columbia Milling Co. vs. Russell Co., 42 So. 233.

The mill sold to defendant a car of flour under a written contract, and the evidence tended to show that, because the particular brand of flour was not well known to defendant's trade, defendant declined to enter into the contract until assured by the mill's representative that the mill would advertise the flour in local newspapers, and would send two experienced salesmen to make a house-to-house canvass in soliciting retail sales. These promises were made before the written contract was entered into. Whether the salesman was authorized to make such promises does not appear.

The flour was shipped by the mill and received by defendant, but was not advertised by the mill, and no salesmen were sent to introduce the product to the defendant's trade. Defendant accordingly refused to pay the full contract price of the flour, insisting upon a deduction of $120 as damages for noncompliance with the salesman's promises. The mill then sued to recover the full contract price.

At the trial, the mill's attorneys objected to evidence tending to show the verbal promises above mentioned. The objection was overruled by the trial judge, and the mill made proof of circumstances excusing noncompliance with those promises and showing that the mill had offered to take back the flour if defendant stood to lose on the purchase.

Judgment was entered for the contract price, less the deduction demanded by defendant. The mill appealed to the Mississippi supreme court, and secured a decision in its favor. The higher court said:

"On the facts presented by this case, it was error in the trial court to permit oral proof to go to the jury of promises made by the plaintiff to do certain things not contracted to be done in the written contract. This testimony could have been admitted only for the purpose of showing that the contract was procured by fraud, and, when defendant accepted the flour after making the written contract, it waived whatever right it may have had to show that it was induced to make the contract by representations of plaintiff not embodied in the writing. It cannot accept the goods under the written contract and, when sued for the price agreed to be paid, reduce that price by showing that plaintiff agreed to do something else not mentioned in the contract.

"To permit this to be done would be to add a new term to the written contract by oral evidence, and then to allow a recovery for a breach of the term thus added, and not mentioned in the writing as a part of the contract."

The court, however, specifically notes that this decision is not to be regarded as affecting the well-established rule of law that one induced to enter into a written contract through fraudulent misrepresentations made to him by the other party may cancel the contract on that ground, although the representations may have been orally made. The law makes a distinction between the right of a contracting party to show oral inducements made to him to enter into the contract and the right to alter or contradict the terms of the contract as disclosed by a writing which appears on its face to have been intended to cover the entire agreement of the parties.

Under another well-recognized principle, it is open to a contracting party to show that through mutual mistake or fraud of the other party a written agreement does not state the terms which it was mutually intended to state, but, in the absence of fraud or mistake, a written contract cannot be varied or contradicted by proof of verbal understandings had before or at the time of the signing of the contract.

See, also, Webb & Maury vs. Smith Bros., 93 S. E. 74, and Montana Flour Mills Co. vs. Lawrence, 194 N. W. 489.

* *

In the case of Marshall Milling Co. vs. Hintz-Cameron Co., 194 N. W. 772, decided by the Minnesota supreme court, the main question in dispute was whether defendant was entitled to rely on certain claimed oral agreements between the parties preceding the execution of formal written contracts, which the court finds were "evidently drawn with the intention of protecting the seller in every possible contingency which might arise." Holding that defendant was not entitled to rely on these antecedent verbal negotiations, the supreme court said:

"Defendant frankly concedes that all the provisions which it sought to prove were fully covered by the written contracts. This being true, defendant was not in position to invoke the rule that where a written instrument is executed in part performance of an oral agreement, the provisions of the oral agreement, not covered by the writing, may be proved by parol [proof of oral agreement]; and makes no claim that the proffered proof was admissible under that rule. . . .

"Defendant concedes that no representations were made concerning the terms and provisions of the contracts, but urges that printing them so that they were similar in appearance to those previously used and presenting them without calling attention to the fact that the terms had been materially changed was equivalent to procuring the execution of them by trick and artifice; and that, having executed them without discovering the change in terms, defendant ought not to be bound by them.

"The facts above recited would hardly justify a charge that fraudulent misconduct on the part of plaintiff induced defendant to execute the contracts without knowing their terms. But, however this may be, the answer contains no such charge. Having voluntarily executed the contracts, defendant is bound by the terms and provisions contained therein, in the absence of fraud of mistake; and neither fraud nor mistake are alleged, except concerning a promise in connection with contract C which will be referred to later. . . .

"Contract C was made as the result of conversations over the long distance telephone. Defendant claims that when asked to make this purchase it had a large quantity of plaintiff's flour on hand and at first declined to buy more, for that reason; that thereupon plaintiff's agent stated 'That he would come to Duluth and would go out with Dan Cameron, one of the defendant's officers, and would sell all the flour of plaintiff's brand then on hand'; and that, relying on such representations and induced thereby, defendant made the purchase and executed contract C therefor. Defendant alleged that these representations were false and were fraudulently made for the purpose of deceiving defendant and inducing it to make the contract.

"Defendant recognizes the rule that, ordinarily, fraud cannot be predicated upon a promise to do something in the future, but relies upon the exception to that rule, namely, that a promise made with intent to deceive and with no intention to perform it may constitute fraud. . . . Defendant's proof did not go far enough to establish fraud within the meaning of this exception. Defendant proved that in a telephone conversation plaintiff's agent made the statement previously quoted, and then contented itself with offering to prove that he 'did not at any time sell any of the flour on hand at the time of the telephone conversation.'

"It appears that this agent had previously gone out with Cameron selling flour, and there is nothing from which it may be inferred that when he made this promise he did [not?] intend to keep it. So far as the record discloses, he may have been ready and willing to go out

with Cameron for the purpose of making sales. There is no showing that he refused to do so. Proving the mere fact that he made no sales without proving anything more is not sufficient to show that the promise was made with a fraudulent intent."

Defendant filed a counterclaim for damages as for breach of a warranty of the quality of flour partly delivered under one of the contracts, but the supreme court held that the trial judge properly excluded testimony offered by defendant to show a verbal warranty and that the flour delivered did not conform thereto. The holding was influenced by the fact that the written contract stated that it was "a contract to sell, by description, goods to be manufactured"; that it contained the "whole agreement"; and that there were "no representations, guaranties or warranties except such as may be written on the face hereof, if any, nor any agreements collateral hereto."

* *

In an action to recover damages for claimed breach of a contract to sell wheat, the Oregon supreme court decided the following points:

An unambiguous contract must be interpreted according to the common meaning of words used, and regardless of trade customs or usages at variance with the specific provisions of the agreement.

One who has signed a written contract of sale will not be entitled to show a concurrent verbal agreement by the other party that he would not insist upon delivery, unless he has been induced by some species of fraud to execute the contract without knowledge of its legal effect.

When an agreement as written does not express the true understanding of the parties, the aggrieved party is entitled to compel reformation of the agreement on the ground of mutual mistake. (Interior Warehouse Co. vs. Dunn, 157 Pac. 806.)

* *

When a contract for a sale of corn was unconditional in its written terms, it was not open to the seller to excuse nonperformance on the ground that the sale was made subject to a verbal understanding that delivery would not be obligatory unless the seller should be able to obtain cars to transport it.

In reaching this conclusion in the case of Marshall Hall Grain Co. vs. P. H. Boyce Mercantile Co., 211 S.W. 725, the Springfield, Mo., court of appeals applied the trite legal principle that where a written contract purports to contain all of the essential terms of the agreement reached between the parties, it cannot be varied or contradicted by proof of some verbal agreement not embodied in the writing, in the absence of fraud or mistake.

In this case defendant seller sought to bring the claimed verbal agreement within an exception to the general rule above stated, by showing that the agreement was left out of the written contract through inadvertence. But the court holds that, by signing the contract with full opportunity to discover the omission, defendant precluded itself from relying on this point.

"The law is well settled in this state," says the court of appeals, "that one who signs a contract is presumed to know and understand its terms, and a mere failure to read or inform himself of the terms, in the absence of fraud, is no defense."

Another point involved in the case turned on the question whether there was any sufficient written contract binding defendant to sell. The sale was verbally negotiated by plaintiff's representative, and was confirmed by plaintiff in writing. Defendant objected to the confirmation, and declined to sign it on the sole ground that it did not express the true agreement as to when the corn should be delivered. However, the papers were returned with a letter from defendant to plaintiff, asking that they be corrected and returned for signature. The correction was made and the papers returned, but defendant did not sign.

It is held by the court that the letter constituted a sufficient contract binding defendant to sell. The letter, read in connection with the proposed form of written contract, identified the essential terms of the sale, and this is all that is required to constitute a valid written contract.

* *

A very practical illustration of an important rule of law applying to flour sales contracts was made by the Massachusetts supreme court lately in the case of Welch et al. vs. Bombardieri, 147 N. E. 595.

Plaintiffs sued for damages for breach of a contract by defendant to buy flour. They offered in evidence a contract and a confirmation for 260 bbls in 98-lb cotton containers, at $13, and 50 bbls in one eighth bbl paper containers, at $13.15. Defendant's copy of the contract conformed to plaintiffs', excepting that it was blank as to the price of the second item. Thereupon, the mill's attorneys

sought to show that its salesman and defendant verbally agreed that the amount might be filled in, according to the governing package differentials, which the mill did in its copy of the contract, and the confirmation was sent.

The trial judge sustained a contention, made by defendant's attorney, that the case came within the rule that a written agreement cannot be modified or contradicted by showing some verbal agreement between the parties existing at the time of, or before, the signing of the contract. The judge, therefore, shut out the verbal agreement above referred to, but, reviewing the case, the supreme judicial court, in ordering a new trial on the ground that the rule did not apply, said:

"Before that rule can be applied, the court must be sure that it has before it a written contract—a writing, or writings, signed by the parties and intended by them as a statement of their complete agreement. . . . If the evidence offered by the plaintiffs be believed, the writings . . . in the form in which they stood when signed on Sept. 15, 1920, did not contain, and were not understood to contain, all the terms of a binding agreement. It was intended that a blank space, purposely left vacant, was later to be filled by inserting a term which neither signer at the moment knew, but which was to bind the parties when inserted. We know of no rule of law which forbids such a transaction. The party who, in such a situation, inserts the term contemplated, does not make a material alteration in a contract. True, he has changed a writing; but he has not altered a contract. Instead of invalidating an agreement, he has given it valid form.

"Nor does the parol evidence rule apply 'when the language used is ambiguous by reason of unexpressed terms, and resort must be had to extrinsic evidence to determine the meaning and extent of the language employed by the contracting parties. Such evidence is admissible, not to vary what is written, but to complete the instrument.' . . . The printed conditions are in many respects in direct conflict with the written terms. The contract was subject to confirmation, and thus was incomplete until confirmed.

"If we assume that the defendant could have defeated the existence of a binding contract by immediate action on receiving the confirmation in refusing to be bound, his lack of action . . . was evidence of an assent."

* *

In a similar action (Pillsbury Flour Mills Co. vs. Pittlekow, 186 N. W. 687) the Wisconsin supreme court decided that certain testimony did not violate the parol evidence rule.

* *

It is doubtful that a search through all the appellate court reports would disclose the record of a shorter flour sales contract than was involved in the Washington case of Wright vs. Seattle Grocery Co., 177 Pac. 818, in which suit the supreme court of the state ordered judgment in favor of plaintiff for breach of a contract to deliver a carload of flour.

But although, as will be seen from the following review of the decision, the validity of the contract was sustained, the fact that it took a lawsuit to determine the enforceability of the agreement will serve to suggest that such brevity of writing is not advisable.

Defendant's salesman orally negotiated a sale of a car of flour to plaintiff, delivering to him a copy of a memorandum of sale in the following form: "Seattle Grocery Company, . . . Seattle, Wash., April 6, 1917. Sold to Chauncey Wright, L. C. Smith Bldg., Seattle, Wash., . . . 1 car Gold Medal flour, $2,790.46." The memorandum consisted of a printed form on which the salesman entered in writing the date, name and address of the buyer, and the statement of the goods sold and the price.

The defendant having failed to carry out the agreement, plaintiff sued for $1,859.54 damages—the difference between the contract price and the market value of the flour when the contract was broken. The jury returned a verdict for $1,472.04, and defendant appealed from a judgment entered on this award.

The supreme court held that the trial judge properly permitted testimony to be admitted before the jury on behalf of plaintiff to explain in detail the agreement of the parties without affecting the material terms stated in the memorandum. This testimony showed that a "car" of flour is generally understood as comprising 310 bbls; but that it was understood the particular car would contain 297 bbls; that delivery would be made on arrival of a certain car in transit to Seattle from Minneapolis; that plaintiff would pay the price on delivery; that defendant would pay the freight and receive 2 per cent more than the miller's price to defendant, the mill's price, plus this allowance, making the gross price mentioned in the memorandum of sale from defendant to plaintiff. Plaintiff also proved that it was agreed that he should not take the flour in the sized

sacks in which it was packed in the car in transit, but that small sacks were to be exchanged for larger.

"It is thus seen," said the supreme court, "that the written memorandum of itself was sufficient to show a complete contract enforceable against the defendant, inasmuch as it set forth the purchaser and seller, the quantity and character of the goods, the price therefor, and the date of the contract. Time and place for delivery were not specified, but in such case a reasonable time is to be presumed, and, as both parties were engaged in business in Seattle, a like presumption would fix that point as the place of delivery. Parol evidence was admissible to explain the quantity understood by the parties to be comprised in a carload."

* *

In the case of Westbrook Brothers vs. Kingfisher Mill & Elevator Co., 192 Pac. 209, plaintiffs, grocers and feed dealers at Antlers, Okla., sued defendant mill for damages for breach of a contract, and the supreme court affirmed judgment in plaintiffs' favor for $400.

Plaintiffs indicated to the Hugo (Okla.) Brokerage Co. that they desired five cars of defendant's flour at $2.55 per 100 lbs. (This was in July, 1916.) Later the same day the brokerage company telephoned that the mill would book three cars at $2.60 and two at $2.55. In the meantime, the broker had wired the mill that plaintiffs wanted "to book five cars mostly flour at two fifty-five, bran one five, meal two, shorts twenty-five." The mill replied, "Book Westbrook three cars of flour two sixty, others as stated."

The mill shipped three cars of flour at $2.60, but refused to ship the other cars, contending that it had sold the plaintiffs only three cars, and that the words "others as stated" referred to other mill products; it being the custom at that time to sell mixed cars of flour, bran, shorts and meal to merchants.

The mill made all sales in the particular locality only through the brokerage company, and plaintiffs had been previously so advised when they attempted to buy direct from the mill.

Disposing of the case on appeal, the Oklahoma supreme court said, in part:

"After the examination of the evidence in the record, we have no doubt that said brokerage firm was defendant's agent, and that as such agent it sold the plaintiffs five cars of flour, three at $2.60 and two at $2.55. It is unnecessary for us to here determine whether the brokerage firm, as agent of the defendant, could bind its principal to deliver five cars, when such principal had only authorized its said agent to sell three cars, for the reason that defendant's telegram to the brokerage company is ambiguous.

"It is susceptible of the construction, as contended for by the defendant, that the words 'others as stated' referred to other mill products, and it is also susceptible of the construction as contended by the plaintiffs, that said words referred to the other two cars. This latter construction is also the construction given the telegram by the brokerage company.

"Defendant contends that there was no contract, on the ground that the minds of the parties did not meet; that is, that the defendant did not accept the proposition made by plaintiffs, and that their telegram merely constituted a new proposal—and cites in support thereof Hart-Parr Co. vs. Brockreide, 77 Okla. 277, 188 Pac. 113. In the case cited it was held that where a person offers to do a definite thing, and another accepts conditionally, or introduces a new term into the acceptance, his answer is a mere expression of willingness to treat, or it is a counter proposal, and in neither case is there an agreement.

"The law thus stated is correct, but it is not applicable to the case at bar, for the reason that defendant's counter proposal was accepted by the plaintiffs when they assented thereto and communicated their assent to the brokerage company as defendant's agent. Then the contract consisted entirely of defendant's counter proposal and plaintiffs' acceptance, upon which there was a meeting of the minds of the contracting parties; but the contract, as thus made, is ambiguous, and, its meaning being in dispute, its construction became a mixed question of law and fact, and was determinable by the jury under proper instructions of the court. . . .

"Under these circumstances it was proper for the court to admit in evidence the extrinsic facts and circumstances throwing light upon the intention of the parties, which, as has been held in a long line of authorities, must prevail over verbal inaccuracies, inapt expressions, and the dry words of the stipulation."

* *

One who has signed an order for goods cannot, after it has been accepted, excuse his failure to read it before signing, on the ground that he was busy with customers at the time and relied on a statement by the salesman who took the order as to the contents, was the decision of the Kansas supreme court in the case of Western Tractor Equipment Co. vs.

Ayers, 225 Pac. 115. The holding was to some extent influenced by the fact that the particular order was brief.

See, also, section 58, treating of the modification of written contracts by subsequent verbal agreement.

SECTION 59A. STIPULATIONS AGAINST COLLATERAL AGREEMENTS

In the case of New Prague Flouring Mill Co. vs. Hewett Grain & Provision Co., 196 N. W. 890, decided by the Michigan supreme court, it appeared that defendant gave plaintiff an order for 1,000 bbls flour and it was accepted, but the defendant refused to order the flour out. Suit followed, and judgment in the mill's favor for damages was affirmed. The court said:

"Defendant attempted to show . . . an oral agreement made with De Smidt, the agent of plaintiff, to put on an advertising campaign in some of the cities in which defendant did business. This was objected to, on the ground that it would alter the contract and enlarge the engagement of the plaintiff. After some discussion the testimony was rejected. Defendant sought to introduce this testimony on the theory that the contract or order was not to go into effect until the advertising campaign was put on, . . . but we need not determine this question, as we think the proofs were objectionable on other grounds. In the written contract we find the following provision:

" 'There are no representations, guaranties or warranties, except such as may be written on the face hereof, if any, nor any agreements collateral hereto.'

"The oral agreement attempted to be proved by defendant was a collateral agreement. After agreeing in writing with plaintiff that there were no collateral agreements, it is not clear to us under what theory defendant can be permitted to interpose this defense. If there were no oral agreement that the contract should not be effective until the advertising campaign was put on, it must have been in existence when the contract was signed, and defendant must have known of it. With the full knowledge that there was such an oral collateral agreement the contract was deliberately executed, stipulating that there was no such agreement. Under such circumstances defendant should be, and is, estopped from now asserting that there was such an agreement. . . .

"It is neither consistent nor reasonable for a party to stipulate in its contract that what is true is not true, and then appeal to a court to relieve it of its folly."

But in the case of International Milling Co. vs. Priem, 192 N. W. 68, the Wisconsin supreme court decided that a clause in a flour sales contract, reciting that there were no representations, etc., except as contained in the written contract, did not preclude the buyer from showing misrepresentation by the salesman that wheat market prices had risen.

See, also, sections 69, 86, 89, 94.

SECTION 60. EFFECT OF CONFIRMATION OF CONTRACT

Where telephonic negotiations result in a verbal agreement for a sale of grain, and the terms of the contract are then stated in the form of written confirmation, one of the parties, having retained the confirmation delivered to him, without objecting to the accuracy of its statement of the understanding, may not afterwards assert a verbal agreement at variance with the written confirmation. It was so decided by the Kansas supreme court in Wallingford Bros. vs. Bushton Grain Co., 164 Pac. 275. The decision gives full legal effect to the method adopted by dealers in grain of making oral negotiations definite by committing them to confirmatory writing, "to avoid the consequences of misunderstandings, defects of memory, in other instances hypertrophy of memory, and in other instances equivocation or downright untruthfulness."

* *

Failure to deliver bran under contracts of sale was held to make defendant seller liable, in the case of Pratt vs. Schreiber et al., 249 S. W. 449, decided by the Kansas City court of appeals.

In each instance the contract was confirmed in writing after verbal negotiation; the confirmation being signed by both parties on a duplicate form provided by plaintiff. In returning plaintiff's copy, defendants also sent another confirmation, signed by defendants and differing from the plaintiff's confirmation, in that it provided that the contract was "subject to strikes . . . and other delays beyond our control." This form of defendants was not signed by plaintiff.

Defendants relied on a railroad strike as an excuse for nondelivery, but the court rejected that as a good defense for the reason that it was not made a part of the written contract between the parties.

SECTION 61. ONE-SIDED UNDERSTANDING

Where flour is sold under written contract specifying a certain brand, the buyer is not entitled to show an understanding on his part that the flour would

be made of old, and not new, wheat. It was so decided by the Indiana appellate court, in the case of Southwestern Milling Co. vs. Niemier, 131 N.E. 831.

Defendant gave plaintiff mill a written order for a specified quantity of "Aristos brand." The word "flour" did not appear in the contract, but it was mutually understood that the quoted term referred to that commodity. According to agreement, the flour was shipped under an order bill of lading attached to draft for the price; but, upon arrival, defendant refused to honor the draft unless first permitted to inspect the flour. Refusing this permission, the mill subsequently resold the flour for defendant's account and sued for damages representing the consequent loss.

On trial of the suit, judgment was rendered in favor of defendant, and the mill appealed. The decision of the appellate court reversed the judgment and ordered a new trial. The appellate court said, in part: "On the trial of the cause, after appellant [the mill] by proper evidence had shown that the term 'Aristos brand' used in the contract was a trade term used to designate, and did designate and mean, a well-known standard brand of flour manufactured and sold throughout the year to the general trade by appellant, the court permitted appellee [plaintiff-buyer], over appellant's objections, to prove that it was understood by her at the time she placed the order for the flour that the term 'Aristos brand' meant flour made from old wheat.

"The admission of this evidence was error. Where, as in the case at bar, a word used in a contract had a peculiar trade meaning, parol evidence is admissible to explain such trade meaning, but parol evidence is not admissible to show what a party to the contract intended by the use of the word."

See, also, In re Ballard, 279 Fed. 574, decided by the United States district court for the northern district of Texas.

SECTION 62. CORRESPONDENCE PRECEDING FINAL CONTRACT

In the case of Bernhard Stern & Sons vs. Chagnon, 99 Atl. 592, the Rhode Island supreme court ordered a new trial on the ground of erroneous rulings of the trial judge; verdict having been returned in plaintiffs' favor for breach of defendant's contract to buy flour for use in his bakery.

The higher court held that, since plaintiffs were permitted to show that defendant refused to accept further delivery under his contract at a time when the market value of the flour was declining, the trial judge improperly refused to receive rebutting testimony tending to show that delivery was rejected on the ground of inferiority of the flour shipped.

But the supreme court holds that defendant was not entitled to show the contents of letters written by plaintiffs' agent before the contract of sale was signed, in which it was stated that the flour should be satisfactory to defendant, and that, if it should fail to prove so, defendant might reject further delivery. The theory of this decision is that the written contract subsequently entered into for the sale must be deemed to have stated all the terms of the agreement, and that it could not be contradicted by the negotiatory correspondence.

* *

When there is a variance between the terms of telegrams leading up to a contract of sale and the terms of a contract finally entered into, tne latter must govern, held the Washington supreme court in the case of L. Teweles Seed Co. vs. Fairbanks, 195 Pac. 40. In this case it appeared that telegrams were exchanged, looking toward a sale of "choice" Canadian yellow peas, and a sale of Canadian yellow peas of "good stock in good merchantable condition" was confirmed. The court holds that the contract governed.

SECTION 63. ONE-SIDED WRITINGS NOT WITHIN RULE

Where a written order for goods is not accepted by the seller in writing, there is no written contract. Hence, the written or printed terms of the order do no fall within the rule of law that the terms of a written contract are not to be contradicted or altered by proof of verbal negotiations preceding or contemporaneous with the making of the contract. This conclusion was reached by the appellate division of the New York supreme court in the case of A. O. Anderson Trading Co. vs. Brody, 184 N.Y. Supp. 383.

* *

In American Bag Co. vs. Taylor Milling Co., 230 S.W. 782, the bag company sued for the price of flour sacks delivered, and the mill counterclaimed for damages on account of asserted breach of a contract for the sale of other sacks.

An order for sacks involved in the controversy was taken by the bag company's salesman by telephone conversation. Later the salesman filled out an order form reciting terms of sale and writing at the bottom, "Ordered by long distance phone through Mr. Rayzor." A copy was sent to each of the parties, and

the seller sent a confirmation to the buyer.

It seems that in the suit the bag company sought to excuse itself on the ground that the mill failed to take the sacks within the time fixed by the written order and confirmation, and that this written agreement could not be contradicted by proof of a verbal contract at variance with its terms. On this phase of the case the court says:

"Appellant [the mill] alleges that there was no agreement that the oral sale should be reduced to writing, and that the same was not reduced to writing, and that said order and letter of confirmation do not constitute a contract between appellant and appellee [the bag company], and appellant never agreed that they should do so.

"If these allegations are true, the exhibits referred to do not show a written contract."

* *

In the case of H. K. Cochran Co. vs. McCorkle, 222 S.W. 34, plaintiff sued for damages for defendant's refusal to accept and pay for a carload of mill products and oats. Plaintiff relied on an order purported to be signed by defendant, and which plaintiff's salesman testified defendant did sign. Defendant admitted receiving a carbon copy of an unsigned memorandum, but insisted that the agreement was verbal.

The written order was unqualified, but it was claimed by plaintiff, and denied by the salesman, that it was mutually understood that plaintiff might cancel the order any time before delivery, and that he did cancel it. The trial judge refused to permit defendant to testify to this claimed option to cancel, and the Arkansas supreme court holds the ruling was erroneous.

"The main issue in the case," says the higher court, "was whether or not the contract was oral or written, and there was a sharp conflict in the testimony on that issue. Defendant testified positively that he did not sign the written order. If that was true, the written memorandum signed by plaintiff alone did not constitute a written contract and was within the statute of frauds [the law which requires certain commercial agreements to be evidenced by signed memorandum]. . . .

"Defendant not having bound himself by writing, the contract rested in parol [verbal understanding], and no rule of evidence was violated by permitting oral testimony to be introduced establishing the additional agreement not set forth in the writing, to the effect that appellant should have the right to cancel the order before delivery."

SECTION 64. SHOWING NO AUTHORIZED CONTRACT WAS MADE

In Kahlotus Grain & Supply Co. vs. Blair, 172 Pac. 818, the Washington supreme court shows that the general rule of law which precludes one from contradicting the terms of a written contract which he has voluntarily signed, uninfluenced by fraud or mistake, does not prevent him from denying that he actually entered into a contract, although his name appears on it.

In this case plaintiff sued for claimed breach of a contract by defendant to sell a quantity of wheat, relying on a memorandum signed by defendant and reading: "8/5/16. Bot from John Blair 1000 sax early bart wheat at 1.02 sacked per bushel 1916 October delivery to Kahlotus Grain & Supply Co."

At the trial, defendant was permitted to show by oral evidence that a signature, "Kahlotus Grain & Supply Co., A. F. Phillipay Mgr.," was added without defendant's knowledge or consent, long after he had delivered the memorandum with no other signature thereon than his own; and that defendant never negotiated with Phillipay as agent of plaintiff, but negotiated with him as agent of a third person.

In answer to an objection made by plaintiff that this testimony was improperly received, and deciding the case in defendant's favor, the supreme court said: "It seems to be the settled law that the receiving of evidence for the purpose of, and which tends to dispute, the actual making of the contract sued upon, is not in violation of the rule excluding evidence varying or contradicting the terms of a written instrument."

It was also strongly intimated by the court that this contract was unenforceable by plaintiff on another ground—for want of specification of the intended purchaser; there having been nothing in the contract as it was originally executed to indicate who was the buyer. Evidently the court treats the provision for "delivery to Kahlotus Grain & Supply Co." as insufficient designation of a buyer.

* *

The general rule of law, that a party to a written contract will not be permitted to alter its effect by showing variant verbal negotiations, will not be applied to preclude one of the parties from showing that the contract was made on his part by an agent, and that the

other party was informed in advance of the agent's lack of authority to agree to a certain provision contained in the contract. It was so decided by the supreme court of Nebraska in the case of Omaha Alfalfa Milling Co. vs. Pinkham, 178 N.W. 910.

Defendant, through an agent, contracted to sell plaintiff a quantity of hay, but plaintiff was advised in advance that defendant insisted that plaintiff furnish the necessary railway cars to transport the hay. Nevertheless, the written contract entered into required defendant to deliver "on board of cars." Holding that defendant was entitled to show that the agent was not authorized to contract to deliver f.o.b., that plaintiff was so advised, and that defendant never furnished cars, the supreme court says:

"While, under ordinary circumstances, if the defendant had made the sale and signed the contract himself, without the interposition of an agent, he would be bound by the terms of the agreement as embodied in the written contract, and could not be permitted to vary them by verbal proof, there was no error in permitting him to show, by oral evidence, that the provision of the contract relative to furnishing cars was known, at the time the contract was signed, to be in excess of the agent's authority."

SECTION 65. PROOF OF TRADE USAGES AND CUSTOMS

See, also, the next chapter, on Trade Usages and Customs.

The decision reached by the St. Louis court of appeals in the case of Landau Grocery Co. vs. Hart, 223 S.W. 793, deals generally with the question as to when a written sales contract can be supplemented by proof concerning trade usages and customs, and specifically with the effect of a provision in a contract that the goods to be delivered are to be "above grade or no sale."

Defendants agreed to sell plaintiff a car of "pound pickers pea beans. . . . Above grade or no sale." A shipment tendered in fulfillment of the contract was rejected by plaintiff on the ground that it was below the grade of "pound pickers," a trade term said to indicate the presence of one pound of bad beans, dirt or split beans to the bushel. Plaintiff sued for damages for failure to perform the contract.

The defense interposed was that there was a trade custom, binding on the parties, under which it was generally understood that under a contract for sale "above grade or no sale" failure of a shipment to conform to the contract quality not only entitles the buyer to reject delivery, but also exonerates the seller from further obligation under the contract. The court of appeals sustained the defense, but found that, apart from any such trade usage, the contract should be interpreted on its face as enabling the seller to terminate the agreement on the buyer rejecting delivery as being below grade. The court of appeals said:

"While the general rule is that parol [oral] evidence is not admissible to contradict, vary, or add to the terms of a written contract, and it is the province and duty of the court to construe the writing, it is well settled that evidence of a general and well-established usage is often admissible to determine the meaning of the language employed; for under many circumstances it is reasonable to suppose that the parties contracted with reference to such usage or custom. . . .

"Evidence of usage is admissible to explain the meaning of the words used in the contract, though such words upon their face appear to be unambiguous; such evidence being received to show that the words were used in a sense different from their ordinary meaning, and upon the theory that the parties knew of the usage or custom and contracted with reference thereto. . . . But the presumption is, prima facie, that words found in a contract have been used by the parties in their usual and ordinary significance. . . . And it is, of course, unnecessary for a party to adduce evidence of any usage in order to show that words were employed in their usual and ordinary sense.

"And hence, in the instant case, if the words 'above grade or no sale,' when taken in their usual and ordinary acceptance, rendered the contract on its face one whereby it was agreed that if the goods shipped by defendant thereunder, as being of the specified grade, should not be found, in fact, somewhat above that grade, then there would be 'no sale,' and the contract would be at an end, neither party being further liable thereon, then there was no duty on defendant to show that, by usage or custom in the business, such was the meaning or import of these words.

"We are of the opinion that, taking these words, 'above grade or no sale,' in their usual and ordinary sense, the contract was one of that precise character; that the contract upon its face should be given the construction for which defendant contends, without the necessity

of resort to parol testimony as to the meaning of the words in question. In our view of the matter, the contract . . . is clear and unmistakable on its face, when the words employed are taken in their usual and ordinary sense. . . . If plaintiff wished to show that the words 'above grade or no sale' were employed by the parties to mean something different from the natural and usual import of such words, the burden was upon plaintiff to adduce evidence to show that, because of some usage or custom in the business, the words had a peculiar or technical meaning not appearing upon the face thereof."

An important decision on the point that testimony is admissible to explain the meaning of contract terms in general trade usage was handed down by the Kansas City court of appeals in the case of J. C. Lysle Milling Co. vs. Sharp & Son, 207 S.W. 72.

SECTION 66. AGREEMENTS AS TO QUALITY OR PRICE

Where the quality of goods to be sold is indicated by a written contract, the buyer will not be permitted to rely upon a claimed concurrent or pre-existing verbal representation by the seller that the goods would be of higher quality than that called for by the written agreement. (22 Corpus Juris, 1119.)

But see the decision of the Arkansas supreme court in Hayes Grain Co. vs. Rea-Patterson Milling Co., 223 S.W. 390, holding that a mill was properly permitted to show that a contract for the purchase of corn required delivery of milling corn.

* *

A practical application of the general rule of law that a written contract cannot be varied by proof of prior or contemporaneous oral understandings was made by the Arkansas supreme court in the case of Sweet Springs Milling Co. vs. Gentry, Buchanan & Co., 218 S.W. 380.

Plaintiff mill sued to recover damages for breach of defendants' contract to buy a car of flour. The agreement was in writing, and, after specifying time and destination of shipment, items to be shipped, prices and terms, recited:

"These goods are sold at prices, on terms and time of shipment specified above, and are not subject to change or countermand without the written consent of both parties. Should either party refuse to fulfill its part of this transaction, the other party shall buy or sell, as the case may be, charging the loss to the defaulting party. No verbal conditions or modifications are valid."

Defendants' version of the affair was that the mill's representative warranted that the flour to be delivered would be as good as any flour defendants had on hand; that this representative also assured defendants that, should flour prices decline, the order might be countermanded; and that, because another flour salesman told defendants that they would have trouble with the brand bargained for with plaintiff, a sample of the flour was obtained, and found to be inferior to the quality represented by plaintiff's agent. Defendants refused to take the car booked, and litigation ensued.

A jury brought in a verdict exonerating defendants from liability to the nonresident milling company. Judgment being entered on the verdict, the mill appealed to the supreme court, which reversed the lower court's decision and ordered a new trial, saying:

"Counsel for appellant moved to exclude the testimony of appellees, and excepted to the ruling of the court in admitting it. The court erred in its ruling. There was no implied warranty as to the quality of the flour. The contract was itself silent in this respect.

"In the case of a sale of personal property, a warranty of its quality is a part of the contract of sale and not a separate and independent collateral contract. Therefore, proof of such warranty cannot be added to the written agreement by parol [oral] evidence. To justify the admission of a parol promise by one of the parties to a written contract on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates. . . .

"The same reasoning applies with regard to the testimony of the test made of the sample flour sent by appellant to appellees after the contract had been executed. The sale was not made by sample, and the contract was silent in this respect. The contract having failed to show that the sale was by sample or that the flour was to be equal in quality to other flour kept in stock by appellees, or that it was to be satisfactory to appellees, it was clearly error to permit appellees to introduce parol evidence in regard to these matters.

"It was likewise error to permit appellees to introduce parol evidence to the effect that appellant's salesman told them that, if the price of flour declined, they might countermand the order, for such testimony plainly varied the terms of the written order, or contract."

SECTION 67. TIME FOR DELIVERY

Although time for delivery of goods sold be specified in a written contract, one of the parties may claim that the time was not regarded as vital, by showing that it was verbally agreed to apply a previous custom between the parties under similar contracts, giving the buyer the right to order the goods out as needed. (American Bag Co. vs. Taylor Milling Co., 230 S.W. 782.)

* *

In the case of Gladney Milling Co. vs. Dement, 230 S.W. 1038, it was decided by the Texas court of civil appeals that in a suit under a contract for delivery of corn chops to be shipped "at once with Market Grocery Co.," the buyer was properly permitted to offer testimony showing a verbal agreement with the salesman that the chops would be shipped with a quantity of goods to be shipped to the grocery company. The court said:

"The testimony complained of was admissible to explain the meaning expressed in the within order. It neither varied, changed, nor added to its terms, but simply was explanatory. . . . The meaning of such terms in a contract has many times had judicial construction. Such orders have a far more restricted meaning than the term 'reasonable time.' . . . But what would be the meaning of the term, in the absence of anything to qualify it, consistent with business activity to be used in filling and shipping the order is properly submitted to a jury."

* *

Time fixed by a written contract of sale for delivery of the goods may be validly extended by verbal agreement. So decided the Minnesota supreme court in the case of A. S. McDonald Commission Co. vs. Union Hay Co., 172 N.W. 891.

* *

In the case of S. & S. Flour Mills Co. vs. Morrison Milling Co., 174 S.W. 1160, a suit passed on by the Arkansas supreme court and involving refusal to receive flour contracted for, defendant attempted to show a verbal understanding whereby receipt of the flour was conditioned upon delivery before new wheat should begin to arrive at defendant's mill, but the supreme court held that this proof was properly rejected by the trial judge. "The effect of the excluded evidence," said the court, "would have been to contradict and vary the terms of the contract, and under a well-known rule of law the court properly excluded it."

See, also, the decision of the Springfield, Mo., court of appeals in the case of Larabee Flour Mills vs. West Plains Commission Co., 262 S. W. 389.

SECTION 68. PLACE FOR DELIVERY

When a written contract for sale of goods calls for delivery f.o.b. place of shipment, the buyer will not be permitted to rely upon a claimed verbal agreement, made at the time of or before the signing of the writing, for delivery at some other point.

Deciding this in the case of Lawson vs. Hobbs, 91 S.E. 750, the Virginia supreme court of appeals said:

"Where qualifying words are used in connection with the words 'free on board' or 'f.o.b.,' then the contract may be construed to have a different meaning, but so far as we are informed there is no dissent from the proposition that where, referring to shipments by rail, the words 'free on board,' or the letters 'f.o.b.,' a certain place, are used, without any other words in the contract indicating a qualification of their meaning, the courts have construed them to mean that the subject of sale is to be placed on board of cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass to the buyer, and the property be wholly at his risk, and that such words are not open to construction."

But in Hage vs. E. L. Wellman Co., 187 N.W. 404, it was decided by the Michigan supreme court that, inasmuch as a written sales contract, evidenced by confirmation signed by both parties, failed definitely to state the place where delivery was to be made, there was no violation of the rule of law against contradicting or varying the terms of the written agreement to permit plaintiffs to "supply that omission by showing the intention of the parties, by proof of their conduct, oral instructions, and all other circumstances of the case tending to prove their mutual understanding upon that point."

SECTION 69. AGREEMENT TO FURNISH SHIPPING INSTRUCTIONS

In Cunningham vs. Rhome Milling Co., 171 S.W. 1081, a suit to recover damages for failure to deliver a quantity of mill products, the Texas court of civil appeals decided that the milling company could not show an oral agreement that the buyer should furnish specific shipping instructions, or that there was a trade custom to that effect, since the contract of sale stated that there was "no agreement, conditions, or stipulations,

verbal or otherwise, except those mentioned in this contract."

See, also, section 59A.

SECTION 70. SHOWING CAPACITY IN WHICH PARTY CONTRACTED

The typical flour sales order is subject to a set of important legal principles affecting the right of the seller or the buyer to afterwards inject into the transaction, by proof of verbal understanding, something not appearing in the written order. Such right often proves to be the decisive factor in a controversy over the right to enforce, or be relieved from, a contract of sale.

Usually, controversy in cases of this kind is based upon a disputed term of sale, but as shown by the decision of the Wisconsin supreme court in the case of Rathmann vs. Schwanz, 175 N.W. 812, a dispute may concern the identity of one of the parties to the contract. It is held that, although a contract may designate one as a party, without showing that he acted in the capacity of agent, it may be proved that there was an actual mutual understanding that he was not bound in his personal capacity.

But the court decides that, where one is designated as an agent, the written contract cannot be contradicted by showing that it was understood that he was to be bound in his personal capacity, in the absence of proof that through fraud or mistake the written contract fails to express the true agreement. The court says:

"It is an elementary principle of the law that the negotiations and conversations between parties leading up to and including the making of a written contract are not admissible evidence to contradict and vary it, where the writing plainly purports to contain the entire contract, in the absence of accident, fraud, or mistake of fact. . . . If such a writing is signed by a person who in fact acts as agent for another in executing the agreement, it may be shown by parol [oral proof] that it was signed for the undisclosed principal."

But the courts will not permit a flat contradiction of a written contract by a showing that it incorrectly designated one as agent, unless mistake or fraud in drawing the paper be established.

* *

In the case of Wright vs. Seattle Grocery Co., 177 Pac. 818, a suit to recover damages for nondelivery of flour, defendant complained that the trial judge improperly refused to permit defendant to show at the trial that plaintiff did not actually make the contract for his own account, but was acting as agent for certain corporations. But the Washington supreme court said that as plaintiff contracted with defendant in his own name, he had a right to enforce the agreement, the ultimate disposition of the goods being immaterial to defendant.

SECTION 71. ADMISSIBILITY OF EXPERT TESTIMONY

Expert testimony is not admissible to explain the meaning of nontechnical words in a flour sales contract, held the Oklahoma supreme court, in the case of Westbrook Brothers vs. Kingfisher Mill & Elevator Co., 192 Pac. 209.

More specifically, the point decided by the Oklahoma court is that where a telegram from a mill as a part of negotiations for a sale of flour or feed does not contain technical or code language, expert testimony is not admissible to show how millers would understand the message. The court said:

"Counsel for defendant insists that the court committed reversible error in refusing to permit several of its witnesses to testify as to the meaning of the telegram. The court did permit the officers of the defendant company, or the plaintiffs, to testify as to what they understood the telegram to mean, but refused to permit so-called expert witnesses, called by the defendant, to testify as to what they understood its meaning was. These so-called expert witnesses were experienced mill men, but there is no showing that the telegram contained any language on the disputed point that had any particular trade meaning. The message was not written in any code. On the other hand, the words employed were those in ordinary use in the English language.

"In offering this testimony, counsel for defendant said: 'We are trying to find out what those messages mean, in the light of the language as it would be understood by those who are engaged in that line of business. It does not have to be a code message, in order to require that sort of testimony.'

"The witnesses did not purport to be experts in the use and meaning of words, and did not qualify as such. Moreover, the essential question was not how other mill men would interpret the language of the telegram, but in what sense the promisor believed, at the time of making the promise, that the promisee understood it. . . . It is not contended that the language was technical, so the plaintiffs were not bound to give it the interpreta-

tion that a mill man would have given it. In our opinion, the nature of the case was such that it did not call for or require expert testimony to explain the meaning of the words used in the telegram."

SECTION 72. PURCHASE OF MACHINERY

A case passed upon by the Kentucky court of appeals involved a contract to sell a gasoline engine and grist mill machinery. The written agreement warranted that the engine would develop specific horsepower, that all materials and workmanship were of the best kind, that all parts were properly proportioned for strength and rigidity, and that repairs rendered necessary by any inherent defect would be made for one year without charge. The contract also provided that there was no verbal understanding modifying the written terms.

After the machinery had been installed, suit brought by the seller to recover a balance due on the purchase price was resisted on the ground that the machinery did not come up to the representations under which it was bought, and the buyers attempted to show that there was a contemporaneous oral contract that the engine would have power, with a consumption of one half gallon of gasoline per hour, to run the grist mill, and that the grist mill would have a stated capacity in producing meal and other products.

The court of appeals held, however, that the buyers were not entitled to rely upon verbal representations made at the time of the sale, but not incorporated in the written agreement. In other words, the scope of the seller's warranty concerning the condition of the machinery was limited by the written contract which purported to cover the entire agreement.

The court declared that the buyers should have seen that all representations intended to be relied upon were embodied in the written contract. Fairbanks, Morse & Co. vs. Manning & Combs, 175 S.W. 1000.

* *

Questions concerning warranties of mill machinery were involved in a decision handed down by the Minnesota supreme court some years ago (66 Minn. 156).

Plaintiff milling company unsuccessfully sued defendant manufacturing company for damages for claimed breach of a warranty covering an engine, boiler and smokestack bought for use at the mill's power plant.

The first point decided by the supreme court was that, since the evidence showed that the contract of sale was evidenced by a written agreement describing the engine and boiler to be installed, but saying nothing concerning their capacity, the milling company was not entitled to prove a concurrent verbal agreement that the machinery would prove to be capable of operating the mill at full capacity, and it was held that there was no implied warranty to that effect. The salient parts of the opinion are as follows:

"All the authorities are substantially agreed that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto; but the point upon which the courts have sometimes differed is as to how the incompleteness of the written contract may be made to appear.

"Some cases seem to go to the length of holding that this may be done by going outside of the writing, and proving that there was a stipulation entered into but not contained in it, and hence that only part of the contract was put in writing. If any such doctrine is to obtain, there would be very little left of the rule against varying written contracts by parol [oral proof]. Such is not the law. Other cases seem to go almost to the other extreme, by holding that the incompleteness of the writing must appear on the face of the document from mere inspection, but to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument.

"If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed, —which evidence is always admissible to put the court in the position of the parties.—shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there.

"In short, the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but, in determining whether it is

thus complete, it is to be construed, as in any other case, according to its subject matter, and the circumstances under which and the purposes for which it was executed. . . .

"Applying the rules which we have laid down, parol evidence to prove a warranty, which was part of the prior or contemporaneous agreement, and about which the written contract was silent, was clearly admissible. The written contract is of the most formal and complete character, specifying with minute detail the particular make, name, size, and power of the engine and boiler and appurtenances to be furnished, and how and when they were to be set up.

"The plaintiff having thus contracted for machinery of a particular make, size, and power, the mere fact that it was purchased for the purpose of operating this mill, and that defendant knew this, would not be a circumstance that would of itself justify the court in construing the writing as an incomplete expression of the contract of the parties. Defendant having furnished the specific machinery, both in make, size, and power, which the parties contracted for, there was no implied warranty that it would furnish power enough to operate plaintiff's mill."

* *

Rights under a contract for the installation of appliances in a mill power plant were involved in the case of De Merritt vs. Forbes Milling Co., 216 Pac. 1086, lately before the Kansas supreme court.

There being a complete written contract covering the sale, the mill was not entitled to rely upon verbal statements of the salesman, guaranteeing the efficiency of the appliances.

SECTION 73. SALE OF CORPORATE SHARES

The rule that the terms of a written contract cannot be contradicted by either party, except upon showing that through fraud or mistake the writing does not express the true agreement, was applied by the Kansas supreme court in Graham County Mill & Elevator Co. vs. Saunders, 152 Pac. 622.

By a written contract between the parties, defendant was employed to manage plaintiff's mill and agree to subscribe for "one thousand dollars in the stock of said mill company." A note was given for the price of the stock subscribed for, and when sued on this note defendant was permitted by the trial judge to testify that there was a verbal agreement that he was to take the shares from an additional stock issue to be made by the mill company, and he claimed that there had been no additional issue.

The supreme court reversed the trial court's action, holding that it was error to admit verbal testimony tending to contradict the written contract by showing an agreement that defendant was to take part of a proposed issue of new stock; the written contract clearly contemplating an issue of existing stock.

CHAPTER VI

EFFECT OF TRADE CUSTOMS AND USAGES*

SECTION 74. IN GENERAL

"CUSTOM is not a small thing." This statement, attributed to Plato, applies with important force to everyday business transactions in the milling world, as is evidenced by a long list of court decisions.

Subject to the qualifications noted below, established trade customs are made by the law as much a part of business contracts as the express terms of those agreements. But a trade custom or usage is not binding if it be unreasonable, or at variance with the specific terms of a contract, or violative of a statute or public policy, or if actual or constructive knowledge of its existence cannot be brought home to the person against whom it is asserted. The principal function of a trade custom is to explain ambiguous contract clauses or to supply important terms of an agreement on which the contract itself is silent.

* *

A mill which received wheat under agreement to pay for it by delivering to the seller on demand a quantity of flour of equal value was denied the right to show, on burning of the mill before the flour was delivered, a claimed custom of the mill to receive wheat only at the depositor's risk of loss. In this case—Martin vs. Ashland Mill Co., 49 Mo. App. 23—the Kansas City court of appeals said:

"There is not the semblance of evidence of any custom among millers generally, or of the defendant mill, that the flour which the miller was to give in exchange for the wheat received was subject to the risk of the person entitled thereto. The flour due the depositor of the wheat was not within the custom proved. 'Customs and usages must be construed strictly,—nay, very strictly,—even stricter than any act of Parliament that alters the common law.' Lawson on Usages and Customs.

"But there is another objection, . . . which is that, if the transaction between the plaintiff and defendant was an exchange or transmutation of commodities, then, as we have seen, the title of the wheat passed to the defendant, and no custom could have the effect of so qualifying or limiting the defendant's ownership of it that the title would not be in it if destroyed by fire; but if not, it would be. This would vary the general and well-settled rule of law, which custom cannot accomplish.

"And, besides this, it is apparent that such a custom would be unreasonable, and would lead to the most absurd consequences, and for that reason it cannot be enforced in a court of justice, even if proved. Parties cannot be held to have entered into a contract with reference to it, especially when unknown to the party seeking to avoid it.

"It is a further rule that a person entering into a contract is not bound by the usage of a particular business, unless it is so general as to furnish a presumption of knowledge, or it is proved that he was acquainted with it."

* *

In the case of Russell-Miller Milling Co. vs. Bastasch, 70 Or. 475, plaintiff sued in the Oregon courts for breach of a contract by defendants to buy flour. On the trial the mill was permitted by the trial judge to show that it was its custom, on receiving orders for flour for future delivery, to set aside a sufficient quantity of wheat from which to manufacture the flour ordered and carry it upon its books at the then prevailing price of wheat, in what was called a hedge account, crediting it with flour as the same was delivered, until the order was filled.

With this as a basis, the trial court allowed the plaintiff mill to show that the wheat thus set aside had depreciated in market value from the time the order was given until the breach of the agreement by the defendant, all for the purpose of affecting the amount of damages to be recovered, by adding the amount of decline in the price of wheat to the difference between the contract price of the flour and the market price of the same at the time of the breach.

*See, also, section 71.

The supreme court reversed the trial court's rulings and judgment, saying: "A custom cannot be received to affect the express terms of a contract. It can be used only as an aid to its interpretation, and not then unless the custom was known to both parties at the time the contract was made or was of such universal prevalence as to raise the presumption that both parties were aware of its existence. The custom was not pleaded, the parties are not shown to have contracted with reference to it, and no knowledge of it is imputed to the defendant in either pleadings or evidence. Hence its consideration as a factor in the trial was erroneous."

* *

A custom of charging contract buyers for flour storage was called in question in Maddox vs. Washburn-Crosby Milling Co., 135 Ga. 539, decided by the Georgia supreme court. In this suit the mill claimed damages for breach of a contract to buy flour, and sought to recover storage charges on the flour held for the buyer, in addition to the excess of the contract price of the flour at the time and place agreed upon for delivery above the market value at that time and place. The claim for storage charges was based upon an asserted custom, but was disallowed by the court for reasons stated as follows:

"If the basis of the recovery sought was an amount chargeable against the purchaser under a custom of the trade so universal as to enter into the contract and amount to a promise by a purchaser of flour to pay storage in addition to purchase price, the allegations were insufficient. They did not show that it was the universal custom of the trade that the purchaser should pay storage charges until he should give shipping orders.

"It was alleged that 'said defendant became liable for said carrying charge.' This was not such an allegation of a custom for him to pay the charge as to impliedly enter into the contract, and render him liable by virtue thereof, but the allegations were sufficient to set up a usual and necessary charge incurred by one of the parties in carrying out the contract, and known to be proper by both."

A local trade custom among flour commission merchants is not binding upon a consigning miller whose place of business is in other territory, and who is not shown to have known such custom. This point was decided by the Indiana supreme court in the case of Wallace vs. Morgan, 23 Ind. 399.

Plaintiffs shipped a quantity of flour from their mill at Trafalgar, Ind., to defendant, a commission merchant in Indianapolis, for sale there. Defendant, in turn, shipped the flour to a commission firm in New York. This firm sold the shipment, but the proceeds were lost to the mill, through the New York firm's insolvency.

In suing defendant, the millers took the position that the defendant misappropriated the flour by sending it to New York, instead of selling it in the Indianapolis market, as intended by the mill. On the other hand, the defendant broker relied upon a claimed custom among Indianapolis brokers of sending flour not suited to the local trade to New York, in the absence of special instructions from the mill.

The Indiana supreme court decided the case in the mill's favor, because the asserted custom did not appear to be either definite or well established. The court said:

"The alleged custom, it seems to us, is void for uncertainty; because, by its terms, as stated in the pleading, it is impossible to determine what grade of flour is, and what is not, subject to its provisions, and condemned to be shipped to New York. It would seem to leave each factor to determine from his own judgment, if not his own peculiar tastes, to what grades the custom applies. If each day is to determine its application, making it apply to one grade today and to another tomorrow,—if at one period it applies to all grades, and at another to none,—it is not only wholly uncertain, but is misnamed 'a commercial usage.'"

SECTION 75. UNREASONABLE CUSTOMS

In a case decided by the Virginia court of appeals in 1860,—Delaphane vs. Crenshaw & Fisher, 15 Gratt. 457,—plaintiffs, a firm of millers, sued a public flour inspector to recover the value of samples of flour taken by defendant for the purpose of inspection, and retained by him. The defense unsuccessfully relied on an immemorial usage among inspectors to retain such "draft" flour as compensation in addition to their lawful fees. In overruling this defense the court said:

"It would be unjust and unreasonable that a public officer, having a specified duty to perform in relation to the property of others for a prescribed fee, should by the discharge of that duty acquire a right not only to the fee allowed, but also to a part of the property itself. It thus makes him the sole judge of the compensation he shall receive. . . . The manufacturer who designs his flour for shipment has no choice in regard to the

inspection. . . . He pays the fee because required by law to do so, but in no respect does he stand in the relation of a contracting party to the inspector.

"If it be conceded that to 'inspect' means more than to make mere ocular examination, and that the inspector is authorized to bake a portion of the flour into bread, or subject it to a chemical test, still that would not authorize him to take away any more than is necessary for that purpose, nor even that for his own use and benefit. Taking away the draft flour is no part of the inspection, for that may be made as well whether the inspector appropriates it to himself, or restores it to the owner."

In passing, it is interesting to note from the decision in the last-cited case that the enterprising inspector accumulated 60,000 lbs flour on inspections for one mill alone in the brief space of 17 months.

SECTION 76. KNOWLEDGE OF CUSTOM

In Collignon & Co. vs. Hammond Milling Co., 68 Wash. 626, a question was raised before the Washington supreme court as to whether, under a contract for sale of a cargo of wheat to be shipped from Seattle, "c.i.f. Manzanillo," the shipment being made under an order bill of lading, the seller was entitled to prove a custom prevailing on the Pacific Coast whereby the purchaser in such cases bore the risk of damage to the cargo at sea, as between buyer and seller.

The court said that if the presumption that the seller reserved title by taking the bill of lading to his own order, placing liability for loss on him, could be rebutted by proof of a contrary intention, then it would seem that evidence of the custom was admissible to aid in ascertaining the intention of the parties.

But the court found it unnecessary to definitely pass on this point, because the evidence failed to establish such a custom as would be binding upon the buyers, in that there was no proof that the custom ever prevailed at the port of Manzanillo, or that the buyers had any knowledge of its existence anywhere, or that the custom was so universal as to charge the buyers with knowledge of it.

* *

In F. W. Stock & Sons vs. Snell, 116 N.E. 263, a suit to recover on account of defendant's refusal to carry out a flour purchase contract, defendant justified refusal to honor two drafts accompanying bills of lading covering shipments, on the ground that the drafts were for excessive amounts. The excess apparently represented charges of the seller for carrying the flour beyond dates when defendant was bound by his contract to order it out.

There was no express agreement for imposition of carrying charges, but the plaintiff relied upon an asserted general custom in the flour trade authorizing them. This point was ruled against the plaintiff by the Massachusetts supreme judicial court, on the ground that the jury impliedly found that there was no such existing custom binding upon the parties, within the following declaration of law made by the trial judge to the jury:

"If there was any such understanding or usage that was known to the parties, and it was contemplated between them that such a carrying charge should be made, then of course the defendant would be liable for such carrying charge, and there would not be any justification on his part to repudiate the contract because carrying charges were included in the draft that he was required to accept before he could receive his fifth carload."

* *

Rules of a business exchange, or customs among its members in dealing with each other, are not binding upon a nonmember who has not had frequent dealings with a member asserting such rule or custom, held the Nebraska supreme court in the case of Vincent Grain Co. vs. English, 172 N.W. 686.

Plaintiff, in suing to recover damages for failure on defendant's part to deliver a quantity of wheat, relied on the right to extend time for delivery under rules of the Omaha Grain Exchange, of which plaintiff is a member. But, although the supreme court recognizes defendant's liability for damages based on market value of the wheat at the time delivery was due under the contract, it refused to assess damages on the basis of higher market values prevailing when plaintiff later bought wheat elsewhere, under its claim of right to extend the time for delivery. Speaking of the exchange rules, the court said:

"The evidence fails to support the contention of plaintiff that such a custom was known to the defendant. There was no proof that he had ever dealt with the Omaha Grain Exchange, or was familiar with its rules, or had ever had more than one or two isolated transactions of this nature. Apparently he was dealing with plaintiff without reference to the operation of the grain exchange. He could not therefore be bound by its rules, or by a custom among grain brokers not known to him or brought to his attention."

EXPLANATION OF CONTRACT OR NEGOTIATIONS

SECTION 77. IN GENERAL

"Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary."

This statement of law laid down by the United States Supreme Court was followed by the Oklahoma supreme court in the case of Elk City Flour Mills Co. vs. Cherokee Grain Co., 188 Pac. 1067. The decision of the Oklahoma court affirmed judgment in favor of plaintiff for damages for defendant's breach of a contract made Oct. 13, 1916, to sell and deliver a quantity of wheat.

The pivotal question in the litigation was whether written confirmations following a long-distance telephone conversation constituted a contract between the parties; it being contended by the defendant that there was such material difference in the confirmations as to prevent a meeting of the minds of the parties on a definite contract.

Counsel for defendant based his argument solely on the legal proposition that the offer of a seller must be accepted by the purchaser unconditionally and without variance—that to effect a contract there must be mutual assent of the parties to the same thing, in the same sense. Overruling this contention, the supreme court says:

"While the wording of the printed matter in the confirmations is not exactly the same, it clearly appears from both confirmations that the Cherokee Grain Co. sold the plaintiff 5,000 bus No. 2 old wheat at $1.61 per bu, basis at the track, Galveston, to be shipped within 10 days, and that the plaintiff bought from the defendant 5,000 bus old wheat, grade No. 2, price $1.61, basis delivered Galveston, time of shipment 10 days. But if it be assumed, for the purposes of this case, that there was some dissimilarity in the confirmations, defendant is not entitled to a reversal of the judgment.

"It is shown by the evidence that both plaintiff and defendant were members of the Oklahoma Grain Dealers' Association, and were familiar with and bound by the rules of the association. It was testified to by a number of witnesses, including some officers of the association, that where a sale of grain is made over the telephone and confirmation letters are sent by both purchaser and seller on the same date of the sale, and where the confirmations are identical as to the quantity, grade, kind of grain, price, destination, weight, and time of shipment, but where there is a dissimilarity in the printed matter at the bottom of the contracts, and where it is further shown that no objection was made by either party, under the rules of the association the purchaser's confirmation has precedence, and controls."

It is held that, under these circumstances, the case comes within the following rules laid down by the highest court of the land:

"Custom or usage may properly be received to ascertain and explain the meaning and intention of the parties to a contract, whether written or oral, the meaning of which would not be ascertained without the aid of such extrinsic evidence, where the parties knew of the existence of the custom or usage, and contracted in reference to it."

* *

An opinion of the Oregon supreme court laid down some general rules governing the legal effect of trade customs upon contracts of sale, and then applied them to a question as to whether the buyer or the seller of a less-than-carload lot of potatoes had the burden of supplying the car necessary for the shipment.

In this case—Hurst vs. Larson et al., 184 Pac. 258—plaintiff sued for damages for nondelivery of 300 sacks of potatoes, which defendants had contracted to sell f.o.b. the shipping point. The defense successfully made was that, under an established custom of the trade in the particular locality, plaintiff was bound to furnish a car for this less-than-carload quantity, but failed to do so.

"It will be observed," says the supreme court, "that the contract requires the potatoes to be delivered by the defendant 'f.o.b. Liberal and shipped to the said W. S. Hurst & Co. at Portland.' It is silent about the means of carriage on board which the produce was to be placed, or who was to furnish the same.

"Under our statute [and the law of Oregon does not seem to differ from that of other states on this point], evidence may be given of usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation.

"It is plain, therefore, that no new terms or stipulations can be added to a contract by proof of usage. Neither can the plain, explicit terms of a written

agreement be contradicted by such testimony. It is otherwise where it is not plain what the true character of the instrument is, or where the stipulation is silent upon something necessary to the complete performance thereof."

The opinion refers to a decision of the New Mexico supreme court on the question of obligation to furnish cars. That holding was to the effect that, where an individual has agreed to perform an act, whatever is necessary to such performance is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act; hence, under a contract to sell f.o.b. cars, a seller must procure the cars and load them.

This conclusion is distinguished by the Oregon supreme court from its decision by pointing out that in the New Mexico case there was no proof of any custom one way or the other as to who should procure the cars. Therefore, the court in the latter case was left free to infer from the provision for delivery f.o.b. that the seller understood that he must furnish the cars. The nub of the Oregon decision is that such a provision does not so far expressly impose obligation on the seller to provide the cars as to exclude proof of a general custom under which the parties may be presumed to have understood that the buyer would secure them.

See, also, section 167.

* *

In E. L. Welch Co. vs. Lahart Elevator Co., 122 Minn. 432, the Minnesota supreme court decided that, where there was evidence tending to show that a seller of wheat had waived the right to reclaim it on account of insolvency of the buyer, although the wheat had not yet been weighed to determine the amount due as the price, it was proper to consider a custom in the Chamber of Commerce of reselling grain in such cases over and over again before weighing or payment; the principal issue in the case being whether the seller had intended to part with title. The court said:

"Of course, if by the contract the sale was plainly for cash, usage could not make it a sale on credit. Custom will not be allowed to vary or contradict the plainly expressed terms of a contract, or to imply from these terms an obligation different from what the law would imply, or to imply an obligation in the absence of any contract on the subject.

"But usage may be admissible to explain what is doubtful. Certain business customs and usages may become so well established and understood that men, in making their contracts, assume them and take them for granted, and contract with reference to them. Accordingly, the custom of this business was proper to be considered in determining what the parties intended by their transaction."

* *

In the case of Saginaw Milling Co. vs. Schram, 152 N.W. 945, the Michigan supreme court recognized the rule of law that where a written contract of sale is ambiguous or silent on an essential point either party may show a trade custom making the agreement definite and certain. The court did not relax the principle that a written contract cannot be contradicted by oral agreements made at the time or by trade customs, but upheld the right of either party to "explain doubtful provisions of the contract, and even to supplement omitted but tacitly implied incidents to those actually expressed."

The contract in this case was for a sale of baled hay to the milling company by defendant, an individual. Although it was signed by both parties, it contained the clause, "We to pay for baling." Since the agreement was ambiguous on its face as to who should pay the baling cost, the court decided that it was open to the seller to show a custom requiring the milling company to furnish the baler and pay the cost of baling.

* *

According to the holding of the Oklahoma supreme court in the case of Lonsdale Grain Co. vs. Johnston, 189 Pac. 359, an action to recover damages for nondelivery of wheat, where an agreement for a sale of grain is silent as to terms, place of delivery, etc., those elements of the mutual understanding being supplied by referring to former transactions between the same parties, the particular agreement is governed by rules and customs of a state grain dealers' association which it was understood applied to such former transactions.

* *

An English case holds that a custom that when corn is sold by sample, and the buyer does not on the day of delivery examine the bulk and reject it, he cannot afterward reject it or refuse to pay the entire price, is binding. Sanders vs. Jameson, 61 E. C. L. 557.

SECTION 78. MEANING OF TRADE TERMS

Words used in a commercial contract may be shown to have a technical or trade meaning, if such meaning is generally known to and recognized by the trade. Such proof is not to be regarded as vary-

ing or contradicting the terms of the written contract, but as merely explaining them.

"And the foregoing is the rule even where the words might be given their customary meaning and still leave the contract intelligible, particularly when all parties to the contract are connected with the trade, for every person connected with the trade is presumed to know the technical meaning of trade words or terms. . . .

"One dealing in a business or trade must be conclusively presumed to know and understand the language of such trade or business, when it is shown that such language is generally used and known in the trade, and his ignorance will not protect him, unless knowledge of such ignorance be brought home to the party with whom he is dealing." (Washington supreme court in Gile vs. Tsutakawa, 187 Pac. 323.)

In Gateway Milling Co. vs. Walker, 92 S.E. 826, the Virginia supreme court of appeals decided that under a contract to sell "winter wheat bran" it was proper to permit the selling mill to prove a custom permitting the presence of screenings. This case is more fully referred to in the chapter relating to quality of goods.

A grain exporter is chargeable with knowledge of an existing custom throughout the grain trade under which a shipment of "cargo" grain cannot vary more than 10 per cent either way from the quantity fixed by a contract of sale; and that if there is a greater variance the purchaser is entitled to refuse to accept delivery. This was decided by the Missouri supreme court in the case of Heyworth vs. Miller Grain & Elevator Co., 174 Mo. 171.

On an issue as to what constitutes a "carload" under a particular contract, the controversy will be solved by a well-established custom among shippers and railroads, according to a decision of the Iowa supreme court in the case of Good vs. Chicago, Rock Island & Pacific Railway Co., 60 N.W. 631.

Nothing being said in a contract for a sale of barley as to whether it was to be delivered in bulk or in sacks, the buyer is entitled to show a custom in the local grain trade requiring delivery in sacks, under the holding of the United States circuit court for the district of California, in the case of United States vs. Robinson, Fed. Case No. 16,177.

SECTION 79. SHOWING NECESSITY FOR FORMAL CONTRACT

A trade custom may be invoked to show that negotiations toward a sale were understood as not resulting in a contract until execution of a formal agreement, despite the fact that, through the intervention of a broker, all terms may have been agreed upon. This important holding was made by the Illinois supreme court in the case of El Reno Wholesale Grocery Co. vs. Stocking, 127 N.E. 642, wherein it was decided that such negotiations fell short of forming a binding contract.

In the light of a proved custom, under which a contract was not to be regarded as closed until execution of a formal instrument, the court said:

"The general rule is that a custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of such custom or usage is inadmissible, for, while usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. . . . But, if the terms of the contract are in any way uncertain, then such custom or usage is proper to be admitted in order to explain such terms, . . . and it is presumed that such contract was made in the light of such custom or usage. . . .

"Some nice distinctions have been made in different jurisdictions as to whether or not the contract had actually been entered into before the formal contract was drawn and executed; but it is apparent . . . that the question resolves itself into a determination of the intention of the parties as to whether or not the preliminary negotiations should be considered a contract, or whether the contract should not be considered binding until formal agreement had been drawn and executed.

"'A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is: Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound? . . .'"

The court referred to a Kansas case where the parties negotiated by telephone for a sale of grain, the evidence showing the existence of a custom governing such sales, requiring the purchaser to send to the seller a written statement of the terms and conditions of the sale, and if such statement, when received by the

seller, was not found to be according to his understanding, the seller must object.

The purchaser sent a statement following the telephone conversation, and no objection was made. The trial court heard evidence of the contract as made by telephone, and entered judgment accordingly, which was reversed by the supreme court of Kansas on the ground that the written memorandum of the sale, under the custom proved to have been in existence, was controlling, and that the telephone conversation inconsistent therewith was superseded.

The Illinois court found that a conclusion, that it was not mutually understood that the negotiations preceding the execution of a formal contract should constitute a binding agreement, was supported by the circumstance that those negotiations were conducted on the part of the seller by a broker not empowered to make a final contract.

The court intimated that the claimed contract was prevented from taking on binding effect through another circumstance: The proposed buyer's offer provided for delivery in the first half of September, while the seller's acceptance called for delivery in September, giving the latter more time in which to perform than the buyer's offer contemplated. On this phase of the case the court said:

"In order to have the acceptance of an offer binding, such acceptance must conform exactly to the offer, and if it contains new conditions there is no contract."

SECTION 80. PASSING OF TITLE

When the express terms of an agreement are not thereby contradicted, title to flour sold may be shown by an established custom to have passed on written orders for delivery, without change in actual possession, according to an early decision of the Virginia court of appeals in Pleasants vs. Pendleton, 18 Am. Dec. 726, which still seems to be the law. In this case, transfer of title was important on an issue as to who must bear the loss of flour through fire while yet physically undelivered.

See, also, section 247.

SECTION 81. PLACE FOR DELIVERING GOODS

The grain trade custom prevailing in Texas and Oklahoma, allowing a buyer of grain for delivery at a specified point in Texas to order delivery at any other point in the state, subject to the buyer's liability for any excess in freight charges above the rate to the original destination, and subject to any clause in the contract contrary to such custom, was recognized by the Oklahoma supreme court in the case of Howe Grain & Mercantile Co. vs. Guthrie Mill & Elevator Co., 157 Pac. 290. In this suit the court affirmed judgment in favor of plaintiff for recovery of money paid as the price of corn before arrival of the shipment, when the corn was found to be in a hot, bad and moldy condition.

Finding that, under correspondence of the parties and rules of the grain association, which were well known to them, there was a clear right in the plaintiff to order delivery at Houston, instead of Howe, Texas, the place of delivery originally agreed upon, the court concluded that if the defendant failed to deliver to plaintiff at Houston shelled corn in the condition expressed in the contract, plaintiff was justified in refusing to accept the same, and after due notice to defendant seller of the damaged condition of the corn and its refusal to handle the same on its own account, was authorized to handle the car of damaged corn to the best advantage on defendant's account.

See, also, Chapter XIV and section 201.

SECTION 82. TIME FOR DELIVERING GOODS

A suit to recover damages for nondelivery of bran gave the Minnesota supreme court occasion for clarifying the law on the effect of a trade custom requiring notice before a party to a sales contract may be held to be in default. (172 N.W. 891.)

Plaintiffs, constituting the A. S. McDonald Commission Co., Boston, sued the Union Hay Co., Minneapolis, for damages for nondelivery of 240 tons of bran bargained for in 1916-17, for delivery in Boston. The district court in Minneapolis awarded judgment in plaintiffs' favor, but the supreme court has reversed the decision, holding that defendant had not been put in default, for want of notice to it of plaintiffs' intention to declare a breach.

It was undisputed at the trial that there was a custom in the feed trade, prevailing both in Minneapolis and Boston, that a contract like that involved in this case was not to be regarded as broken until after 24 hours' written notice had been served requiring performance. Plaintiffs —the buyers—gave no such notice and attempted to excuse that omission on the ground that the custom could not apply to a case where a specific time for delivery was fixed in the contract. It was contended that, under such a contract, failure to deliver within an agreed time automatically works a breach of the contract.

Disposing of this contention, the su-

preme court recognized the legal rule that "where a general custom or usage prevails in the conduct of a trade or business it enters into and becomes a part of a contract made in that business, unless there is repugnancy between the custom and the terms of the contract, in which case the latter control."

It was held that, since the modified agreement in this case was that the bran should be shipped by the end of a given month, after there had been considerable delay, there was no such definite time for delivery fixed as made it repugnant to the contract to apply the custom referred to. And this conclusion was fortified by a consideration of the fact that, after lapse of the month in which shipment was to be made, plaintiffs, as buyers, still treated the contract as subsisting.

The court intimated that it is the law that "where a time limit is fixed for the performance of a contract, a request made upon the party in default to perform, after expiration of the time, waives the breach, and the contract thereafter becomes a subsisting contract with the time limit eliminated, giving the one in default a reasonable time after the request within which to perform. . . . It may be doubted whether the rule applies where one in default makes no effort whatever, after the request is made, to perform, nor promises so to do."

Finding that, after the time for delivery passed, plaintiffs, the buyers, made repeated requests for delivery, and that defendant made promises and, apparently, efforts to perform, it was held that there had been such waiver on plaintiffs' part as to the time for delivery as made the trade custom above mentioned applicable. Hence, because the notice required by that custom was not given, defendant was never legally in default as to delivery.

* *

It has been ruled that a contract to sell goods "to arrive by the 15th of November" was not open to proof of a custom that it meant deliverable on or before Nov. 15 (23 Ohio State Reports, 632). And in another case it was declared that a contract for delivery of goods in certain quantities monthly could not be enlarged by proof of customs and usages indicated in other transactions.

A decision directly in point was handed down by the Indiana appellate court in the case of Valdosta Grocery vs. Cadick Milling Co. (126 N. E. 240). The contract there involved called for shipment of flour, "Nov. and Dec.," with certain provisions for extending the shipping period. The court said:

"It is obvious from reading the contract that it was incumbent upon appellee [the buyer] to order out the flour covered thereby with shipping specifications and instructions within the life of the contract, but until the contract had expired by limitation, or had been terminated according to its provisions, it was optional with the appellee when this should be done. This was true, not because of any custom, but by a fair implication arising from the provisions of the contract itself. It follows that the general custom alleged by appellant [the seller] could not be accepted as controlling in that regard."

* *

The contract involved in Napier Iron Works vs. Caldwell & Drake Iron Works (110 N. E. 714) provided for "Shipment: About equally during first half 1910." The Indiana appellate court said: "The contract in suit is neither ambiguous nor uncertain. The language used by the parties is sufficiently clear to show the time and manner of the several shipments; consequently, trade usages or customs are not to be considered in its construction."

See, also, Chapter XIII.

SECTION 83. LIABILITY FOR FREIGHT CHARGES

In Carsten-Williams Co. vs. Marshall Oil Co., 173 N.W. 903, the only difference between the parties was as to whether the buyer of a bill of goods was entitled to deduct from the contract price an amount covering freight charges. The contract being blank on this question, the buyer relied upon a claimed custom of the particular trade (rubber tires) in the particular territory. under which the buyer is entitled to reimbursement against freight charges when there has been no mutual understanding to the contrary.

Supporting the buyer's right to rely upon such custom, on proving its existence (and the court held that the testimony of one uncontradicted witness is enough to establish a custom), the Iowa supreme court said:

"A party dealing in a trade market is presumed to know all customs of that market bearing upon the transaction in question. . . . Parties who are engaged in a particular trade or business or accustomed to deal with those engaged in a particular business may be presumed to have knowledge of the uniform course of that business, and one party may be bound thereby though ignorant, unless it appear that the other party knew that he was ignorant."

On the other hand, the seller argued that the question was controlled by the general rule of law that, where nothing is said as to where delivery shall be made, delivery to the carrying railway company, or other common carrier, for transportation to the buyer is a constructive delivery to the buyer, and especially so when the buyer has designated the route over which he desires shipment to be made.

The court recognized the soundness of this rule, but held that "while for some purposes delivery to the designated carrier would become delivery to the buyer, this is not so with reference to which party is to pay freight. On that question, a direction to deliver to a certain carrier for shipment is not conclusive against the buyer."

In other words, a mutual intention that delivery should be made to the buyer at the place of shipping, merely inferred from failure to require the seller to deliver at the destination, will not outweigh a proved trade custom under which the buyer is entitled to be reimbursed for freight paid, where nothing has been said as to who would pay such charges.

It seems, however, that the Iowa supreme court's decision was quite consistent with the view that, where there is no agreement as to where the goods are to be delivered, or who is to pay the freight, and there is no pertinent custom controlling the transaction, a buyer is not entitled to reimbursement for freight charges. In such cases, the liability for freight charges may well be said to follow the presumed intention that delivery to the carrier should operate as constructive delivery to the buyer.

CONTRADICTION OF CONTRACT TERMS

SECTION 84. IN GENERAL

Custom in the flour or other trade will not be given effect to vary the legal force of a written agreement, being applied only when application is consistent with the legal import and express terms of the agreement.

This point was well illustrated by a decision of the Texas commission of appeals, approved by the supreme court of the state, in the case of Alexander vs. Heidenheimer, 221 S.W. 942.

Plaintiff was awarded recovery of the price of goods sold f.o.b. point of origin, although they were found to be damaged when inspected on arrival at the destination, and were rejected by the buyer on that account. Defendant relied upon a custom under which it was asserted that a buyer is entitled to inspect goods at the destination and reject them if they are damaged, regardless of whether they were shipped direct to the buyer and whether they were sold f.o.b. destination or not.

The commission of appeals laid down these rules, which fairly reflect the law as applied throughout the country:

"It is an established rule of law that when property is delivered to a carrier by the vendor, as directed by the vendee, or where the contract is silent as to the place of delivery, delivery to the carrier operates as a delivery to the vendee and passes title to him; and, if the property at the time of such delivery is in the condition as to quality which the vendee is entitled to receive, this will constitute a performance of the agreement of sale; and any loss of the property thereafter will fall, not upon the vendor, but upon the vendee.

"As the property was in good condition when delivered to the carrier at the point of origin, and in a damaged condition upon inspection at destination, the controversy turns upon whether title to the goods passed at the point of origin or at destination.

"This, of course, involves a construction of the contract, which necessitates an inquiry into the acts and negotiations of the parties, as disclosed by the contract, to determine whether there was an intention on the part of the seller to relinquish all further claim as owner upon delivery to the carrier, and an intention on the part of the buyer to assume such control, with all liabilities. It becomes important, in this connection, to determine whether the evidence of the alleged custom is admissible in arriving at the intention of the parties. . . .

"It is a well-recognized rule that evidence of customs and usages may be admitted to explain or aid in the interpretation of a contract where the contract is ambiguous, unprecise, incomplete, or inconsistent; but evidence of custom or usage is inadmissible to contradict, restrict, or enlarge what requires no explanation."

After referring to the facts that the sale was f.o.b. point of origin, that the buyer designated the routing, that the bill of lading named him as consignee, and that the goods were in good condi-

tion and properly packed when shipped, the court concludes:

"The legal import of the contract is to pass the title by operation of law to the defendant at the point of origin. The effect of the custom pleaded by the buyer was to change the rights and liabilities of the parties as thus fixed by law. This cannot be done. The legal import of a contract, as distinguished from its express terms, cannot be varied by usage. That is, where judicial construction has affixed to a contract a certain meaning and has defined the rights and liabilities thereunder, this legal effect or import cannot be varied by proof of a usage giving to the contract a different meaning."

See, also, section 155.

* *

In the case of El Reno Mill & Elevator Co. vs. Medlock Grocery Co., 224 Pac. 177, plaintiff sued for damages for breach of a contract to buy six cars of flour. Defendant pleaded and introduced evidence tending to prove, and the trial court instructed conformably therewith, that there was a general custom of trade well known to plaintiff that the order for flour was taken under a guaranteed price; i.e., if flour declined, defendant should pay for the flour at the market price at the time of delivery.

Holding that the trial court erred in permitting proof of the alleged custom, the supreme court said:

"It has been said of old that usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain. . . . Customs may not be resorted to, to interpret a contract, unless there is ambiguity or uncertainty upon the face of the instrument arising out of the terms used by the parties. . . . See Oelricks et al. vs. Ford, 23 How. 49, 16 L. Ed. 534, holding that, where there was a written contract to deliver certain quantities of flour at a certain price, proof of a usage to demand margins of the seller was inadmissible.

"The term 'price per bbl or cwt $13.20, basis 48's,' in so far as price is concerned, is not doubtful or ambiguous. Defendant does not contend that the price named does not refer to the barrel lot. Such contract, as to the price therein named, is not susceptible of construction. It carries its own import on its face. The price, $13.20, imports what it purports. Extrinsic aid or evidence of custom is not competent to modify it. A great volume of the business of the commercial world is carried on by transactions based on orders. These are often informal and cryptic, containing abbreviations and trade terms. As to all such, the usage and custom will be read into the contract as a part thereof.

"An illustration is found in the contract under consideration. By custom shown by the record, a barrel of flour, sold on a basis of 48-lb sacks, is four of such sacks. If the flour be in smaller packages, the price per barrel would perhaps be greater because of the extra cost of packing. This package differential is fixed by custom. The law cannot remake such orders for the parties. Such order is controlled by the same canons of construction as other and more formal contracts. Otherwise, the foundations of the commercial world might be imperiled and the door opened to repudiators of contracts. . . .

"In the instant case, if defendant can show by custom that the agreement to pay $13.20 per bbl for flour, in the absence of fraud or mistake, means to pay $10.40, then, by the same token, may not the obligations of all contracts be impaired and violated by thus superadding that which is repugnant to their plain terms? It was reversible error to permit defendant to introduce evidence of the alleged custom, and likewise error for the court to countenance the same in the instructions."

See, also, the decision of the same court in Bower Venus Grain Co. vs. Norman Milling & Grain Co., 207 Pac. 297.

* *

"If a contract is ambiguous, custom is admissible to explain the meaning of the contract, or technical terms or words peculiar to some art, calling or occupation. But custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible." McDowell vs. Bowles, Billings & Kessler Grain Co., 157 N.W. 173, decided by the Iowa supreme court.

* *

An express provision in a contract is not controlled by a trade custom at variance with that provision, although such a custom will be given effect where it may be fairly inferred that the parties contracted in the light of it, according to a decision of the Georgia supreme court in Cartersville Grocery Co. vs. Rowland, 86 S.E. 402.

* *

In the case of Cargill Commission Co. vs. Mowery, 161 Pac. 634, the Kansas supreme court refused to give effect to an asserted custom of the grain trade where-

by the letters of confirmation, and not the telegrams, should be treated as forming the contract, on the ground that, where telegraphic negotiations show on their face a complete contract of sale, this legal effect cannot be contradicted by trade usage.

"The very fact," says the opinion, "that, knowing the usages and exigencies of the grain business, the parties made and accepted the offer by wire, indicated an intention to act quickly and not a purpose to await the slow course of the mails to determine what, if anything, their telegraphic communications had meant."

One point was decided against plaintiff, however, on the question of damages for breach of a claimed contract to sell from "30,000 to 35,000 bus" of wheat. Plaintiff offered proof of a grain trade custom under which it was entitled, on defendant's breach of contract, to buy elsewhere either the minimum or the maximum amount of grain called for by the broken contract, and hold the defaulting seller for the excess of the cost above the contract price.

The court ruled against this point on the ground that a contract to sell "30,000 to 35,000 bus" so clearly gives the seller an option to refuse to deliver more than 30,000 bus that his liability cannot be extended beyond that quantity by applying a conflicting trade custom.

The decision recognized the validity of trade customs and usages to explain uncertainty or ambiguity in a contract, but not to contradict a plainly expressed agreement.

* *

In Walker Grain Co. vs. Denison Mill & Grain Co., the Texas court of civil appeals found that there existed in the Texas grain trade a custom under which a contract for sale of wheat under telephonic negotiations was to be regarded as binding, although it might be mutually understood that each party should make confirmation of the agreement in writing. Plaintiff unsuccessfully sought to show that custom precluded a valid contract, unless the written confirmations of the two parties should agree. (178 S.W. 555.)

* *

Under a written contract for the sale of 1,000 bus corn, the Georgia court of appeals decided, in Brunswig vs. East Point Milling Co., 74 S.E. 448, that the seller could not excuse tender of 1,071 bus under a claimed custom permitting a variance of from 50 to 100 bus under an order for 1,000 bus.

Where a contract by Winnipeg grain dealers, to sell wheat for delivery at Goderich, Ont., completely expressed the terms of sale, except that the price was to be determined by reference to the New York market, it was held by the Ontario court of appeal that the seller could not extend the buyer's obligation by showing a usage in the Winnipeg wheat market under which the buyer became bound to sell the seller a similar quantity of New York wheat. (Northern Elevator Co. vs. Lake Huron & Manitoba Milling Co., 13 Ont. L. R. 349.) In this case the court said:

"The alleged custom would, if established, clearly do more than merely add terms incidental to the performance of the written contract. It would, in effect, result in this, that what is stated as a sale is not in fact a sale at all, but an exchange of May Winnipeg wheat for July New York wheat, and payment of the difference, if any."

In an action by grain commission merchants to recover a balance claimed to be due from a grain and milling firm, on account of sales of wheat for future delivery made by plaintiffs for defendants, the commission merchants relied on a certain custom prevailing among Baltimore grain brokers. The United States Supreme Court refused to give effect to this custom, for the reasons stated in the following excerpt from the court's opinion in the case of Irwin vs. Williar:

"The custom proved, . . . disclosed that the brokers did not perform the original contracts of sale actually made, but delivered equal quantities of grain, or its market value, in fulfillment of contracts of purchase made by them for others, and which, by the process of mutual exchange authorized by this custom, had come into their hands for that purpose.

"This exchange and substitution, and payment of differences to effect it, working as it does a complete change in the nature of the seller's rights and obligations, cannot be made without his assent, and that assent can be implied only from knowledge of the custom which it claims authorizes it." (110 U.S. 499.)

* *

Holding that a written instrument in which defendant acknowledged that it had "received in store of C. R. Marks one load of corn, subject to storage. No. of bushels, 2,920," clearly showed a storage contract, the Iowa supreme court decided in Marks vs. Cass County Mill & Elevator Co., 43 Iowa, 146, that, on burning of the elevator in which the corn

was deposited, plaintiff was not entitled to show a custom under which the transaction would be treated as a sale to defendant, so as to place the liability for the loss on defendant elevator company.

The court said that a custom might be proved to explain ambiguous terms of a contract, but it could not be shown to contradict the express terms of an agreement.

* *

The general rule of law that a local usage cannot be proved to contradict a contract nor to subvert a well-settled rule of law was applied in the Minnesota supreme court in Globe Milling Co. vs. Minneapolis Elevator Co., 46 N.W. 306, a case decided years ago.

The elevator contracted to sell wheat to D. C. Moak & Co., presumably for cash, and a carload was switched for delivery to that firm, but was afterwards reclaimed by the elevator for nonpayment of the price. In the meantime, Moak & Co. had contracted to sell wheat to Griffiths, Marshall & Co., and presented a bill to the latter covering the car in question, and the bill was paid. The last mentioned firm, having in turn agreed to sell to plaintiff mill, drew draft on plaintiff for the price, sending shipping bill covering the same car.

The mill, having paid the draft, but not received the wheat, because it was reclaimed by the elevator as above noted, sued the elevator as for conversion of the shipment. To support its case, the mill attempted to show a usage of the Minneapolis grain trade under which on loading of the car and its transfer for delivery to Moak & Co., it became that firm's property, and subject to sale to third persons, free of any claim of the elevator.

But the supreme court decided that the usage could not be shown, since it would contradict the elevator's contract right to cash payment for the wheat, and its legal right to reclaim the property on nonpayment. The court said:

"But a local usage cannot be proved to contradict a contract. If, by the contract for the sale of this wheat, it was for cash on delivery, the usage could not make it a sale on credit. Also, such a usage cannot be allowed to subvert a well-settled rule of law. There is no rule of law better settled than that, upon a cash sale, the seller, if he have not waived his right to payment, . . . may reclaim the property, if the purchaser refuse or fail to pay."

* *

The general rule was applied by the Wisconsin supreme court in the case of State vs. Park, 165 N.W. 289, wherein it was decided that the fact that a buyer of goods had customarily settled with the seller by personal check could not override an express clause, "All invoices to be settled monthly by cash, payable in funds current in Chicago or New York." The court said:

"The fact that the plaintiff [the seller] had been in the habit of receiving personal checks in payment of installments due under the previous contracts cuts no figure. At the most, this seems to have been mere indulgence, but, even if it rose to the dignity of custom, it could not vary the terms of a definite and unambiguous contract."

* *

In the Vermont case of Catlin vs. Smith, 24 Vt. 85, it appeared that a broker was intrusted with a sale of goods for "cash," and that he sold them on a few days' credit, which he extended from time to time until the buyer failed, without paying.

Under these circumstances, the supreme court decided that the broker could not show, in defense of liability for the value of the goods, a custom whereby the sale would be deemed to have been one for cash.

In the case of Mays vs. Jennings, 4 Humph. (Tenn.) 102, the Tennessee supreme court declared that a custom of treating a "barrel" or other measure of grain as containing a different weight or volume than fixed by statute is invalid.

SECTION 85. MEANING OF "F.O.B."

The meaning of the term "f.o.b." is so clear, held the Texas court of civil appeals in the case of Lee vs. Gilchrist Cotton Oil Co., 215 S.W. 977, that testimony is not admissible to prove a claimed trade usage to treat the expression as meaning something different from its well-established meaning.

Lee agreed to sell cottonseed to the oil company "f.o.b. cars Jewett destination weights guaranteed," Jewett being the place where the shipments were to originate, and Lampasas being the destination.

In the company's suit to recover damages for failure to deliver, question arose as to whether the contract called for delivery by the seller at the destination. On this point the court said:

" 'F.o.b.' means 'free on board of cars.' 'Free' means without expense to the buyer. 'On board of cars' shows how the delivery is to be made, and, in the absence of any words indicating the contrary,

means at the place of sale, or the nearest station thereto. . . . In the instant case the place of delivery is fixed by the words 'f.o.b. Jewett.'

"Do the words, 'destination weights guaranteed,' render doubtful the express provision that the delivery was to be made at Jewett? We think not. These words simply show that it was in the contemplation of the parties that the cottonseed would be shipped to some point other than that at which they were received—in this instance to Lampasas—and that the weight at that point would be accepted as correct by the seller. The fact that goods were to be shipped to a certain point does not make the price payable at that point. This amounts to no more than a mere shipping direction which obligated the seller to bill the goods to that point. . . .

"When goods are delivered to a carrier at the point of delivery to be transported to another point, they become the property of the buyer. The carrier becomes his agent to receive and ship them as directed.

"The weight in this case was unimportant, except as determining how much the buyer was to pay. It was held in Neimeyer Lumber Co. vs. Burlington & Missouri River Railway Co., 54 Neb. 321, 74 N.W. 670, 40 L.R.A. 534, that the words in a contract, 'price f.o.b. Omaha,' related only to the price to be paid, and not to the point of delivery. We hold that evidence seeking to vary, by proof of custom, the well-established meaning of the term 'f.o.b.' was inadmissible."

See, also, section 165.

SECTION 86. NECESSITY FOR SHIPPING INSTRUCTIONS

Under a written contract for a sale of mill products, providing that "no agreement, conditions, or stipulations, verbal or otherwise, except those mentioned in this contract, will be claimed," the Texas court of civil appeals decided that the agreement as written could not be enlarged by showing a custom for the buyer to furnish shipping directions. (Rhome Milling Co. vs. Cunningham, 171 S.W. 108.)

See, also, section 59A.

SECTION 87. QUALITY REQUIREMENTS

A view that a seller's obligation to deliver grain or flour of certain quality, as shown by samples submitted by him and approved by the buyer, cannot be enlarged by the latter by showing a custom concerning the quality generally required, is supported by the decision of the Illinois appellate court in the case of Clark vs. Mid-Kansas Milling Co., 165 Ill. App. 177.

Defendant mill submitted a sample of flour, and plaintiff replied: "The flour is not as strong as some of the 95 per cent patent coming in here; I will, however, give you $4.80 per barrel," etc. The mill accepted the offer, but plaintiff rejected a tendered delivery on the ground of its unsoundness, and later sued for damages for claimed failure of the mill to fulfill its contract.

Judgment in plaintiff's favor was affirmed on a finding that the flour tendered did not conform to the sample, and the court decided that, therefore, the defending mill was not harmed by the trial judge's action in permitting plaintiff to show a custom to the effect that a car of flour offered for sale by sample is understood to be sound unless otherwise specified.

But the opinion plainly indicates that when flour is sold by sample and the goods delivered conform to the sample, whether sound or unsound, the buyer is not entitled to show a custom requiring a better quality than that of the sample.

On another phase of the subject the court said: "A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business; and this is so whether he knew of the custom or not." But when the court said this it referred to customs not at variance with the express terms of a contract.

See, also, Chapter XI.

SECTION 88. BURNING OF MILL AS EXCUSING NONDELIVERY

In an action for damages for nondelivery of feed contracted to be manufactured according to a special formula, the defendant relying on burning of the mill as an excuse for nonperformance, it was decided by the St. Louis court of appeals that defendant was not entitled to show a claimed custom excusing manufacturers from performance in such cases. (Heffernan vs. Neumond, 201 S.W. 645.) The court observed that if a seller fails to guard against such contingencies by express contract he will be entitled to "show a custom to the effect that his absolute written contract is not what it reads, but only a conditional agreement."

See, also, section 185.

CHAPTER VII

SALESMEN AND SALES AGENTS*

RELATION TO THE BUYER

SECTION 89. AUTHORITY TO CONTRACT TO SELL

A MILL is not bound by a contract of sale made by its travelling salesman, unless he has been previously authorized to make such contract or unless it is approved by the mill. This important point of law was affirmed by the court of appeals of Kentucky in the case of White Grocery Co. vs. Nolin Milling Co., 182 S. W. 191.

Defendant's travelling salesman agreed to sell plaintiff 600 bbls of flour at $4 bbl, to be delivered in four monthly installments, and delivered to the plaintiff a memorandum of sale containing the terms agreed upon. This occurred July 28, 1914, just as the wheat market was being affected by declarations of war in Europe.

Immediately upon receipt of advice that the agreement had been made, the defendant mill notified the plaintiff both by wire and by letter that the contract would not be confirmed. Plaintiff sued as for breach of contract to sell the flour, and recovered judgment for $1,300 in the trial court, but it was reversed by the court of appeals.

First, the higher court held that the memorandum signed by the salesman should be regarded as a contract subject to approval by the mill, especially since it appeared that he was ordinarily provided with printed order forms and customarily used them, and since the plaintiff's representative had previously made purchases subject to the mill's approval, and did not testify explicitly that he did not understand the particular sale to be on condition. The court of appeals further declared:

"No doctrine is better settled than that a principal is bound by such acts of his agent as are performed within the apparent scope of the latter's authority, even though they may go beyond his real authority. It is not here claimed, however, that Chandler had express authority to make a contract binding upon appellant, but contended that he had implied authority to do so, and that what he did in the transaction with White, appellee's president and manager, was within the apparent scope of his authority.

"In our opinion, the facts of this case fail to show such implied authority. . . . 'In the absence of special authority to bind his principal the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal. . . . The house may refuse to accept the order; it is a mere proposal to be accepted or not as the house may see fit, and may be withdrawn by the purchaser at any time before its final acceptance.' . . .

"The principal is never bound where the person dealing with the agent knows, or has reason to know, that the agent is exceeding his authority. In dealing with a drummer one cannot assume that he has implied authority to make an absolute sale of the article or commodity he handles."

* *

Whether a salesman had real or apparent authority to make a binding contract for a sale of flour was the point in controversy in the case of Gwin Lewis Grocery Co. vs. Cape County Milling Co. et al., 86 So. 275, before the Mississippi supreme court.

Plaintiff sued the mill for damages based on a claim that the mill had broken a contract to deliver flour, getting jurisdiction of the mill by garnishing the proceeds of other flour sold locally by the mill to other customers. The mill established its defense that the salesman or agent was without authority to do more than solicit orders for flour, which were not binding until and unless accepted; and that plaintiff's order was never accepted.

*The authority of corporate officers, etc., is dealt with in the chapter on Corporations. The relation of brokers to sales contracts is discussed in the next chapter. See, also, section 24, and the chapter in Part III on Agents and Employees.

The salesman, J. D. Welsh, took an order from plaintiff for the mill, and signed it as "state agent." The mill refused to confirm it when it was received from Welsh, and so advised him, but it seems that he did not communicate the fact of rejection to plaintiff until some days later, when the market value of the flour had advanced.

Dismissing the suit, the supreme court says: "It is the contention of the plaintiff grocery company that Mr. Welsh was the general agent of the defendant milling company, or was held out by it to be its general agent, and as such had the real or apparent authority to make this contract.

"It is claimed that this is shown by the declaration of Mr. Welsh made to the officer of the plaintiff grocery company at the time this memorandum was signed, and further by the fact that Welsh signed this agreement or memorandum as 'State Agent,' and mailed a copy of it to the defendant milling company so signed, and also by the further fact that when on Aug. 28 it wired defendant to quote it prices on flour it was referred to Mr. Welsh.

"Counsel for plaintiff rely upon the case of Potter vs. Springfield Milling Co., 75 Miss. 532, 23 So. 259. From the opinion in that case, however, it appears that the Springfield Milling Co. had given Potter the authority to sell its flour to all persons wishing to purchase it. That is the very question in issue in this case. The authority of an agent to bind his principal rests upon the powers conferred upon him by the principal, and the burden of proof to show the real or apparent authority is with the complainant in this case. This burden the complainant has attempted to meet by proving the mere statement of the agent made to the plaintiff.

"Agency cannot be proven in this way. . . . The fact that the order was signed 'State Agent' falls in the same category, viz., it is an attempt to prove the authority of the agent by the declaration of the agent. This order was not confirmed, but was repudiated, by the defendant milling company. Nor was there any proof of the agency by the mere fact that the plaintiff was referred to Mr. Welsh to quote prices on flour. We assume that Mr. Welsh would have been furnished by the milling company with a list of prices by letter or telegram just as he was when he first called upon the plaintiff grocery company on Aug. 2.

"In this case the testimony for the defendant showed that Mr. Welsh had no authority to make an absolute contract of sale. He was the milling company's travelling salesman or 'drummer' only, and, as was held by this court in the case of Becker Co. vs. Clardy, 96 Miss. 301, 51 So. 211, 'in the absence of express authority, such an agent has authority only to solicit orders and transmit same to his principal for approval.'

"In this case the order was not approved; consequently, there was no binding contract, and the decree below should have been in favor of defendant."

* *

In the case of J. C. Lysle Milling Co. vs. North Alabama Grocery Co., 77 So. 748, a suit to recover the price of 175 bbls of flour delivered, in which defendant counterclaimed for damages for nondelivery of other flour, one of the questions involved related to the authority of an agent for the mill to make a binding contract of sale without securing the mill's approval.

Apparently, the mill did not acquiesce in defendant's interpretation of the transactions between the parties as evidencing a single contract for 800 bbls of flour, but stood on a claim that there was only one contract approved by it, and that that was for the 175 bbls actually delivered.

The mill asserted that its sales agent, one Fitzhugh, who took the orders, was without authority to do more than take orders for flour and forward the same to plaintiff mill at its business office at Leavenworth, Kansas, for confirmation or rejection, and that no order for undelivered flour was confirmed by it.

On the other hand, defendant insisted that Fitzhugh was a general sales agent for the mill, with power to bind it to sales contracts without confirmation. Meeting this situation, the Alabama supreme court declared:

"It is not controverted that an agent whose authority is limited to taking and forwarding orders to the principal for confirmation has no authority to bind his principal without confirmation or ratification by the principal. . . . The plaintiff did business in various states through agents. The agent Fitzhugh's authority to make a binding contract with the defendant at the time of the taking of the order for the flour is the controverted question of fact.

"All of the attendant material facts and circumstances entering into the taking of said order by the agent, to the confirmation thereof or action thereon by the principal, should have been permitted in evidence to aid the jury in draw-

ing a reasonable inference as to the authority or not of such agent at the time the order was taken."

* *

Further limitations on a salesman's implied powers are indicated in the case of Colorcraft vs. American Packing Co., 216 S.W. 831.

A salesman was furnished printed order blanks which fixed time for deliveries "as soon as possible." The form of blanks also stated that the order was not subject to change, and that no agreement not stated on it would be recognized. An order was taken on this form, but the buyer sought to show that the salesman specially promised that delivery would be made within 10 days.

Holding that this proof was inadmissible, the St. Louis court of appeals said: "We do not think that the powers of a sales agent are of such character as to allow him to contract for the time of delivery when the very contract signed—a blank furnished him by his employer, and his only apparent authority in the matter—specifically . provides that the seller is to 'ship as soon as possible.'

"The order also specifically provides that it is placed with the understanding, among other things, that it is not subject to change or countermand, and that any agreement not stated in the order will not be recognized. So we do not think that it was proper to admit testimony as to the understanding between this sales agent and the representative of the plaintiff as to the time of delivery."

See, also, section 59A.

* *

The Virginia supreme court of appeals affirmed judgment in favor of S. W. Holt & Co. against the J. C. Lysle Milling Co. for nondelivery of flour under a contract made by J. G. Fitzhugh, a representative of the mill, but disapproved by the defendant company. The suit turned upon the question of fact whether Fitzhugh had been empowered to make binding contracts, or was an ordinary travelling salesman in the sense that he was merely authorized to take orders subject to approval or rejection by the mill. The court found that there was sufficient evidence to sustain the jury's finding that the broader power had been conferred by the mill. (95 S.E. 414.)

July 11, 1916, Fitzhugh signed a contract for the mill, binding it to deliver three cars of flour on the specified terms. The writing contained no provision for approval or confirmation, but, in reporting the sale, Fitzhugh, after stating the substance of the contract, added in his report: "All subject to confirmation." On receipt of this telegram, the mill wired that it could not accept the order, but did not then communicate with plaintiff, deeming that unnecessary, as the sale was reported subject to confirmation. When delivery became overdue, plaintiff wrote the mill and then learned that the contract had been disapproved.

There was evidence tending to show that Fitzhugh's letterheads showed him to be the mill's "southern representative," that the mill had made previous deliveries under similar contracts made by Fitzhugh, without first confirming them, and that the mill had held him out as empowered to make final agreements.

"The defendant contended and produced proof to show that Fitzhugh was merely a 'drummer,' or 'commercial traveller,' in the narrow sense of that term, with authority only to take orders subject to acceptance and confirmation. If this claim as to his agency could be regarded as a fact conclusively established, then the law of the case would be with the defendant," said the Virginia court.

"The primary inquiry, however, is whether Fitzhugh was in fact acting merely in the capacity of a drummer. Looking to the evidence as a whole, we think there was direct testimony tending materially to show that his agency carried with it the authority to make sales, and that, therefore, the court properly allowed the question of authority to go to the jury."

The supreme court of appeals adhered to the general rule of law that the scope of an agent's authority from his principal cannot be proved by the mere declarations of the agent, and that there must be some act of the principal expressly or impliedly holding the agent out as possessing the power in controversy. But the decision also holds that, where existence of such power is prima facie proved, the agent's declarations may be considered by way of corroboration. The court also quoted the following now well-settled rules of law:

"While, as between principal and agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third parties ignorant thereof; and as between the principal and agent and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing,

or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny.

"'The apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority.' 31 Cyc., 1333."

* *

An outside salesman for wholesale dealers in flour had implied authority to bind them by an agreement for a future delivery of flour to a customer, the Connecticut supreme court of errors held in the case of Falletti vs. Carrano, 103 Atl. 753. But this decision is not to be regarded as conflicting with the general rule that where a representative is engaged to merely obtain orders for approval by his employer, he is without power to enter into a binding contract of sale.

The court found, from the circumstances of this case, that there was no such limitation upon the powers of the particular salesman. The evidence showed that he had an agreement for a share of the net profits of his firm's business, as part of his compensation.

This was an action brought to recover damages for refusal of the defendant to deliver 50 bbls of flour contracted to be sold by the salesman, one Rivkin, as shown by the following memorandum signed by him:

"Sold to James Fallett 50 bbls Daisy flour in 98 lot, at $8.90, to be taken from the car, terms cash. Carrano & Nobile—N. F. R."

"There is no ground for the assumption of the trial court that Rivkin did not have authority to make a contract for the future delivery of the flour as set forth in the memorandum of sale," said the supreme court of errors in reversing a decision of the court of common pleas at Hartford.

"Rivkin's authority was that of an outside salesman of a wholesale grocery house, with unrestricted powers of sale and collection. It is a familiar principle of the law of agency that every authority given to an agent, whether general or special, express or implied, impliedly includes in it, and confers on such agent, all the powers which are necessary, or proper, or usual, to effectuate the purposes for which such authority was created. It embraces the appropriate means to accomplish the desired end. . . .

"An agent clothed with general power to sell personal property without restrictions has implied authority to select the purchaser, to fix the price, and to agree upon such ordinary incidental matters as the time and place of delivery, and the other ordinary and usual terms of sale."

The validity of the contract was further attacked by the defendant on the ground that the provision for delivery—"to be taken from the car"—was too indefinite to constitute a valid agreement within the statute requiring certain contracts to be in writing. But the supreme court of errors ruled that this provision could be explained by witnesses, and that, with the mutual understanding as to the place of delivery explained, the memorandum showed a binding contract to sell the flour.

* *

It has been held by the Alabama supreme court that if a mill's representative happens to have authority to make a binding contract of sale, his acceptance of an order, or agreement to sell, will bind the mill, although the buyer may be unadvised that the representative has more than the customary authority to merely receive an order for transmission to the home office for acceptance or rejection there. (J. C. Lysle Milling Co. vs. North Alabama Grocery Co., 88 So. 590.)

But a mere order for goods does not become a binding contract of sale merely because signed by the salesman and because he may be empowered to enter into a binding contract of sale, according to the United States district court for the eastern district of Pennsylvania in the case of C. F. Bally, Ltd., vs. Quaker City Corporation, 271 Fed. 957.

* *

When a corporation has apparently intrusted the manager of one of its departments to make contracts of sale without securing approval of such agreements, the company is bound by his act in entering into a contract of this kind, notwithstanding the existence of instructions given by the company to the managing agent, but not known to the other party to the contract, to secure the approval of a corporate officer of all such contracts. (Bigio vs. William H. Knox & Co., 185 N. Y. Supp. 465.)

* *

Wright vs. Seattle Grocery Co., 177 Pac. 818, was a suit to recover damages for nondelivery of flour under a contract of sale. Replying to a contention that there was no proof that the salesman was authorized to bind defendant by the contract made with the plaintiff, the Washington supreme court said: "We think

there was sufficient evidence for the jury to find that he was acting for his principal. He had been a salesman for the defendant for six years, actively engaged in soliciting orders, and had acted in that capacity on various occasions in making sales of goods to the plaintiff, employing in such sales the same kind of billheads as the one in controversy here. His authority in such sales had never been questioned by the defendant prior to this transaction."

See, also, the decision of the Oregon supreme court in the case of Bagot vs. Inter-Mountain Milling Co., 196 Pac. 824, and cases cited in section 111.

SECTION 90. AUTHORITY TO WARRANT GOODS

An important limitation upon the authority of salesmen is indicated in the following statement of the law, as laid down by the appellate term of the New York supreme court in the case of Eichler vs. Kahnweiler, 178 N.Y.S. 257:

"It is an established rule of law that a salesman with authority to sell has no authority to warrant the merchandise sold, unless he has been given express authority to do so, or unless such authority can be implied from the fact that it is customary for agents to give a warranty on sales of merchandise of that description.

"The further rule is equally well established that the burden is upon the vendee, who relies upon the warranty, to prove either the express authority or the custom from which the implied authority is presumed."

It is true, of course, that an unauthorized warranty made by a salesman will bind his employer if ratified by the latter, as where the warranty is brought to the employer's attention before delivery is made. But the New York court notes that there can be no ratification where the employer is not shown to have received knowledge of the making of the warranty. "The mere delivery of the goods and acceptance of part of the purchase price is not sufficient to render him liable for the representations of the salesman," said the court.

SECTION 91. AUTHORITY TO CANCEL OR MODIFY CONTRACT

A salesman's authority to sell goods implies no authority to agree to a cancellation of the contract, held the St. Louis court of appeals in the case of Moorman Mfg. Co. vs. Selsor, 226 S.W. 89. The court said:

"We are of the opinion that the signed order of defendant, wherein it was agreed that no contract or agreement other than appeared on the face of the order would be binding, was ample notice to an ordinarily prudent man that the authority of the salesman as plaintiff's agent was limited. The agent's authority to sell gave him no power to exercise any control over the rights or liabilities of the plaintiff not included in the power to sell; nor did the salesman have power to revoke or rescind the sale, after the contract had been completed or executed, and receive back the goods.

"The attempted rescission or revocation of the contract and acceptance of the goods was presumptively beyond the authority of the salesman to bind the plaintiff, and does not come within the apparent scope of his authority to sell. We find no substantial evidence tending to show that the salesman was a general agent, or that he was vested with authority to rescind or revoke the order or receive back the goods."

* *

The Washington supreme court said in the case of Bernstein vs. Schwartz, 183 Pac. 105:

"An agent employed to make contracts has no power to rescind them. His duty is to acquire interests, not to give them away; nor has he any implied power to waive or give up rights or interests of his principal."

* *

In another case—Dahnke-Walker Milling Co. vs. T. J. Phillips & Sons, 78 So. 6—a question of a mill representative's authority was decided in favor of the mill by the Mississippi supreme court.

In this case, the mill sued to recover loss sustained through defendants' refusal to receive 200 bbls of flour bargained for. The defense interposed was that the mill had previously broken a contract to deliver meal, and that its representative agreed that defendants' claim on account of the nondelivery of the meal should offset the mill's claim for defendants' refusal to receive the flour.

The mill won the suit, the supreme court holding that the representative had neither express nor implied power to make the compromise agreement, and that there was no valid contract made by the mill to sell the meal.

It was proved that the order for the meal was taken on a form making it subject to acceptance by the milling company, and that the mill declined to accept.

"We think that it is fundamental that a selling agent, in the absence of evidence to the contrary, is not empowered to compromise," said the supreme court.

" 'Ordinarily such an agent is supposed to be employed to contract a sale, and has no implied power, once this is done, either to undo or to modify the contract.' 31 Cyc., 136.

"We gather from this record that the travelling salesman in this case was furnished with blank forms upon which orders were taken and signed by the buyer, in which form was written a reserved power to the principal to reject the order, which was done in the meal order the salesman transmitted to his principal. The settlement or compromise relied on by defendants, in the absence of proof, was not within the powers delegated to selling agents, and no such proof appears in the record."

See, also, the decision of the United States circuit court of appeals, eighth circuit, in the case of Hogan Milling Co. vs. Weinberg, 299 Fed. 458.

* *

According to the decision of the Alabama court of appeals in Southern States Co. vs. Long, 73 So. 148, a buyer cannot rely upon an agreement with the seller's agent as showing a waiver of the seller's rights, without first proving the authority of the agent to make the agreement.

* *

The rule that a travelling salesman employed to solicit orders is without power to bind his employer by agreeing to cancel a contract obtained from a customer is not to be extended to the case of an agent possessing general powers. The point is illustrated by the holding of the Illinois appellate court in the case of Middle Division Elevator Co. vs. Vandeventer, 80 Ill. App. 669. It was there decided that an agent placed at an elevator to buy and receive grain had implied power to rescind a contract. The court observed:

"It is claimed that Arbogast had no authority to rescind the contract. His authority, it is claimed, was limited to receiving the corn and paying for it. Such contention cannot prevail in the face of the testimony showing that he was placed at the elevator to buy and receive grain; that he contracted for future delivery, and attended generally to the corporation's business there."

* *

A buyer of goods is not entitled to enforce, against the seller, an agreement made by the salesman, to the effect that goods remaining on hand unsold at a certain time may be returned, unless it be shown that the salesman was authorized to make such an agreement. Salesmen have no such authority by implication from their employment. This is the gist of the decision handed down by the appellate term of the New York supreme court in the case of Rubin vs. Askins, 204 N. Y. Supp. 827.

To the same effect, see the Alabama case of Charles E. Morris & Co. vs. Bynum Brothers, 93 So. 467.

* *

In a case decided by the appellate division of the New York supreme court (Churchill Grain & Seed Co. vs. Buchman, 197 N. Y. Supp. 552) it appeared that plaintiff contracted to ship to defendant a carload of oats within a certain month. Defendant gave notice that if shipment were not so made he would cancel the order. More than one week after the month ended, plaintiff shipped the car and sent invoice, and weight and inspection certificates. A little later the salesman who negotiated the contract called on defendant and assured him that if he would take the car plaintiff would stand any loss resulting. Under this assurance defendant paid the draft covering the car, and unloaded the oats on its arrival. Afterwards he sought to recover the amount of his loss by counterclaiming the same when sued by plaintiff on account of another sale, but the court decided that he could not recover, because the salesman had no authority for giving the assurance relied on.

See, also, the case of Morton vs. Albers Brothers Milling Co., 226 Pac. 809, referred to in section 58.

SECTION 92. AUTHORITY TO RECEIVE PAYMENT

The Washington supreme court has laid down these rules as governing cases where a travelling salesman unauthorizedly makes collections from customers and fails to account for them, as concerning the customer's right to claim credit for the amount:

Except as the employer of a travelling salesman may have expressly or impliedly held him out to customers as being authorized to do so, the salesman has no authority to collect accounts for goods sold on credit; customers are not entitled to rely upon the statements of the salesman as to the extent of his authority, and they act at their peril in dealing with him without ascertaining the actual scope of his agency powers; the fact that the salesman is in possession of a statement of account covering a sale on credit gives him no implied power to collect; when it appears that a salesman has unauthorizedly made a collection and

failed to account for it, the loss falls on the customer who made the payment. (159 Pac. 757.)

* *

The right of a milling company to recover the price of flour sold a customer, where the amount has been collected and embezzled by one of the company's salesmen, was considered by the Arkansas supreme court. The salesman drew a draft on the customer for the amount due for a shipment, in the name of the milling company, but payable to himself. He never accounted for the proceeds of the draft and, after he disappeared, the company brought suit to recover the price of the shipment.

The trial court awarded judgment in favor of the customer, but on the company's appeal to the supreme court a new trial was ordered, the latter court announcing the following rules of law:

"Third persons, in dealing with an agent, act at their own peril in transacting business with him that is not within his actual or apparent authority; a salesman has no implied authority to collect money for his employer, although the same be due for goods sold by him; when he has actual authority to collect cash, his acceptance of a note or time check or draft payable in the future is not binding upon his employer." (Hadley Milling Co. vs. Kelley, 174 S.W. 227.)

SECTION 93. MISCELLANEOUS ASPECTS OF AUTHORITY

Liability for agreements entered into on their part by representatives is affected by the rules of law announced by the Kentucky court of appeals and the Texas court of civil appeals in the two cases cited below.

In the Kentucky case it was held that the fact of agency cannot be proved against a supposed principal merely by showing declarations of authority made by the agent; that a principal is liable for acts of his agent performed within the apparent scope of his authority, although they were not expressly authorized; that a representative authorized to buy or sell for cash has no authority to buy or sell on credit, and that it is only when he is not provided with funds to buy for cash that authority to buy on credit will be presumed. (173 S.W. 360.)

Under the holding of the Texas court of civil appeals a representative authorized to buy or sell goods has no implied authority to bind his principal by agreeing to pay a third person a commission for negotiating a purchase or sale. (173 S.W. 586.)

SECTION 94. NOTICE OF SALESMAN'S LIMITED AUTHORITY

The effect of notice of a salesman's limited authority was considered in the decision of the South Dakota supreme court in Stevens vs. Whole Wheat Milling Co., 172 N.W. 244.

The defendant company gave a note to cover payment to become due to an advertising concern on an advertising contract. This contract contained a clause reciting that the agent was merely a soliciting salesman, that all orders were taken subject to approval, and that the purchaser must see that all arrangements pertaining to the order were evidenced in writing or printing on the contract, etc.

Resisting liability on the note, defendant claimed that there had been a breach of a written agreement entered into between the mill and the agent at the same time that the note and other contract was executed, and as part of the same transaction, but the supreme court affirmed a decision entitling plaintiff to recover on the note, notwithstanding any breach of the agreement relied upon by the mill; it appearing that no knowledge concerning that agreement ever came to the attention of the advertising concern. The court holds that the case is governed by the following stated rule of law:

" 'Instructions modifying or limiting the authority of the agent, which are known to a person dealing with him, are as binding upon such person as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto.' 2 Corpus Juris, 569."

* *

In the case of New Prague Flouring Mill Co. vs. Hewitt Grain & Provision Co., 196 N. W. 890, the Michigan supreme court said concerning defendant's claim that plaintiff's salesman had made a certain verbal agreement:

"The contract recited:

" 'Only authority of seller's salesman is to sign this contract for and transmit same to seller. Thereafter all matters must be taken up, in writing, through seller's office. This contract shall not bind seller until it has mailed, or placed in the course of transmission by telegram, to buyer, at within or known address, its acceptance or confirmation hereof from either its said office, or its branch office at Pittsburgh, Pa., or Des Moines, Iowa.'

"This gave defendant ample notice that the agent with whom it was dealing had no power to contract, and therefore

it would follow that, if De Smidt did make such an oral collateral agreement, it was of no force, unless afterward accepted by defendant with knowledge of the agreement. Defendant well knew that the only way plaintiff could know what order had been made and what its provisions were was what appeared on the face of the order. This order, when it reached plaintiff's home office, was acted on, either favorably or unfavorably. In the instant case it was favorably acted on and accepted only as to what appeared on its face. This lack of authority on the part of plaintiff's agent would furnish ample reason for rejecting the oral agreement."

* *

An illustration of what may happen where a flour or feed sales contract is silent as to the salesman's authority to represent quality, etc., is afforded by the decision handed down several years ago by the Kansas court of appeals in the case of Loomis Milling Co. vs. Vawter, 57 Pac. 43.

Plaintiff mill sued for a balance due on account of flour sold, and defendant counterclaimed damages for asserted breach of warranty as to quality. At the trial the mill's attorney attempted to show that its salesman was not authorized to make the verbal warranty of quality on which defendant relied. The trial judge refused to permit such showing, and the court of appeals approved the ruling, saying:

"The plaintiff did not offer to provide that the defendant had any knowledge of any restrictions or limitations upon the authority of the agent. It was conceded that the agent who sold the flour was the general agent of the company, whose business it was to travel and sell the flour manufactured by the plaintiff. The plaintiff is seeking to enforce the contract so far as it inures to its benefit, and to repudiate that part of it which imposes on it a burden.

"The defendant had a right to assume authority upon the part of this agent to make the warranty, unless the defendant had notice of some limitation upon the agent's authority in respect thereto. An offer to prove a limitation upon his authority, without an offer to prove knowledge on the part of the defendant, would be immaterial and incompetent, and the objection thereto was properly sustained. Nor could the plaintiff enforce the contract, and at the same time repudiate the warranty."

Speaking on the subject of the measure of damages, for breach of warranty of flour, the court further said: "The rule of damages is the difference between the actual value and what its value would have been at the delivery if it had conformed to the warranty. Hence any advance in price between the date of contract and delivery would be covered by the general damages."

See, also, section 112.

SECTION 95. RATIFICATION OF UNAUTHORIZED CONTRACT

The Pennsylvania superior court's decision in the case of Smuckler vs. Di Napoli, 62 Pa. Super 570, involved one of the commonest and most important phases of flour sales contract—the binding character of a contract of sale made by an agent.

Plaintiff was given judgment for damages for defendant's failure to deliver 100 bbls of flour which defendant's agent agreed to sell. The evidence showed that defendant authorized one Leary to sell flour for him for cash, and Leary obtained an order from plaintiff for 5 bbls, with the understanding that if the flour proved to be satisfactory, the order would be for 100 bbls. Defendant, being advised of all the facts, delivered the 5 bbls, but refused to comply with plaintiff's demand for delivery of the 100 bbls. Said the court:

"There was an affirmance of the act of the agent by Di Napoli by the fact that he performed the contract partially, delivered the 5 bbls, and gave no intimation that he was not bound by its terms. . . . 'It is indisputable that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority makes the act his own. He is bound to disavow it the moment the fact comes to his knowledge.' "

Plaintiff introduced evidence at the trial tending to show a custom in the flour trade making it optional with the seller under such contracts to deliver, but the court refused to give effect to the claimed custom, because "there was no proof that the custom was notorious, universal and well established, or was actually known by the plaintiff."

* *

In the case of Ward vs. Wolfe City Milling Co., 194 S.W. 957, decided by the Texas court of civil appeals, a suit to recover damages for the mill's failure to deliver two cars of flour, the mill contended that the salesman who made the contract of sale was not authorized by the mill to make it, but this point was

decided against defendant on the ground that, even if the salesman was not so authorized, the mill adopted or ratified the agreement, thereby giving it the same legal effect as if it had been authorized in advance.

See, also, to the same effect, the decision of the Texas court of civil appeals in the case of Pittman & Harrison Co. vs. B. F. Robery & Co., 234 S. W. 1114.

SECTION 96. AGENT NEGLECTING TO FORWARD ORDER

A legal angle of orders for goods was dealt with by the Texas court of civil appeals in the case of Wickendon vs. Four States Grocers Co., 217 S.W. 1103. The court held that where a travelling representative solicits an order, subject to acceptance or rejection by his principal, the latter is not liable for neglect of the representative to forward it.

Plaintiff gave an order to defendant's salesman for a quantity of goods, but it was not forwarded. In plaintiff's suit for damages his attorneys argued that, if the order had been transmitted by the salesman to the defendant within a reasonable time, defendant would have accepted it.

"From this the conclusion is drawn," remarked the court, "that, as between the defendant and the plaintiff, the former should suffer for the injurious consequences resulting from the failure of its agent to perform the duty assumed in that transaction. The argument is based upon the erroneous assumption that the failure of Joplin [the salesman] was, in legal effect, the failure of the defendant, his employer.

"Joplin personally owed both his employer and his customer the duty to promptly transmit orders taken in the course of his business. To hold that the defendant owed the duty of transmitting to itself, for confirmation, orders taken in that manner, would be absurd. The very fact that the order must be accepted before the contract is made shows that the defendant was in no sense a party to the transaction of taking the order."

Incidentally, the court held that the addressee of an order may arbitrarily reject it; such orders being in legal effect no more than offers or proposals to buy upon the terms mentioned in them.

SECTION 97. INDIVIDUAL LIABILITY OF AGENT

When one makes a contract to sell goods, signing it as an individual, he will not be permitted to escape personal liability for breach of the agreement, on the ground that he acted as mere agent for some undisclosed principal. It was so decided by the appellate term of the New York supreme court in the case of Levy vs. Shour (178 N.Y.S. 227), wherein defendant was sued for nondelivery of goods and it appeared that he was mentioned in the body of an order as "manufacturer's selling agent."

Defendant signed as an individual, and there was nothing in the contract to show for whom he was acting, if not for himself. Disposing of the case in plaintiff's favor, the court said:

"Under the well-established rule, it requires no extended citation of authority to show that an agent acting for an undisclosed principal becomes personally liable upon his contract."

When one ostensibly makes a contract of sale in his own name, but really acts for an undisclosed third person, he cannot avoid liability to the other party to the agreement for breach of the contract, by showing that he acted in a representative capacity. (Heller vs. Ferguson, 176 S.W. 1126, decided by Kansas City court of appeals.)

RELATION TO PRINCIPAL

SECTION 98. TERM OF EMPLOYMENT

One of the most interesting appellate court decisions to be found in the law reports concerning employment contracts in the milling industry is the one handed down by the Kansas City court of appeals several years ago in the case of Hendricks vs. R. T. Davis Mill Co., 77 Mo. App. 224.

Plaintiff had been employed by defendant mill as its eastern sales manager before defendant sold its eastern business to another concern, in November, 1896. Defendant then requested plaintiff to take charge of Canadian or southeastern territory, which he declined to do. A few weeks later defendant suggested by letter that plaintiff "go along" on his existing salary until the following January, when new arrangements were to be made.

In December, 1896, defendant discharged plaintiff, and he afterwards sued for compensation up to July 1, 1897, on the theory that he had a contract from year to year. Judgment in his favor was affirmed by the court of appeals.

There was no distinct written contract, but the court found that it was proper

to infer a yearly contract from the correspondence between the parties, and the conceded fact that up to July 1, 1896, the end of a milling year, plaintiff had received a salary and commissions. The court of appeals said:

"It is further disclosed by the evidence that what is known as the 'miller's year' begins on the first day of July, and hence it may be fairly presumed, wherever the term 'year' was used by the plaintiff and defendant's general manager, either in their conversation or letters relating to plaintiff's employment, it meant the 'miller's year.' Even though the only contract existing between plaintiff and defendant was that evidenced by the letters, still we find nothing in them or either of them to justify the trial court in declaring to the jury by an instruction that plaintiff's employment under contract ended Jan. 1, 1897."

SECTION 99. RIGHT TO COMPENSATION

When a salesman is employed exclusively in effecting sales for a manufacturer, any act tending to divert customers to his employer's competitor is such gross breach of duty as forfeits right to compensation for services rendered, if the salesman acts willfully and to his own advantage. It was so held by the appellate division of the New York supreme court. (176 N.Y. Supp. 798.)

In this case plaintiff, defendant's former salesman, sued for commissions earned, and the defendant resisted liability on the ground that just before terminating his employment to enter the service of a competitor, plaintiff diverted one of defendant's valuable customers to a competing manufacturer, into whose service the salesman then stepped. Plaintiff sought to excuse himself on the ground, among others, that the customer was dissatisfied with defendant and would have shifted its patronage in any event. But the court says on this point:

"As an agent in the employ of defendant, the plaintiff owed the utmost of good faith to his employer. If he learned of the dissatisfaction of the customer, it was his duty to report to his employer and attempt to remove the cause of dissatisfaction, and by every means in his power try to hold the trade."

* *

"Is a miller's agent, selling the former's products from time to time on a commission basis, entitled to commissions on sales made direct by the mill, until the mill notifies the agent that the agency is terminated?" inquired a mill agent not long ago. This interesting question cannot be answered unqualifiedly yes or no. The answer depends upon facts not hypothesized, and particularly upon the question whether it was mutually agreed that the agent should have the exclusive sale of the mill's products in his territory.

Where there is an agreement that the mill is to give the agent an exclusive sales agency in his territory, and that he is to receive a commission on all sales made by him or direct, he is entitled to compensation on sales made by the mill until he is notified that his services are dispensed with, but an important distinction is to be noted between exclusive power to sell and exclusive sales agency.

It seems that an exclusive agency in given territory to sell a mill's products will not prevent the mill from making direct sales, unless there is something in the circumstances under which the contract has been made indicating mutual understanding to that effect. Remarking upon this distinction, the Wisconsin supreme court said, in the case of Greene vs. American Malting Co., 140 N.W. 1130:

"A distinction is made in some cases between exclusive power to sell and exclusive agency to procure a sale or find a purchaser; in others between an exclusive agency and an agency for a particular time, where, within it, the agent proceeding in good faith finds a purchaser; between a sale, as in this case, without any interference on the part of the agent, and a sale to a person to whose attention the property is brought by the agent.

"Here there was the ordinary exclusive agency to find a purchaser, and after a long delay the owner made a sale without the agent being connected with it in any way. In such circumstances the agent is not entitled to commission."

And in the case of Smith vs. Preiss, 136 N.W. 7, the Minnesota supreme court said: "An exclusive agency to sell property is not . . . equivalent to a grant of the exclusive right to sell; and where the owner grants an exclusive agency only, he retains the right in himself to sell, without being liable to the agent for a commission."

It is true that the two cases I have just cited involved questions of real estate brokers' commissions, but real estate brokers and merchandise brokers or agents are governed by the same general rules of law respecting their right to commission.

However, I am of the opinion that, under a contract for an "exclusive sales agency," it would be open to the agent to show that by reason of the existence of well-established custom, if any, or other circumstances, it was mutually understood that the contract was intended to entitle him to commissions on any sales made direct by his mill, although without intervention of his services.

The following statement of legal principles is supported by a citation of numerous decisions of courts of last resort in the several states:

"By their contract of employment, agents for the continuous sale of goods are frequently given the sole or exclusive agency, especially in a certain territory, and persons employed to sell a particular piece of property are likewise not infrequently made sole or exclusive agents for that purpose.

"As a rule these contracts are not so worded as to entitle the agent to compensation when the principal himself, acting independently of the agent, sells the particular piece of property in question or sells his goods in the agent's territory, although the contract may be so framed as to entitle the agent to commissions on sales made by the principal himself in the agent's territory.

"Such sole or exclusive agency contracts, however, generally preclude the principal from appointing other agents to sell the same articles, or within the same territory, and from thus depriving the exclusive agent of compensation on account of independent sales made by such others; but, in order to entitle the agent to recover his commission from his principal for such a sale, he must show that the new agent actually made a sale within his territory, and that he himself would have made a sale, or that he performed, in connection therewith, the requirements imposed upon him by his contract." Corpus Juris, 777-778.

The above discussion should serve to draw attention to the importance of having explicit understanding as to whether the agent is to receive a commission on sales made direct by the mill, thereby producing a more specific agreement than a mere contract that the agent is to have an exclusive sales agency in his territory.

Obviously, the point is one of mutual importance. If it be unjust to the agent, who has diligently undertaken throughout his territory to promote his mill's business, that the mill step in and make a contract direct, leaving him without compensation, although he has done nothing toward effecting a sale, it is at least equally unjust to the mill that the creation of an agency for extending its business should prove to be a handicap by requiring it to pay to an agent who has not been diligent or influential enough to secure a particular order, compensation for services he has not rendered.

The gentleman who presented the question forming the text of this discussion also inquired concerning the legal effect of the mill making a sale direct without notifying the agent of the termination of his agency.

If it be assumed in a particular case that it was mutually understood that the agent was to receive a commission on all products sold in his territory, whether the sales were brought about by his services or not, I am of the opinion that it is very important whether he has been notified of the mill's election to terminate the contract. Under such a contract the agent is entitled to compensation pursuant to the agreement until the contract is terminated, and there can be no termination, ordinarily, without notice thereof to the agent.

If the agency was granted for an indefinite time it might be terminated any time without assignment of any reason, subject to the agent's right to commissions on matters under way. But a contract for an agency for a specified time could not be terminated without good cause, on some ground reserved in the contract or afforded by fault of the agent, nor, in any event, can liability for commissions be avoided on the mere ground that the mill mentally determined to dispense with the agent's services. Both fairness and the law require that the agent be notified that his services are dispensed with.

On the other hand, it is not meant that notice must be formally given in every instance. Knowledge that a mill is soliciting business through a new agent, or directly, might be sufficient to apprise an agent of the mill's revocation of his exclusive agency, for the purpose of defeating his right to compensation on an order obtained without his assistance, or long-continued failure of an agent to send in any order might be treated as an abandonment of the agency.

SECTION 100. TERMINATION OF EMPLOYMENT

Some practical questions bearing on the right of a mill to cancel a salesman's employment contract were raised under the following stated circumstances:

A salesman was employed for one year

under a written contract which assigned him to certain territory in which he undertook to sell 25,000 bbls of flour within the year. A clause of the agreement reserved to the mill the right to cancel the employment at the end of six months, should the salesman's average monthly sales for that period fall below 2,500 bbls.

After the contract was executed, but before commencement of the employment period, the mill requested the salesman not to call on the trade in a certain part of the contract territory, although he had previously been furnished with a list of customers therein to be called upon; the mill stated that another salesman would be, and he was, assigned to that field.

Sales made in the territory left to the first salesman fell below the 2,500-bbl monthly average during the first six months, and the mill canceled the contract with him.

The salesman claims that he is entitled to compensation at the agreed rate for the remaining six months, on the theory that the mill deprived him of ability to sell 2,500 bbls monthly, by taking away part of the territory originally agreed upon.

Had the salesman a valid claim against the mill?

Assuming that no material facts have been omitted from the foregoing statement, I am of the opinion that the mill was legally entitled to terminate the contract, on the ground that the salesman acquiesced in the mill's "request" that the territory be reduced over that originally agreed upon—in legal effect, a request to modify the contract terms only in respect to the field to be covered—without any modification of the contingency upon which the mill reserved the right to cancel the contract.

Had the salesman protested against the reduction of his territory, or insisted upon a proportionate abatement of the monthly sales requirement, the mill's refusal to give him the full field originally assigned, or to modify such requirement, would have amounted to such breach of agreement as would clearly have entitled him to recover damages.

But he did not do this. He appears to have conformed to the mill's request without making any objection. If so, there was a clear modification of the original contract as to the area of territory, without affecting any of the other terms of the agreement. In the absence of any showing of mutual intention to abate any part of the 2,500-bbl requirement, it remained in force, affording an option to the mill to cancel.

In passing, it is worthy of note that the courts have frequently decided that where an employee is wrongfully discharged before termination of a contract employment period he is bound to exercise reasonable diligence to secure new employment, and that the damages recoverable by him are limited to the excess of what he would have earned had he been permitted to carry out the employment, above what he earned, or was able to earn elsewhere, during the remainder of the term.

On a showing of inability to secure substitute employment on reasonable exertion, he can recover the full contract compensation, less any expenses saved to him through the discharge.

* *

There is a fundamental legal principle to the effect that substantial damages for breach of contract, or for any other legal wrong, will not be awarded by a court where they must rest upon conjecture as to the extent of the claimant's actual pecuniary loss. As one court has phrased the principle, "juries are not permitted to guess money out of one man's pocket into another's."

It is often attempted to apply this rule in defense against a sales agent's suit to recover damages for depriving him of his contract territory before expiration of the time for which it has been agreed he might enjoy that territory exclusively; but the opinion filed by the Pennsylvania supreme court in the case of Macan vs. Scandinavia Belting Co., 107 Atl. 750, shows that, where the sales agent makes reasonably clear proof as to the nature and extent of his loss, damages should be allowed him.

The court held that the measure of damages in a case of this class is the value of the contract at the time of its breach, and if it reasonably appears that profits would have been realized if the contract had been carried out, and that the loss of such benefits necessarily followed the breach, their amount may constitute the true measure of damages. The agent may show the extent and volume of the business done in the territory under both his agency and that of his successor, as bearing upon the question of damages.

SECTION 101. ACCOUNTING BY SALESMEN

The supreme court of Pennsylvania affirmed judgment in favor of the Northwestern Consolidated Milling Co. against one George D. Young on a settlement of the latter's accounts as local salesman

and collector for the mill at Shenandoah, Pa. (104 Atl. 550.)

Defendant admitted the receipt of certain collections, but claimed credit because he had paid them to the plaintiff by applying them to the payment of accounts of customers other than those who actually made the payments. But the supreme court adopted the following stated conclusions of the judge of the lower court:

"Where he received the authority to do this, or whether or not it was done with the knowledge of the plaintiff or the parties whose money was so credited, does not appear in the affidavit of defense. We do not see by what right this defendant collected the money from one man and credited it on the account of another, and we do not feel that this would be a valid defense in the trial of the case. We therefore grant judgment for this amount, $2,805.97."

The milling company was also sustained in a claim against defendant for $6,166.64 for flour which defendant caused to be charged on the books of the company as having been sold to certain persons, when in fact the flour had been sold to other customers, and payment not properly accounted for. On this point the decision reads:

"The affidavit of defense, replying thereto, sets forth that the defendant was under the orders and direction of F. D. Watts, assistant manager for eastern Pennsylvania, Philadelphia branch of the plaintiff company, and that the said F. D. Watts would call on defendant for money and insist on having advances without delay. Whereupon the deponent would make sales of flour to different customers and others to realize money quickly, and in order to do so, and to induce immediate purchases, so as to provide for the demands of the said F. D. Watts, defendant sold, to the different persons named, flour at less than the prevailing or market price, but on the books of the company the persons purchasing at reduced price were charged the prevailing or market price of flour, and this course of dealing was carried on for a considerable time, and in that way balances against the customers, being the difference between what they actually paid for the flour and the market price, increased from time to time.

"He alleges that all moneys received from the customers at less than market prices were paid by the defendant to the milling company from time to time, and that the balance against such customers . . . defendant never received, and was not responsible to the company for the amounts.

"There nowhere appears in the affidavit of defense any averment that this arrangement was ever acquiesced in by the plaintiff, or that the plaintiff had any knowledge of the same, nor does it appear that F. D. Watts . . . had any knowledge of it, or acquiesced in it, nor does it appear that the said F. D. Watts had the authority to make any such arrangement for the plaintiff company.

"In view of these facts, we do not think that the affidavit of defense is sufficient as to these items."

SECTION 102. EMBEZZLEMENT

The Rhode Island supreme court affirmed conviction of one McAvoy for embezzlement of funds of the Bay State Milling Co., received by him as flour salesman for the company. (101 Atl. 109.)

From the opinion of the court it appears that flour was shipped by the mill to itself at Providence, and that McAvoy's duties were those of the ordinary flour salesman. The evidence showed that he made sales which were never reported to the mill, as required by his instructions, and appropriated the proceeds to his own use, instead of depositing them to the credit of the mill, as he was instructed to do.

Another fact established in the prosecution was that when the mill called upon the warehouse company for an inventory of flour on hand, defendant obtained permission from the representative of that company to make up the inventory as coming from such company, and made it conform to his reports to the mill, whereby a shortage of 300 bbls of flour was concealed.

McAvoy attempted to establish the fact that he was a factor or commission merchant, and that, as such, he was vested with title to the flour in such sense that he could not be guilty of embezzlement of the proceeds, although civilly liable as a debtor to the extent of the value of the flour not accounted for by him, but the court holds that this position was not tenable—that he held the proceeds of the flour as the mill's agent, thereby rendering himself guilty of embezzlement in misappropriating them.

CHAPTER VIII

BROKERS AND COMMISSION MERCHANTS*

STATUS IN GENERAL

SECTION 103. WHO ARE BROKERS, FACTORS AND COMMISSION MEN?

SINCE the term "broker" has a well-defined meaning in law, as determined by the courts in almost innumerable cases, trade usage of the term in business contracts should be found to conform closely to that definition. The courts have not originated the definition, but merely apply what has been found to be common understanding in the business world. And when one is designated as "broker" in a given transaction it will be presumed by judges that the term was used in its commonly understood sense.

"A broker is one who is engaged for others on a commission negotiating contracts relative to property with the custody of which he has no concern." 9 Corpus Juris, 508.

He is to be distinguished in legal relationship to his principal from the salaried representative of a mill or grain dealer, who is ordinarily charged with the duty of exclusively serving his employer and of negotiating matters beyond the mere making of contracts of sale or purchase. The fact that a salesman takes orders for his employer on an agreement whereby he is to be compensated wholly or in part by commissions does not make him a broker.

A "factor," or "commission merchant," is distinguishable from a "broker" in that the former is intrusted with the possession, disposal, and control of goods, and may sell them in his own name. Sometimes the functions of factor and broker are combined, the broker being given possession of the goods to be sold, or being empowered to receive the goods which he is to buy; but in these cases he is, strictly speaking, a factor or commission merchant.

It is true, of course, that the fact that a flour dealer, or other middleman in the sale of any kind of goods, has customarily acted for a mill as its broker does not establish such hard and fast relationship between the parties as precludes the status of seller and buyer in a particular instance. But to show that one who had generally acted as broker for a mill was an independent buyer in a given transaction, as affecting his personal rights or liabilities, there must be reasonably clear proof that the latter relationship was mutually understood to exist.

In any particular case, question as to the character of the relationship must be determined according to the manifest intention of the parties in the light of past dealings and the language of their agreement.

In view of the fact that one cannot reasonably expect to be both broker and buyer at one and the same time, it is surprising to meet frequent instances in which a middleman has claimed to be an independent buyer, where his contract called for the payment of brokerage to him. Such a provision, coupled with the fact of customary dealing as a broker, conclusively establishes that relationship in the particular transaction in the absence of other circumstances clearly calling for a different conclusion.

That honest confusion may exist on this point is shown by a letter The Northwestern Miller received from a firm of flour dealers, reporting the result of a lawsuit in an Illinois circuit court. The firm wrote that, "acting as brokers," it contracted to buy quantities of flour from a mill. By reason of death of one of the millers and suspension of operations at the plant when a boiler exploded, the contract was not fulfilled on the mill's part. The firm bought in substitute flour on an advanced market, and sued the mill for reimbursement against the loss.

Trial of the suit resulted in the mill's favor, on the jury's finding that the plaintiffs were acting as brokers and had no claim against the mill, deciding that they were working for the mill on a 10c commission basis, although it was fully

*For a discussion of closely related matters specifically applied to salesmen and sales agents employed on salary or commission see the preceding chapter.

proved that plaintiffs bought the flour outright, as they had been doing right along. Still, because there was a 10c commission mentioned in the contract it was decided adversely to the plaintiffs.

Now, the law of this case seems to be clear: If the mill's previous dealings with the firm warranted the mill in understanding that the firm was acting as a "broker," the decision was plainly correct, and the fact that the firm designated itself as such and that a commission or brokerage was charged is strong evidence that the firm was not an independent purchaser.

True, the mere fact that the term "broker" was inadvertently used would not preclude a showing that it was mutually understood that the firm was an independent buyer, and not a broker; and the term "commission" might be shown to have been mutually and mistakenly treated as meaning discount or something else consistent with an absolute sale. But in this case the firm evidently failed to sustain the burden of proving that the mill understood that it was contracting a sale to the firm for the firm's own account.

* *

For some time there had been considerable uncertainty in the minds of many flour men as to whether they were brokers and liable to the broker's tax of $50 under the federal revenue act. The secretary of the Boston Flour Club, Warren G. Torrey, wrote to the commissioner of internal revenue, Washington, and received the following ruling:

"In reply to your letter regarding liability to special tax as broker, section 1001, paragraph 1, of the revenue act of 1918 provides in part as follows: 'Brokers shall pay $50. Every person whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, or other securities, produce or merchandise, for others, shall be regarded as a broker.'

"You state that a certain flour concern in your city represents certain flour mills exclusively for firms in different states, for which it is paid a commission, and you request to be advised as to its liability to special tax under the above section of the law.

"You are advised it is the ruling of this office that a person or firm who is a sales agent of one or more corporations, and whose business is handled in the name of such corporations, is not a broker within the meaning of section 1001, paragraph 1, of the act. However, a person or firm who has a place of business of his own, and negotiates the purchase or sale of any of the commodities enumerated under the aforementioned section and paragraph of the act for others, is liable to the special tax imposed upon brokers under the said provision of the law.

"Therefore, if the firm nemtioned maintains a place of business of its own and transacts business for others as a broker, special tax liability would be incurred under the above section of the law."

See, also, section 109, which quotes from a Kentucky decision on the distinction between brokers and factors, and section 117, citing a decision of the Oregon supreme court.

SECTION 104. RESPONSIBILITY WHERE RELATIONSHIP IS DISCLOSED

"It is, of course, competent for an agent, acting for a disclosed principal, to bind himself personally by a contract made in behalf of his principal, if the other party exacts it, or he volunteers and intends so to do: but it is to be presumed that he intends only to bind the principal, and therefore, unless the contract clearly shows that it was intended to be the personal contract of the agent, he is not bound thereby individually, and the party with whom he negotiates it may look only to the principal for performance. But the agent, if not authorized by his principal, becomes liable for all damages sustained by the other party so contracting in reliance upon his authority."

This statement of legal principles was made by the appellate division of the New York supreme court in the case of Hernandez vs. Brookdale Mills, Inc., 185 N.Y. Supp. 485. The court also held that if a contract be ambiguous on the point whether it is the individual undertaking of the agent or a contract made for his principal, although signed by the agent individually, testimony is admissible to show whose contract it was actually intended to be.

* *

Conditions under which a broker may be held personally liable on a contract of sale negotiated by him were considered by the West Virginia supreme court of appeals in the case of Hurricane Milling Co. vs. Steel & Payne Co., 99 S.E. 490.

The conclusion reached by the court was that "an agent or broker contracting for and on behalf of a principal known or disclosed to the person with whom the contract is made is not personally bound by it, nor liable for a breach thereof,

unless the credit has been extended to him or he has expressly bound himself by the contract in some form."

The decision in the case denied the mill's right to recover against defendant broker on account of damage to a carload of corn bought through it.

Defendant, by telephone, offered to sell plaintiff the corn at a certain price, and plaintiff accepted. Defendant confirmed the sale in writing, which recited that it was "for account of Paul Kuhn & Co." Plaintiff paid a draft drawn in favor of Paul Kuhn & Co., and attached it to a bill of lading for the corn in which that concern was named as consignor. Previous purchases had been made under similar circumstances.

On arrival the corn was found to be damaged, and the mill sought to hold defendant responsible. Trial of the suit resulted in judgment in favor of the mill, but it was reversed by the supreme court of appeals; a new trial being ordered.

Holding that a broker is not personally liable on a contract negotiated by him where the other party is fairly chargeable with notice that the broker is acting in a representative capacity, it was ruled that the trial judge erred in excluding testimony offered by defendant and tending to show that by reason of previous transactions the mill knew that defendant was acting for Paul Kuhn & Co.

"It was not at all improper for the jury to know that part of the defandant's business was brokerage in corn," said the opinion, "and that it usually represented a certain firm of corn dealers, as sellers. These circumstances do not of themselves constitute a defense to the action, but they are essential elements of the defense. Coupled with notice thereof to the plaintiff, they make out a complete defense."

The decision went still farther by holding that unqualified and unexplained payment of a sight draft with bill of lading attached, receipt of confirmation, and previous dealings—all pointing to a third person as the principal seller—conclusively established the buyer's knowledge as to the identity of the real seller.

* *

As shown by a Kentucky court decision referred to below, when one has previously acted only in the capacity of broker, the mere fact that he sends a message ordering goods shipped to him, without disclosing the name of any customer, does not constitute him an independent purchaser, if, under all the surrounding circumstances, the seller reasonably understood that he was dealing with the other person in the latter's usual capacity as broker. (155 Ky. 465.)

SECTION 105. UNDISCLOSED RELATIONSHIP AS BROKER

Fiction's frontier gambler, who had two directly conflicting rules as to the winning power of a "bobtail flush" so framed in his poker room that he could rely upon one or the other according to whether he or an unsophisticated patron should draw such a hand, has his prototype in actual business life in the middleman who attempts to so trim his negotiations that he may pose as either a broker or independent dealer on his own account, according to whether market values of the goods bargained for go up or down.

But, under the law, business contracts do not permit such elasticity of obligation, in the absence of an expressly conferred option in the particular agreement. Under the ordinary contract, the legal relationship of the parties becomes fixed when they enter into their agreement, and cannot afterwards be changed by one-sided action.

The Texas court of civil appeals has handed down an interesting and important decision bearing on this subject. In this instance (Boehringer vs. Dorman, 195 S.W. 669), plaintiff sued to recover $600 as damages for defendant's claimed breach of contract to deliver 12 cars of No. 2 sacked white corn at $1.01½, whereby plaintiff was compelled to buy substitute corn on the market at from $1.05½ to $1.07½.

When the contract was made, defendant did not disclose anything tending to show that he was acting as agent in agreeing to sell, and the contract on its face purported to be his own individual obligation. But he defended on the ground that he had merely acted in a representative capacity. His principal reliance to charge plaintiff with notice that he was acting as a broker was the fact that his letterhead, on which the contract was written, contained a condition printed in small type, to the effect that he was responsible only as a broker. The court said:

"If an agent discloses the fact of his agency, but conceals the name and identity of his principal, and deals in his own name as the contracting party, he will be personally liable. . . . Appellant utterly failed to show that he had any principal, and contracted in his own

name for delivery of the corn. The word 'principal' is nowhere mentioned in the transaction between the parties.

"An agent contracting in his own name and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods is personally liable for whatever obligation may arise out of the contract."

The court not only decided that a broker is personally liable where he conceals the fact that he is acting for another, but also that he may be held responsible where he discloses the fact of his relationship as broker, but not the identity of his principal. The following statement of the court on this point seems to be well supported by other judicial authorities:

"Appellant could not escape liability by merely stating that he was liable only as a broker, unless he disclosed for whom he was acting as agent. The disclosure of agency is not completely made unless it embraces the name of the principal. Appellant not only failed to show that he was acting for any principal, but failed to show that he ever had any authority for making the contract of sale.

"On the other hand, the facts tend to show that there was no principal, and that he was contracting for himself, and was therefore liable. . . . If appellant is not liable for a breach of the contract, no one is liable, for he had no principal. He cannot escape by stating on his stationery that he acted as broker only and assumed responsibility as such. As such broker, he is liable when he discloses no principal."

On rehearing of this case (195 S.W. 1183), however, judgment was reversed on the ground that the evidence failed to establish market values.

* *

It is not to be understood that a broker need disclose his representative capacity to third parties, so far as the principal's rights are concerned. For example, it was decided by the United States circuit court of appeals, eighth circuit, in the case of Wilhite vs. Houston, 200 Fed. 390, that where brokers were employed to buy and sell grain at various exchanges, having no interest in the transactions other than brokerage, their relation to their principal was not affected by the fact that in executing his orders they assumed the position of principals toward those with whom they dealt in making such sales and purchases.

DUTIES TO PRINCIPAL

SECTION 106. DUTY TO MAKE BEST POSSIBLE CONTRACT

The decision of the Kansas City court of appeals in the case of Russell Grain Co. vs. Bainter, 223 S.W. 769, established a point of law of vital importance to every one who sells commodities through brokers, and the decision is of no less importance to brokers themselves. The court held that a broker is under legal obligation to use reasonable diligence and care to sell at the best price obtainable, and must account for his failure to do so.

Plaintiff received a car of wheat from defendant for sale on commission, advancing $2,900 on defendant's draft. Plaintiff sold the wheat for $2,347.03, and deduction of commission and expenses left defendant indebted to plaintiff $652.16, the excess of the advance made by the broker above the net proceeds of the grain. Defendant successfully resisted plaintiff's attempt to recover this balance, on the ground that the plaintiff could have sold the wheat at a market price of $3,022.10.

The judge and jury in the trial court found in defendant's favor, and the court of appeals upheld the verdict, saying: "We find there was abundant and substantial evidence to sustain the jury in finding that plaintiff could have obtained a better price, and by careless neglect failed to do so."

The higher court also approved instructions given by the trial judge to the jury, to the effect that it was plaintiff's duty to act in good faith and with reasonable diligence and care in the sale of the wheat, and that if the defendant informed the plaintiff that he would be satisfied to get a certain price, and plaintiff by reasonable diligence and care could have sold at that price, but failed to make such effort, and thereafter sold at a lower price, plaintiff could not recover.

"A broker must act in good faith and in the interest of his principal. This requires him to give the principal the benefit of his knowledge and advice, and to keep him informed of all material facts affecting his interest which come to his knowledge, and if in dealing with his principal a broker is guilty of fraud, he is liable in damages. . . .

"So if a broker employed to sell property understates to the principal the best price obtainable, the principal may recover from him the difference between that obtained and that which might have

been obtained, except where the broker does not learn of the better terms until after the transaction is closed, or where he is to sell for a net price, which he does. And a broker employed to purchase property must inform the principal of the lowest price at which it may be bought." 9 Corpus Juris, 536.

* *

One who undertakes to sell staple commodities for others is bound to use good faith efforts to obtain at least the market price, according to the Arkansas supreme court's ruling in the case of Brown et al. vs. Joy Rice Milling Co. (268 S. W. 1).

See, also, section 110.

SECTION 107. DUTY TO OBTAIN VALID CONTRACT

Question was raised not long ago concerning the liability of a broker for failing to obtain a signed order from one who verbally agreed to buy flour; the buyer later taking advantage of the point that he had signed no written contract, thereby making his agreement to purchase unenforceable.

The broker could not be held personally liable as the buyer, because he had signed the order only as the mill's representative. If the mill had customarily acted upon orders signed by its salesman or broker alone, it was in no position to complain of loss in the particular instance on the ground of the representative's neglect to secure the customer's signature.

But I believe that the courts would apply the general rule of law that an employee is liable for loss sustained by his employer through the former's willful or negligent omission to perform his contract duties in a reasonably efficient manner, in a case where a mill has instructed its salesman or representative to secure buyers' signatures and has never acquiesced in violation of these instructions, and loss flows from a violation in a particular instance, especially on it appearing that the customer would have signed up on request when the order was received.

And, plainly, when a broker's commission is dependent upon his obtaining a contract from a customer for a purchase he could not require payment of the commission so long as the order remains subject to repudiation by the customer for want of proper signature.

SECTION 108. DUTIES OF COMMISSION MERCHANTS

Flour commission merchants are governed by the following rules of law, as laid down by the Michigan supreme court in the case of Hutchins vs. Vinkemulder, 154 N.W. 80.

They must use ordinary prudence in caring for and disposing of the goods intrusted to them, and duly account for the proceeds.

After the lapse of considerable time, without any accounting, under some circumstances it may be presumed that an agent to sell goods has sold them, and suit may be maintained against him to recover the net proceeds, but this presumption is overthrown by proof on the part of the commission man that no return has been received by him. (It would seem, however, that his failure to receive return would be no defense to liability, if he had negligently and unauthorizedly extended credit to an irresponsible customer.)

On an issue as to whether a commission merchant has discharged his legal duty to his principal, correspondence between him and a subagent will not be received in evidence, it being regarded as mere hearsay evidence.

SECTION 109. BROKER'S INDIVIDUAL INTEREST

When a broker accepts employment to buy or sell goods, the law will not permit him to profit at his principal's expense beyond the amount of agreed compensation, so far as concerns transactions within the scope of the employment, except as the principal may afterwards ratify the broker's acts in his own interest.

Broadly speaking, one employed to buy property is not entitled to sell his own property to the principal, unless the latter deals with his eyes open. This rule was applied in the case of Tewksbury vs. Spruance, 75 Ill. 187, where it was held that a commission merchant employed to go on the market and buy a given quantity of wheat for cash was not authorized to turn over to his principal wheat held by him, although no more than the market price was charged. Removal of opportunities for faithless dealing furnishes the reason of the rule.

And, as decided by the United States circuit court of appeals, if a broker overstates the price at which goods may be bought, obtaining for himself the difference, the principal may recover the amount of the broker's attempted secret profit.

For like reasons, a broker employed to sell will not be permitted to sell to himself, without the principal's approval, as shown by a decision of the Kentucky court of appeals hereinafter reviewed (155 Ky. 465). "Where a broker, em-

ployed to sell, fraudulently purchases from the principal and then resells at a greater price, or understates the price received by him and keeps the difference, he must account to the principal therefor, although the amount turned over to the principal exceeds the amount for which the latter agreed to sell." 9 Corpus Juris, 539, 540.

But these rules have been formulated and are enforced only for the purpose of thwarting attempts to deceive principals as to matters in which they are entitled to the exercise of good faith. Hence, a broker is not only entitled to deal in his principal's goods for his own profit, when the principal authorizes or ratifies such dealings, but he is also permitted to deal on his own account after he has discharged his full duties to the principal.

To illustrate: If A, as a mill's broker, sells a shipment of flour to B, discharging all the duties of his employment faithfully, there is no reason or legal principle to prevent A from afterwards negotiating a repurchase of the same flour for his own account from B, although the mill may not be apprised of the latter fact. But the courts will scrutinize the transaction closely, and if it shows that A did not act in good faith in making the sale for the mill, and that he made it with a view to his repurchase from B, that will be deemed such fraud upon the mill as entitles it to an accounting.

* *

I was called upon to give an opinion in a controversy involving these principles. A broker negotiated a sale of flour for export by a mill to a customer abroad, with no intention of profiting beyond the brokerage the mill agreed to pay; the price of the flour to be paid on arrival in New York. Pending delay in delivery, the broker, foreseeing a rise in market prices, negotiated with the foreign buyer for a resale of the flour from the latter to him on his own account. It would have been to the mill's advantage to have secured a cancellation of its contract of sale, but the broker's employment did not comprehend services to this end; his work had ended when he negotiated the sale.

Under these circumstances, and on the following legal authorities, an opinion was given that the broker was entitled to the benefits of the repurchase:

The rule against an agent's dealing for his own account "does not prevent a bona fide purchaser of the property from afterwards selling in good faith the property to the agent." 2 Corpus Juris, 702. The decision of the United States Supreme Court in the case of Robertson vs. Chapman, 14 S. Ct. 741, supports this point.

After termination of the agency, the agent has the same right as any other person to deal in the property. The principal must show that adverse interest was acquired during the continuance of the agency. The agent is under no duty to disclose his after-acquired interest, and the fact that he has not disclosed it is no badge of fraud or bad faith. (Federal Case No. 17,068.)

Furthermore, the facts in the controversy mentioned above showed that when the mill was advised by the broker that he had repurchased the flour, the mill did not object to the broker dealing on his own account, and promised delivery to him on proof that he had actually secured a contract of resale from the original purchaser.

On these facts, it seems quite clear that, even if it could be said that the broker had improperly negotiated for the flour on his own account, the mill ratified his acts, thereby making the mill's obligations as strong legally as if the sale had been made directly to the broker in the first instance, as an independent buyer.

Even where an agent has wrongfully purchased for his own account, the transaction is not void, but merely voidable, and is subject to validation by the principal's ratification. 2 Corpus Juris, 702.

* *

One of the leading court decisions bearing on this subject was rendered by the Kentucky court of appeals in the case of Sutton & Cummins vs. Kiel Cheese & Butter Co., 155 Ky. 465. This was a suit involving asserted breach of a contract to sell cheese, but the principles involved apply with full force to dealings in the grain and flour trades. It was decided that neither a broker nor a factor can purchase from the principal for himself without apprising the principal of all the facts within his knowledge, unless it be clearly understood between them that he has the right to do so.

In holding that defendant was entitled to cancel a contract to sell goods on ascertaining that the plaintiffs were buying on their own account, and not as brokers, as defendant had assumed, although the contract relied upon by plaintiffs was evidenced by a request from them for a price on the goods, an answer quoting a price, and plaintiffs' order for a specified quantity, the court said:

"The difference between a broker and a factor is that a broker is a mere negotiator between other parties, and does not ordinarily act in his own name, but in

that of his employer. He is not intrusted with the custody of goods which he may be employed to buy or sell, and is not authorized to buy or sell them in his own name. On the other hand, the factor may buy or sell in his own name as well as in the name of his principal, and he is intrusted with the possession, management, control or disposal of the goods to be bought or sold, and has a special property in them. . . .

"However, the character of the factor and broker are frequently combined, the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase; but in these cases he is, properly speaking, a factor. . . . It is manifest that the relation which plaintiffs bore to defendant in this case was that of brokers. But even that distinction is immaterial so far as this case is concerned, for neither a broker nor a factor can sell to himself unless the principal, with full knowledge of the facts, consents to the transaction, or unless it is clearly understood between the parties that he shall do so. . . .

"The reason for the rule is that if the broker or factor were permitted to buy from and sell to himself there would be combined in him the incompatible relation of purchaser and seller, and an interest adverse to that of his principal would be created such as would ordinarily lead to a violation of his duty as agent. Where a factor or broker sells to himself, the sale is prima facie voidable, and the principal may either ratify the sale or recover for the actual value of the goods."

Responding to plaintiffs' suggestion in this case that defendant had actual knowledge of the fact that they were making purchases of goods in their own name, because defendant first insisted on knowing the names of plaintiffs' customers but afterwards shipped to plaintiffs direct on ascertaining that plaintiffs were financially responsible, the court added:

"As we view the correspondence, however, there is nothing in it to show that defendant regarded the plaintiffs in the light of purchasers. It is entirely consistent with the theory that defendant wanted to know either that the intending purchasers, or plaintiffs, as their agents, were financially responsible. Furthermore, plaintiffs charged a brokerage on all transactions had with defendant. Not only so, but in their letter . . . confirming the telegraphic correspondence with reference to the particular cheese in question, they stated, 'We take it for granted that our brokerage will be ¼c.'

"Instead, therefore, of fully acquainting defendant with the fact that they were purchasing the cheese for their own account, they were demanding brokerage on the transaction, a fact absolutely inconsistent with their claim as purchasers. Under these circumstances, the sale was voidable at the election of the defendant, and having repudiated the sale when apprised of the fact that the plaintiffs were the real purchasers, no liability attached on the contract in question, even if we assume that it is valid in other respects."

SECTION 110. LIABILITY ON UNREPORTED TRANSACTIONS

A miller inquired whether a mill or a broker is liable to a customer under the following stated circumstances:

A broker, representing a mill, "made a sale" of two cars of flour, writing the "sale upon the mill's regular order book, showing the mill's name, etc." The sale was never reported to the mill. The miller added: "We have made a practice of having some of our brokers use our order book. We confirm all our orders, and do not accept any business from a broker unless it has been confirmed by wire."

On fundamental principles of the law of agency, the mill was not liable, unless it authorized the broker to make a final contract of sale, without reserving any right of confirmation, and he made such a contract. If he was merely empowered to receive orders and transmit them to the mill for acceptance or rejection, there is no legal liability to the customer, on the part of either mill or broker. This is on account of the broker's failure to transmit a particular order, which is, in legal effect, a mere offer to buy, without binding effect until accepted.

If the broker's contract of employment by the mill required him to communicate all orders received, the mill would probably have a valid claim against him for any loss directly sustained through his omission to communicate the particular order. Or, if a buyer of flour should employ a broker to place an order with a mill, the broker would doubtless be liable to the buyer for neglect to transmit the order.

But, clearly, the mill is not responsible in any of the cases above mentioned, for it has not entered into any contract to sell, having at most invited the trade to make offers to buy through the broker employed by it.

It is well-settled law that persons dealing with a salesman or broker are bound to ascertain the extent of authority conferred upon him. In the absence of proof

of broader authority, such a selling representative will be presumed to have been merely authorized to receive orders, subject to approval by the mill.

Of course, where a broker is authorized to make an absolute contract of sale on the part of a mill, any agreement made by him within the scope of such authority is binding on the mill, although he may neglect to advise it of the making of the particular contract. In such event, the mill is bound by its representative's authorized act, looking to him for indemnity on account of liability to the customer.

If, however, his power is limited to the making of contracts subject to approval by the mill, such a contract could not become binding on the mill until received by it and expressly or impliedly approved, and hence the broker's omission to transmit the tentative agreement would impose no liability on the mill.

In the case of Mason Produce Co. vs. Harry C. Gilbert Co., 141 N. E. 613, it was held that a broker may be held liable for failing to communicate to his principal information that a buyer has repudiated an order for goods placed through the broker. Reversing a decision of the Indiana appellate court (138 N. E. 100), the Indiana supreme court said:

"A broker owes to his principal the duty to act with the utmost good faith in all their dealings with each other, and is under legal obligation to disclose to a person by whom he is employed as broker all facts within his knowledge or which he may learn in the course of a transaction in behalf of such person that are or may be material to the matter in which he is employed or which might influence the action of his principal, in relation thereto."

The court ruled that, whether or not an enforceable contract of sale had been made, it was the duty of the broker to advise his principal of the buyer's repudiation of the order, to the end that futile shipment be not made. The opinion expressly holds that a broker's duties to his principal do not necessarily end with the negotiation of a binding contract of sale.

See, also, section 117A.

AUTHORITY OF BROKER

SECTION 111. SCOPE OF POWERS

In El Reno Wholesale Grocery Co. vs. Stocking, 127 N.E. 642, the Illinois supreme court said: "A broker is a special agent for a single object, and cannot bind the principal beyond the limitations of his authority, and while, ordinarily, he has implied authority to do everything necessary to effect the business about which he is employed, such authority is restricted by express instructions or the usages of the trade. . . .

"A customer, in giving authority to a broker to negotiate a transaction in a certain trade or market, is presumed, in the absence of evidence to the contrary, to have authorized the broker to transact the business in question in accordance with the rules, customs and usages prevailing in that trade or exchange. . . . Any person dealing with a broker is bound to ascertain the extent of the broker's authority, and acts at his peril if the broker exceeds his authority."

* *

Although all the courts respect any understanding between a mill and its sales representatives that the latter are merely authorized to receive orders for acceptance or rejection at the home office, there is no lack of judicial authority for the proposition that, where a mill treats a representative as empowered to make binding contracts, it will not be permitted to deny his authority to enter into such a contract, when the other party thereto seeks to enforce it.

A case in point, decided by the Kansas City court of appeals, is Haubelt Bros. vs. Rea & Page Mill Co., 77 Mo. App. 672. There it was found that by customarily treating a Texas flour broker as being empowered to bind the mill by contracting sales of mill products, the mill precluded itself from refusing to execute a contract made by him with plaintiffs. The court said:

"It seems well settled in the law of agency that where it appears that an agent had repeatedly performed acts like the one in question, which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred. . . . The broker testified that he had been acting as the agent of defendant for a number of years in making sale of the latter's flour and that his contracts as such had always been carried out by defendant. . . . In the light of the precedents just referred to, we must conclude that he was authorized to make the sale of the flour to plaintiffs."

* *

The authority of a broker in dealing

with his principal's goods is restricted to the carrying out of contracts negotiated with the principal's sanction. For instance, approval by a mill of a sale to one person does not authorize the mill's broker to agree to rescission of the contract and delivery of the goods to another. This point is illustrated by the decision of the Georgia supreme court in the case of Kauffman Milling Co. vs. Kelly & Bro., 92 Ga. 103.

A broker negotiated a sale of flour to defendants for the mill, and shipment was made to defendants under a straight bill of lading. Without the knowledge of the mill, defendants did not receive the flour, but indorsed the bill of lading over to the broker, who received the flour on his own account and disposed of it, appropriating the proceeds. When the mill sued defendants for the agreed price, the latter interposed the defense that they did not receive the goods, and that the mill's broker took charge of them. In sustaining the mill's contention that the broker's act was unauthorized and that defendants must be held liable as for co-operating in an unauthorized disposition of the goods, the court said:

"We think the broker, being a mere middleman to negotiate the sale, and having no express authority to do more, could not rescind the contract to receive the flour and bind the milling company by his conduct. It was sought to enlarge his authority under the general law by local custom or usage prevailing in Atlanta, under which brokers were recognized as representing the persons who had employed them to sell, in afterwards canceling the sales and taking charge of the goods. But the evidence fails to show any knowledge of this local custom or usage by the milling company or any dealing by it with reference thereto. There is no ground for inferring its assent to such a custom."

* *

A decision of the Connecticut supreme court of errors shows how restricted are the powers of a merchandise broker, in binding a seller by warranties, representations, etc. (Politziner vs. Vanetch, 125 Atl. 630). It was held that there was no implied warranty on the part of a seller of sugar that it was suitable for certain uses, although a broker who negotiated the sale knew that the sugar was being bought for such uses.

See, also, sections 89-93.

SECTION 112. IMPUTED NOTICE OF LIMITATION OF AUTHORITY

One dealing with another through a broker is chargeable with knowledge of limitations on the broker's power to bind his principal. This trite principle of law was applied by the Kansas City court of appeals in a case which will interest the mill and grain trades generally.

In this case—Fowler vs. Cobb, 232 S.W. 1084—it appeared that defendant, a Texas grain dealer, authorized J. C. Robb, a Kansas City broker, to buy a carload of No. 3 mixed corn at $2.27 from plaintiff. The confirmations covered corn of this grade, without reference to samples.

Before arrival of the car, an invoice informed defendant that a car containing 88,000 lbs or 1,571.24 bus of "mixed corn" had been shipped at $2.25. Defendant notified plaintiff of his refusal to accept the shipment unless the delivery should be reduced to 1,000 bus, on the ground of excessive quantity, and on arrival plaintiff sold the corn on a declining market and sued to recover the excess of the invoice price to defendant.

It developed that the corn tendered defendant was not of the grade specified in the contract, as was shown by a reinspection at the time the shipment was made to defendant by plaintiff. But plaintiff claimed that the corn shipped corresponded to a sample exhibited to Robb, as defendant's broker. This gave rise to the important question whether defendant was bound by the sample.

The Kansas City court of appeals held that defendant was not so bound. In the course of its opinion the court made the following observations bearing on the limits of a broker's authority to bind his customer: "In the case at bar it is not shown that Robb was the general agent of defendant, but that his authority was limited to the terms of the contract. In other words, Robb's was a limited agency, and he had authority only to purchase the amount and grade of corn specified in the telegraphic order and contract.

"The principal may make the authority of the agent as broad or as narrow as he will. Any lawful limitations he may choose to impose upon the agent's powers, and not of a secret nature, will be binding upon third persons. And if the original authority is restricted and limited, then such limitations form a part of the power itself, and third persons must know them at their peril.

"The conclusion is warranted that, in purchasing No. 4 corn, Robb went beyond his authority, and plaintiff completed the contract with the agent at his own peril. We, therefore, hold that defendant is not bound by the sale.

"Plaintiff's second point, to the effect that the act of the broker in purchasing corn by sample was the act of defendant, . . . was later waived by defendant, so that he is bound by the transaction. The position of plaintiff cannot be sustained that, because Robb had acted many times for defendant in the purchase of grain prior to this transaction, he was defendant's agent generally. Said agent was not authorized to act in any other way than in strict conformity with the order and confirmation, and legally could not exceed the authority therein expressly conferred."

See, also, section 94.

RIGHT TO COMPENSATION

SECTION 113. NECESSITY FOR LICENSE

Pennsylvania had a law which imposed a license tax on merchandise brokers, who were defined as "those who for a commission or other compensation make contracts for the sale or purchase of personal property for others," apparently embracing flour brokers.

Interpreting this law in a case which was before it the supreme court of Pennsylvania said:

"Neither this act nor prior legislation prohibits a person whose business or occupation is that of a broker from receiving compensation for services rendered in single transactions of buying or selling real estate, or other property, for another. . . . If, however, a person is actually engaged as a broker, the procuring of a license is a condition precedent for the lawful transaction of business and, consequently, to the recovery of compensation for services rendered." (95 Atl. 715.)

It would seem, however, that this law could be applied only to those cases where brokers are engaged in intrastate business, since it appears to be well settled that such state regulations cannot be construed to apply to interstate commerce.

SECTION 114. CONDITIONS AGREED UPON

When a special offer is made to a merchandise broker to pay him a stated commission for effecting a sale of goods within a stated time, the courts will regard time as of the essence of the contract, defeating the right to commission if the sale be not effected within the time limited, unless the broker is prevented from earning the agreed compensation through some act on the other party's part. This was the holding of the Washington supreme court in a case where a commission was offered on condition that a sale of merchandise be made during the current day. (Brady vs. Admiralty Trading Co., 151 Pac. 1084.) The court adopted this general rule:

"The parties are at liberty to make the payment of commissions dependent upon such lawful conditions and contingencies as please them, and, where no improper advantage is taken, their express stipulations must prevail, although the result be that the broker finds that he has risked his labor and expenses upon the mere caprice of his employer, as when he undertakes to find a purchaser of property upon terms satisfactory to the seller."

SECTION 115. COMMISSIONS ON UNCOMPLETED SALES, IN GENERAL

A Minnesota mill obtained through The Northwestern Miller the views of representative millers and brokers, and a legal opinion on the following stated case concerning a broker's claim to a commission:

The broker sold a car of flour and the mill wired acceptance. The buyer asked for a sample, which was sent him by the mill. The buyer later advised that the sample was not up to the sample submitted by the broker, and suggested that the order be canceled. As cancellation was agreeable to the mill, it was put into effect.

In the meantime, the wheat had undergone no material change and neither the mill nor the buyer claimed anything. The broker, under these circumstances, wanted a commission on the car of flour.

The lay views did not concur, some holding that the commission was earned, and others that the broker had no valid claim. The following legal opinion was furnished:

Unless it was understood that the broker's right to commission should depend upon a completed sale, he was entitled to the agreed compensation. It is a general rule of law that when a broker's right to commission has once accrued under the terms of his employment, it cannot afterwards be defeated by the act of either or both the seller and the buyer, as by repudiation or cancellation of the contract.

It is inferable from the facts stated that the failure of the sale, after a binding contract had been made, was not the fault of the broker, and, in the absence of a previous understanding between

the mill and the broker that the right of commission was subject to cancellation of the contract of sale, the case is governed by the general rule of law that a broker earns his commission when he produces a customer who enters into a binding contract on the terms fixed by the broker's employer.

Of course, if it could be shown that the broker misrepresented the quality of the flour offered for sale, or if the sale failed through any other act on his part in exceeding his authority, such act not afterwards being ratified by the mill, cancellation of the contract on that ground would defeat any right to compensation.

Trade custom, if any on the point exists, might be a determining factor in this case. But any express agreement as to when the right to commission should accrue could not be affected by any conflicting custom.

The mill could, however, avoid liability, if there was no express understanding as to when the compensation should be earned, by proving a custom, if any there was known to both parties at the time, whereby the commission was lost by cancellation of the contract of sale.

Referring to this discussion, a Minneapolis miller later wrote to The Northwestern Miller:

"I have noted with interest the answers which The Northwestern Miller received with regard to the inquiry made by a Minnesota mill whether a broker, under certain circumstances, was entitled to his commission. A question that is of such vital importance to every mill employing brokers as a means of disposing of its product should be settled firmly in the mind of the manager.

"In our own case, we never make a brokerage arrangement with any broker without stipulating in our contract that no brokerage is earned until shipment is made and the goods delivered and paid for by the buyer. We do know, however, that a great many mills do not take this precaution, and too many mills are finding themselves in the same position as the Minnesota mill making this inquiry.

"This question has gone through the courts an innumerable number of times, and there is no doubt as to what the law is. Attorney Street's statement as to the law I have found to be correct, after having read a large number of cases involving this question."

* *

A flour broker asked an opinion as to his right to be compensated by a mill for negotiating a sale canceled by the mill on the ground of the buyer's failure to order shipment within contract time.

The only material facts disclosed are that the buyer has established, in a court, a claim against the mill for damages for canceling the contract—seemingly on a theory that the mill was not entitled to cancel under the peculiar circumstances of the case without first requesting shipping instructions or giving notice of intent to cancel—and that the mill denies that the broker represented it. The nature of the contract or understanding between the mill and the broker is not stated. Therefore, if is not possible to give a definite opinion as to whether or not the broker is entitled to recover in this case; but the case will be governed by the following well-established rules of law.

To establish a valid claim to compensation, a broker must show that he was authorized by the principal to find a buyer, negotiate a sale, or render some other definite service; and, further, show that he has fully performed the service to be performed by him, and prove the amount of compensation agreed upon.

Where a broker shows that he brought about a contract for a sale of flour, or other commodity, on an understanding with the seller that he was to receive certain compensation for that service, he prima facie establishes a right to the pay, although it may appear that the buyer has refused to carry out his contract. For stronger reasons, of course, there is a right to recover where the seller has refused to perform the contract of sale. In order to avoid liability for compensation, it is necessary for the seller to show that there was an agreement, express or implied, that the compensation was not to be deemed earned until the contract of sale should be carried out, and it would take a clearly expressed understanding to the contrary to defeat the broker's right to compensation on a sale negotiated by him but not consummated because of the seller-principal's fault.

Numerous court decisions from different jurisdictions are cited in support of the following summary of the law, as stated by a standard legal authority:

"If the principal and the customer found by the broker enter into a valid contract, and the broker acts in good faith, the broker is not deprived of his right to a commission by the fact that the customer fails or is unable to carry out the contract, . . . unless the broker knew at the time of offering his services that the customer would be unable to

carry out such contract. This rule is especially applicable where the failure or refusal of the customer is due to some fault of the principal. However, the principal may avoid the rule by embodying a stipulation to the contrary in the contract of employment." 9 Corpus Juris, 631-632.

The courts seem to take the position—which is just—that, where a broker's service is complete when he has brought about a contract of sale, his right to compensation should be fixed, excepting as he may have agreed to hazard it upon the chances of the buyer refusing to carry out his agreement. This view treats the broker as employed merely to bring about contracts for purchases, and not purchases, much the same as mill salesmen are employed to secure orders. But the law fully recognizes the right of a mill to adopt a policy of "no completed sale, no commission," merely requiring that that policy be expressed in its understanding with the brokers with whom it deals.

* *

When it is desired to so limit a broker's or sales agent's right to commission, a model form of agreement will be found in a decision by the North Carolina supreme court in the case of Swift & Co. vs. New Bern Produce Co., 103 S.E. 889.

The contract involved in this case provided for payment of a commission upon the actual quantity of goods actually delivered, "due and payable only when all notes and accounts accruing hereunder have been paid in full to principal." It was also provided that all contracts of sale should be subject to approval by the principal.

Under this agreement it was held that the sales agent could not enforce a claim for commission on goods which a third person contracted to buy, but failed to order out.

* *

The pertinency of the decision of the appellate division of the New York supreme court in the case of Taylor vs. Crucible Steel Co. of America, 183 N.Y.S. 181, to common dealings in the flour trade is not defeated by the circumstance that the contract there involved was one to pay a commission for obtaining munition contracts with belligerent countries, instead of the more common contract to pay commissions for obtaining flour orders from private concerns.

An important point adjudicated concerned plaintiff's right to commissions on unperformed contracts negotiated for defendant. The contract under which plaintiff was employed specified that his commissions were payable "as and when" payments should be made to defendant, but that after defendant's acceptance of orders procured by plaintiff, defendant should "assume all responsibilities and obligations." Holding that plaintiff's commissions were earned on defendant's acceptance of orders, the court said:

"If defendant failed through inability to perform, other than from causes specified in the contract of sale, the commissions became due at least at the extended contract date. This construction would be given to the ordinary brokerage contract. In this contract, however, the plaintiff's right of recovery is fortified by the provision that all contracts are to be submitted to defendant for approval before they shall be accepted, 'and after acceptance we shall assume all responsibilities and obligations in connection therewith.' . . .

"While perhaps not necessary to the conclusion which we reach, nevertheless this provision may fairly be interpreted to mean that the plaintiff has earned his commission when he produces a contract which defendant approves, but payment thereof is to be delayed until defendant has received the price of performance, for which performance it assumes full responsibility. We find no ambiguity in the contract which makes competent parol [extraneous and oral] evidence. Its import seems clear, and upon the facts shown we think plaintiff is entitled to commissions upon the gross amounts of the contracts."

The New York court of appeals affirmed this decision (134 N. E. 581).

* *

While flour sales were subject to the control of the Food Administration an opinion was asked on the following stated transaction: 1,000 bbls of flour were sold Jan. 10 for shipment within 30 days. Jan. 26, the mill shipped one car, leaving 700 bbls undelivered, and Feb. 25 declared a cancellation of the contract, assigning as a reason that the Food Administration had cut off the mill's supply of wheat. The buyer replied that he would wait until shipment could be made, but the mill reiterated its purpose to cancel, and would say nothing further. The mill denied liability for its sales agent's commission on the 700 bbls.

The facts stated strongly tended to show that the mill was liable both to the buyer and to the sales agent, because apparently no attempt to cancel the con-

tract was made until more than two weeks after the mill became in default in delivery.

In the absence of a statement of the terms of the contract of sale, it was assumed that the agreement was made on the uniform sales contract form, which provided against extension of time for delivery, and which provided against liability for delay in making shipment, "occurring through failure of government agencies to supply wheat," etc.

If the contract was so written, and if the Food Administration directly prevented fulfillment of the contract within the 30 days' period fixed for delivery, it seemed that the mill would have been excused from making delivery. But in that case it was the mill's duty to give the buyer timely notice of the action of the Food Administration, to the end that the buyer might make a substitute purchase.

The delay in declaring a cancellation was strong evidence that cutting off of the supply of wheat did not prevent fulfillment of the contract within the time agreed upon for shipment. Certainly, a cutting off of such supply after the contract had been broken by nondelivery within the 30 days fixed for shipment would afford no ground for cancellation.

Under a view that the mill was not legally excused in failing to deliver the remaining 700 bbls of flour, the sales agent would seem to be clearly entitled to his commission, unless it was understood between him and the mill, by well-established custom or by express agreement, that the right to commission would fail on cancellation of the contract, without regard to whether the mill should be at fault in canceling or not.

And even if the mill was legally excused from delivering the 700 bbls, because of a cutting off of its supply of wheat by the Food Administration before this quantity of flour should have been delivered under the contract, still that would not release the mill from liability for the commission, except as it may have been mutually understood between the mill and the broker that the latter's right to compensation should depend upon actual delivery.

Ordinarily, a broker's right to commission becomes fixed when he has negotiated a contract of sale for his mill, and a binding contract has been entered into between the mill and the customer. When such an agreement has been concluded, the broker's right to compensation can be divested only by a previously existing understanding with the mill that right to a commission should not accrue until actual delivery of the flour or payment therefor by the buyer.

* *

"Was a miller's agent entitled to his brokerage on the sale of a car of flour which the mill accepted and confirmed, but later canceled because of closing down by order of the Food Administration?"

A solution of this question, propounded by a member of the flour trade, depended upon undisclosed facts concerning the terms of the agreement under which the broker acted as the mill's representative. Was it mutually understood, by express agreement or by implication arising from previous dealings between the same parties or from trade custom, that the broker had earned his commission when the mill confirmed the contract of sale he negotiated?

If so, I failed to see where subsequent defeat of the flour sale, without the broker's fault, could affect his accrued right to commission. The mere fact that the accrued compensation had not been paid would not release the mill's liability.

But if it was mutually understood, expressly or impliedly, that no commission should be paid until and unless the flour sale contract should be fully executed, then it remained to inquire whether the closing of the mill and consequent inability to deliver the flour were due to fault on the mill's part.

If the government had requisitioned the mill under the food control act, or if the mill was closed for some reason reflecting no fault of the owners or management, the broker lost his commission, assuming that he understood that his compensation was to depend upon consummation of the contract.

On the other hand, if the mill was closed for violating some regulation of the Food Administration, or other fault, then the mill is not entitled to rely on its self-crippling act as an excuse for refusing to pay the broker's compensation. An agreement that brokerage is to depend upon consummation of a sale impliedly binds the broker's employer to do nothing of a wrongful nature that will thwart the sale.

Although closing a mill by the Food Administration presented a situation new to the law, I saw nothing in it to avoid application of the following stated well-established principles of law governing a broker's right to compensation:

"As a general rule a broker is not entitled to compensation until he has performed the undertaking assumed by him; and in the absence of any contrary provi-

sion in his contract, it matters not how great have been his efforts nor how meritorious his services. . . .

"If by the contract of employment the broker is merely to find a customer who is able, ready, and willing to enter into a transaction with the principal on the terms prescribed by him, the broker is entitled to compensation on performing that service, whether or not the principal completes the transaction.

"Thus a broker employed to find a purchaser or a vendor . . . ordinarily becomes entitled to a commission on the execution of a contract of purchase or sale or exchange, although without any fault on the part of the broker the contract is never carried out, unless there is a stipulation, express or implied, making his right to compensation depend on the performance of the contract or the happening of some other event. . . .

"In many cases the broker's right to a commission depends on the final consummation of the transaction which he was employed to negotiate. Thus a broker employed to buy, sell, or exchange property may be engaged on such terms that he is not entitled to compensation until a contract of purchase, sale or exchange has been entered into, or until the title has been transferred, or until the payment or tender of the purchase money or a certain portion thereof." 9 Corpus Juris, 587-594.

"The principal cannot relieve himself from liability for a commission by any voluntary act disabling him from performance." 9 Corpus Juris, 624.

SECTION 116. GOODS REJECTED BY BUYER

A North Dakota mill asked an opinion as to its liability for a broker's commission, under the following circumstances:

The mill's Chicago broker sold several cars of flour to a customer. When next to the last car was received and all but 10 sacks had been used, the customer claimed that the shipment was moldy, and notified the mill that unless an allowance to the extent of about one half the value of the flour should be made, the last car in transit would be rejected.

The mill disallowed the customer's claim, and when the last car arrived in Chicago the broker advised that it be diverted on account of its being found on inspection to be a trifle unsound, and the mill so diverted it.

The broker requested payment of his commission on the last car, and the mill disputed liability.

I was of the opinion that the commission should be paid, unless there was some agreement to the contrary in the mill's arrangements for representation by the broker.

Evidently, a binding contract for sale of the flour to the customer had been made, and had the last shipment, on which the commission was claimed, been sound, the customer would have been legally bound to receive it, notwithstanding any unsoundness of the preceding shipment.

So, it appears that the failure of delivery of the last car was due to no omission on the part of the broker, but rather to the mill's failure to ship sound flour, in which case there is no good reason why the broker should lose his stipulated commission.

The legal proposition that, where a broker is instrumental in securing execution of a contract for a sale of goods or other property, he has earned his commission for effecting the sale, was reaffirmed by the Texas court of civil appeals in the case of Callahan vs. Wolfman & Katz, 204 S.W. 777. The fact that the buyer may refuse to carry out his agreement does not defeat the broker's commission, except as there may be an agreement between the seller and the broker that the commission is not to be deemed to have been earned until the buyer performs the contract negotiated.

SECTION 116A. RIGHT TO COMMISSION ON OUTSIDE SALES

"We have a representative in Michigan, but several months ago we sold a lot of flour to a New York concern and that concern ordered some of the flour shipped to points in Michigan," wrote a mill recently. "We did not know where this flour was going when the order was booked, and now our representative in Michigan claims that he should have a commission on all flour that goes into his territory. This would make a double commission, and all the profit on this sale would be taken away if we have got to pay it. In your opinion, is the Michigan representative entitled to a commission on this transaction?"

In my opinion he was not entitled to a commission unless the contract under which he acted as mill representative was plainly worded to that effect.

The particular sale was made, not in Michigan, but in New York. That part of the flour which reached Michigan went there, not as the property of the mill, but as the property of the New York buyer for resale in Michigan.

A different situation would be presented if the party in New York had been a mere representative of the mill in making

the sale in Michigan, or agent of the Michigan buyer. But even then it would be incumbent upon the Michigan representative to show that his contract made him exclusive representative for that territory and entitled him to commissions on all sales made by the mill there.

A standard legal authority says: "By their contract of employment, agents for the continuous sale of goods are frequently given the sole or exclusive agency, especially in certain territory. . . . As a rule these contracts are not so worded as to entitle the agent to compensation when the principal himself, acting independently of the agent, . . . sells his goods in the agent's territory, although the contract may be so framed as to entitle the agent to commissions on sales made by the principal himself in the agent's territory.

"Such sole or exclusive agency contracts, however, generally preclude the principal from appointing other agents to sell the same articles, or within the same territory, and from thus depriving the exclusive agent of compensation on account of independent sales made by others; but, in order to entitle the agent to recover his commission from his principal for such a sale, he must show that the new agent actually made a sale within his territory, and that he himself would have made the sale, or that he performed, in connection therewith, the requirements imposed upon him by his contract." 2 Corpus Juris, 777-778.

A case resembling the one here presented was submitted to the Iowa supreme court for decision (Cedar Rapids Auto Co. vs. Jeffrey, 116 N. W. 1054). There it was decided that an exclusive sales agent in certain territory was not even entitled to a commission on a sale made by an exclusive agent in other territory. The holding was that a contract granting plaintiff the right to sell defendant's products in designated territory, defendant agreeing to refer to plaintiff all inquiries from prospective purchasers there, did not entitle plaintiff to an allowance on account of a sale made by an exclusive agent for other territory, where such other agent did not disclose to defendant any purpose to sell in plaintiff's territory, and there was nothing to show that defendant was informed that the other agent intended to make a sale in defendant's territory. For much stronger reasons a principal is not liable for a commission on account of a resale made in given territory by one who has become owner of the goods through purchase from the principal outside that territory.

In the case of Godsol vs. Nash Motors Co., 115 Atl. 604, the Maryland court of appeals decided that a sale by a principal outside of designated territory to a nonresident thereof for use therein did not entitle the agent for that territory to commissions under a contract for commissions on sales "in and for" designated territory.

SECTION 117. WRONGFUL TERMINATION OF CONTRACT

The opinion handed down by the Oregon supreme court in the case of Fletcher vs. Fischer et al, 182 Pac. 822, deals with several aspects of the employment of selling agents for mills.

In this suit, in which the court affirmed judgment for several thousand dollars in favor of plaintiff, it appeared that he was employed under a written contract for five years as exclusive selling agent in Oregon and Washington for cereal products manufactured by defendants at their mill at Silverton, Oregon. The suit was brought to recover damages for breach of the agreement on defendants' part by discharging plaintiff before the contract period had expired.

The main defense was that plaintiff had justified his discharge by collecting proceeds of goods sold, and failing to account for the same. The court found that plaintiff did not break the agreement in this respect.

Incidentally, it became a material question whether plaintiff occupied the relationship of factor or of ordinary selling agent to the defendants, within the legal definition of a factor as being one whose business it is to receive and sell goods for a commission. As said by a legal authority (Mechem) quoted by the court, a factor, or commission merchant, "is invested by law with a special property in the goods to be sold and a general lien upon them, and their proceeds, for his advances; and, unless there be an agreement or usage to the contrary, he may sell upon a reasonable credit."

Referring to the terms of the employment contract, and to the fact that plaintiff had made sales from a stock of goods kept in Portland, billing shipments in his own name, and that he had negotiated other sales for defendants, on which shipments had been made to the customers direct from the mill, the court said:

"We therefore conclude that as to the stock of goods kept in Portland, from which sales were made, the plaintiff was a factor, and as to shipments made from

Silverton, he was a broker, and as to both classes of transactions he was an agent selling upon a del credere commission, since he was required to guarantee the payment of all accounts. The weight of authority appears to be that a broker selling goods upon a del credere commission [guaranteeing payment of accounts] stands in the relation, to his principal, of an original debtor."

It follows that, in the transactions as to which plaintiff acted as factor, he was entitled to make collections, and it is decided that, since the contract was silent as to when remittance should be made by him, he could not be put in default by a failure to remit until after a reasonable time had elapsed and demand had been made upon him for payment.

It was found that plaintiff never withheld money due defendants until defendants violated the terms of the contract with him by refusing to fill orders, and the court affirmed judgment in his favor for $17,000 damages, less $5,500 which he held as security for his claim after defendants broke the agreement.

As to the measure of plaintiff's damages, the court said:

"Finally, it is urged that there is no legal evidence in the record upon which the court could base an estimate of the amount of plaintiff's recovery. There is evidence to the effect that plaintiff, prior to and at the time when he began operations under the contract in question, was a jobber in certain specified lines of groceries; that he maintained an office in Portland, had office help, employed travelling salesmen, etc; that the increase in business required enlarged quarters, more help, and increased expenses.

"This is followed by exact figures as to his gross commissions from the sale of cereals during the years while the contract was in force, the net commissions for each year after deducting discounts, expenses, and losses.

"The expenses of this business, as carried on in connection with the other business of plaintiff, were computed by comparison of the volume of business in each line, and the expense naturally connected with each. There was a comparison of the business of the first year with that of the second, and an estimate of the comparative increase of sales, owing to advertising, improved quality of the goods and an increased acquaintance therewith by a steadily increasing list of customers, and an estimate of the probable increase in the volume of business during the remaining years of the contract. This kind of evidence we think is clearly competent, and sufficient foundation for a verdict or judgment."

SECTION 117A. BROKER'S LIABILITY TO BUYER

A broker, who unauthorizedly assumes to contract on a principal's behalf, is liable to the third person for damages resulting to the latter through unenforceability of the contract, held the appellate division of the New York supreme court in the case of Mickles vs. Atlantic Brokerage Co., 204 N. Y. Supp. 571. But it is noted that "To the general rule giving such right of action there is an exception, to the effect that an agent cannot be held liable if he fully discloses to the person with whom he is dealing the limitations upon his authority, and discloses all the facts and circumstances with reference to the authority under which he assumes to act."

The concrete point decided in the case was that where a broker misstated buyers' counter offer to a seller, and therefore misled the buyers as to the nature of the offer accepted, making a contract with them not authorized by the seller's acceptance, the broker rendered himself liable to the buyers.

See, also, section 110.

CHAPTER IX

QUANTITY OF GOODS TO BE DELIVERED

SECTION 118. SALES BY "CARLOAD"

A CONTRACT to deliver one or more "cars" or "carloads" of a given commodity is not invalid for failing sufficiently to specify the quantity bargained for. It will be assumed that the parties to the agreement intended a delivery in accordance with the capacity of a railway car of the kind ordinarily used in transporting the particular kind of goods, and in assessing damages for the seller's breach of contract, they will not necessarily be computed upon the basis of the minimum capacity of a car.

This is an abstract of the decision of the Alabama supreme court, handed down in the case of Ferguson vs. W. F. Covington Mfg. Co., 85 So. 726. The court affirmed judgment in favor of plaintiff on account of defendant's breach of a contract to sell corn.

The contract was to sell "11 cars of corn in the ear at $1.50 per bushel of 80 pounds." Defendant objected that there was no valid contract; that the agreement was void for uncertainty as to quantity to be delivered, but the courts overruled this contention. The supreme court says:

"Our court has approved the following quotations from 35 Cyc., pp. 210, 639, defining the meaning of a carload:

"Page 210: 'Where the goods are sold by the "carload" the term may be construed by the custom of trade, but in the absence of any agreement or particular custom it will ordinarily be held to mean the capacity of a car used for transporting the particular kind of goods sold. So, too, a sale of a "cargo" of goods means ordinarily the entire load of the vessel, and is limited only by the capacity of the vessel.'

"Page 639: 'Quantity on which damages will be computed.—If no fixed quantity of goods is contracted for, but the purchase is of a "carload," damages should be computed on the amount usually contained in an ordinary car.' "

Defendant made partial delivery, and claimed as a second defense that, based on the minimum capacity of cars, it had substantially complied with the contract, whereas plaintiff asserted that there was a deficiency of three cars. Disposing of this claim and determining the proper basis for an award of damages in plaintiff's favor, the supreme court says:

"We will observe of the evidence that it is undisputed that plaintiff extended the time for performance of the contract (as to the delivery of the three cars of corn in question) until there was repudiation of the contract on the part of the defendant and the purchase by plaintiff of three cars of corn at its market price in Birmingham.

"Under the authorities, the market price is fixed and governed as of the time to which the delivery on contract was postponed. . . . The measure of damages for nondelivery is based on the difference between the agreed price and the market price at the time and place of delivery, with interest. . . .

"The evidence tended to show that on Feb. 4, 1918, defendant wrote plaintiff, recognizing the contract as executory [unfulfilled]; that on the day following, plaintiff wired defendant he would buy for defendant's account the three carloads of corn at the place of delivery, and immediately defendant wired that he had performed the contract in the previous shipments; that is, he claimed to 'have already shipped 10 over cars.'

"To this plaintiff replied that he was buying for account of defendant three cars of corn, and would send draft on Covington Mfg. Co. for the difference in price between what he would have to pay in the market at the point of delivery and the contract price of the corn. To this defendant replied:

" 'I had equally as much right to give you so many tons of corn as you had to expect me to ship you so many tons, inasmuch as 20,000 lbs, or 10 tons, make a minimum car as per railroad schedule. . . . We consider that we have filled our contract in the absence of the terms not being specified as to the number of tons each car should hold, and we shall stand on shipments already made. . . .'

"Under the circumstances of the breach, plaintiff had the right to pur-

chase the corn for the defendant's account at the market price at the point of delivery, and hold defendant liable for the difference. . . .

"When the defense is analyzed, it is merely a contention that liability be limited to the minimum capacity of a car, 20,000 lbs. This testimony was confined to the statement of two witnesses, who, in substance, said there was no usual amount of corn contained in the ordinary carload; that the minimum carload of corn a railroad would accept for transportation was 20,000 lbs. Plaintiff's evidence tended to show that ordinarily a car of corn varied from 20,000 to 60,000 lbs. . . .

"Under the evidence and the instructions of the [trial] court, plaintiff was not confined to a recovery based on the minimum capacity of a car of corn; the question was properly submitted to the jury to determine the amount of the damages, from the evidence, for nondelivery of the three cars of corn (in the ear) in the quantity which an ordinary car of corn in the ear contains.

"In the instructions the [trial] court submitted to the jury the amount of damages sustained by plaintiff for the breach of the contract, and limited the issue to the amount of corn for which recovery could be had for nondelivery of the three cars purchased, saying:

"'What amount of corn should those cars have contained—the usual amount—it is not the average, you must find from all the evidence in this case. . . . Will you put it at 20,000 lbs, 30,000 lbs, or 40,000 lbs? . . .'

"The measure of damages was properly submitted, and the finding was supported by the evidence. The motion for a new trial was properly refused."

* *

A contract of sale specifying the quantity of goods to be delivered as a "carload" is not invalid for indefiniteness, according to the view taken by the Kansas supreme court in Hayes vs. Cardwell, 192 Pac. 757.

Plaintiff confirmed sale to defendant of "two cars No. 2 hard wheat." Defendant confirmed purchase of "two cars No. 2 hard wheat of 1,000 bushels each." Plaintiff replied that he would "try to furnish sixty capacity cars," but that most of the cars had "been running eighty capacity, and it is probable that you will get eighty capacity cars." Defendant made no response.

Defendant accepted one car containing 66,000 lbs (1,100 bus), but further delivery was declined on the ground that the contract was unenforceable for indefiniteness as to quantity to be delivered. In the meantime, wheat prices had declined.

Affirming judgment for damages in plaintiff's favor, the supreme court remarks:

"Touching the making of the contract and its terms, the record shows that the parties, by telephone, closed a bargain for the sale and purchase of two carloads of wheat. Under that bargain any ordinary carloads would answer the terms of the contract, as no special carload capacity was prescribed. When defendant, in his written confirmation of the contract already made, specified carloads of 1,000 bus capacity, he attempted to inject a particular limitation not covered by the original bargain.

"The plaintiff did not assent to that limitation. He promptly notified defendant that the prevailing type of grain car in use in that part of the country was one of 80,000 capacity, and probably that was the capacity of the cars which would be furnished to him. Defendant raised no further discussion as to the capacity of the carloads which he had purchased, and he became bound to accept and pay for two carloads, whether they were of the larger or smaller size.

"There is no merit to the defendant's argument that the aggregate amount of wheat which he had agreed to purchase was 2,000 bus. It was shown by evidence that even if the carload capacity had been specified, such specification would only be an approximation, and that any carload of wheat may overrun its specified capacity by as much as 10 per cent. Defendant was a grain merchant, and he knew that fact; and the contention that he agreed only to buy and pay for 2,000 bus of grain, neither more nor less, cannot be countenanced.

"Plaintiff was clearly within the terms of the contract when he furnished defendant the second and larger carload of wheat, but he did not need to insist on his strict legal right on that point; he might show some leniency to defendant on account of the falling price of wheat (Dubbs vs. Haworth, 102 Kan. 603, 606, 171 Pac. 624), and he could and did lawfully agree with defendant to divert the large carload and to supply a smaller one in its stead upon defendant's expressed assent to waive the matter of delivery within the originally specified time.

"The defendant's excuse for dishonoring the draft, that it was drawn for too large an amount, was ill-founded; it was

not too large, and the money was then due. He should have paid it. Moreover, he had already exercised an act of ownership and dominion over the carload of wheat by causing the railway company to stop the car in Herington for diversion. It was then his carload of wheat, subject to the rights of the plaintiff for payment before surrender of the bill of lading—the evidence of title."

SECTION 119. BUYER'S "REQUIREMENTS"

When a mill contracts to deliver a baker's flour requirements for a specified period, the latter will not be entitled to speculate upon his contract by ordering flour on a rising market for resale, when the agreement contemplates supply to him of only such flour as he might need in his business.

If judicial authority need be cited upon so reasonable a business proposition, it is to be found in the decision of the appellate division of the New York supreme court in the case of Moore vs. American Molasses Co., 166 N. Y. Supp. 4.

Defendant renewed a contract to supply plaintiff's molasses requirements for one year, and after delivering 964 bbls, 122 more than plaintiff had used in the previous year, refused to deliver more, and rejected subsequent orders calling for 2,773 bbls in the aggregate. Plaintiff sued for $15,251 damages, but the court holds that he is not entitled to recover if, as claimed by defendant, it was understood that the goods were to be supplied merely for plaintiff's use as a veterinarian and dealer in dairy and stable supplies, and he undertook to take advantage of greatly increased market prices by soliciting orders for molasses outside the scope of his ordinary business.

As to the validity of a contract to sell the buyer's requirements, as being sufficiently definite, see section 21.

SECTION 120. "DESTINATION WEIGHTS"

Under a contract for sale of goods to be shipped from one point to another, the shipping seller guaranteeing weights and grades at destination, proof of weights at the shipping point is no evidence against the buyer of weight at the destination, except as there may be supporting proof that there could have been no change in the weight after the car left the point of shipment.

This legal principle was laid down by the Texas court of civil appeals in the case of D. S. Cage & Co. vs. Amsler, 217 S.W. 1094. In this case it appeared that plaintiff ordered a car of peanuts from defendant for shipment from Howth, Texas, to Houston, on condition that the seller guarantee "destination weights and grades."

It being shown that the goods were subject to shrinkage, the court says:

"In these circumstances, the sole question being the weight at Houston, it is immaterial how many pounds were put in the car at Howth, and evidence that any particular number of pounds were shipped from there would not tend to prove that the same quantity was delivered in Houston so many days later, especially in the absence of any showing that the shipment in the meantime remained intact."

On the other hand, the court holds that the buyer's weights at the destination were not conclusive against the seller; being subject to impeachment by the seller by proof of error or mistake in the buyer's weighing.

As to proof of shortage, in general, see the next section.

SECTION 121. PROOF AS TO SHORTAGE

See, also, the preceding section and section 333.

Where, on litigation of an ordinary commercial dispute, there is a flat contradiction between the parties as to the existence of a material fact on which judgment is to depend, the legal principle of burden of proof becomes highly important, yet lawsuits are often plunged into without taking this principle into account.

The general rule is that the party who asserts a fact as a basis of recovery or defense has the burden of proving it. That he may make out just as strong a case as the other party on that point does him no good; he must make out a stronger case, or, as the trial judge instructs the jury, must prove his contention by a preponderance of the evidence.

The principle was involved in Swartz vs. Levin, 194 Pac. 646, on an issue as to shortage in the weight of goods delivered under a sales contract. The question was whether there was shortage in delivery of two carloads. Defendants so insisted in filing counterclaims on that ground in plaintiff's suit to recover the price of a third car.

"The trial court held," says the Kansas supreme court, "that as to these matters the burden of proof was on the defendant, because the goods on the first two cars had been accepted and paid for. . . . This ruling was justified by the condition of the pleadings as already indicated. The counterclaims of the de-

fendant with respect to the first two carloads, which had been accepted and fully paid for, were in the nature of actions for the recovery of payments or parts of payments already made, the burden of proof being upon the person making the demand (30 Cyc. 1325), and the presumption being that the actual weight of the goods corresponded to the amount paid for them.

"The defendant introduced testimony that the contents of the first two cars when received at their destination did not weigh as much as corresponded to the amounts paid for them, and no rebuttal was offered, so that the question is presented whether the evidence did not require a judgment against the plaintiff for the amount of shortage claimed in these two cars. Assuming that such evidence was equivalent to testimony as to the amount of goods loaded into the cars, in the absence of a showing of any loss in transit (Mountain City Mill Co. vs. Link Milling Co., 92 Mo. App. 474), no basis for reversal is afforded, because the trier of the facts was not bound to believe the defendant's evidence as to the weights at destination, even in the absence of express contradiction. . . . The trial court may have distrusted the veracity of the witnesses from something in their manner or from a suspicion growing out of the way in which the transaction had been conducted on the part of the defendant."

* *

The Globe Grain & Milling Co., a California corporation, won a suit against the Walker Construction Co. before the California district court of appeals, second district, involving weights of rolled barley at the time of sale, as affected by possible shrinkage between the time of sacking and the time of delivery to the construction company. (176 Pac. 725.)

The milling company sued for a balance due for barley delivered, and an appeal from judgment in its favor involved the single question whether the company had sustained the burden of proving that the grain delivered was of the weight charged for.

The evidence showed that defendant had made frequent purchases of both whole and rolled barley; and that they were invoiced when deliveries were made to defendant's drivers. Whole barley was weighed out at the time of delivery, whereas the rolled barley was kept sacked in 75-lb packages, as correctly weighed at the time of sacking.

Plaintiff's witness admitted that rolled barley might shrink in weight after sacking and while stored, and that the grain involved in the suit might have been previously stored for several weeks, although he did not know how long it had been sacked before delivery to defendant. Affirming the judgment in plaintiff's favor, the appellate court said:

"No attempt was made by defendant to show what the shrinkage in weight would amount to—whether of considerable amount or nominal. Neither was it shown how long this particular barley had remained in storage. We think that where the plaintiff showed that the rolled barley when sacked had been accurately weighed, and that those weights were the ones charged against the defendant, it made out a prima facie case.

"It was not shown by the cross-examination, as we have noted, that any shrinkage over any length of time, long or short, would be more than nominal, and hence, in our opinion, nothing appeared before the court in evidence which is sufficient to disturb the prima facie case so established in plaintiff's behalf."

Apparently, defendant offered no evidence bearing upon the actual weight of the grain at the time of actual delivery, merely contenting itself with requiring plaintiff to make affirmative proof that it had delivered the weight charged.

* *

In a suit to recover a balance claimed to be due plaintiff on account of wheat sold defendant (Bloss vs. Aurora Milling Co., 229 S.W. 833), the Springfield, Mo., court of appeals said:

"Defendant also contends that plaintiff agreed in the sale of the wheat to take the mill weights. This contention is based on the fact that defendant is a wheat buyer and keeps scales at its mill on which it weighs all wheat that it buys, and that plaintiff knew that fact and by sending wheat there agreed to take the mill weights, and is bound thereby in the absence of fraud or mistake.

"No authorities are cited to sustain that position, and we are of the opinion that it is not well taken. All grain buyers maintain scales on which to weigh the grain, and it would generally be supposed that their scales would weigh correctly, but we do not think this supposition or belief on the part of the seller of grain amounts to a contract to be bound by the weights shown by the scales of the purchaser."

SECTION 122. WAIVER OF SHORTAGE

According to the decision of the Georgia supreme court in Cartersville

Grocery Co. vs. Rowland, 86 S.E. 402, a contract to deliver 240 sacks of goods "is not complied with by tendering at the point of delivery 237 sacks. But while this is true, the circumstances attending the receipt of the shipment and the attempt to deliver it, together with the subsequent negotiations between the parties, might authorize a finding that the purchaser waived his right to insist upon delivery of the exact quantity ordered." But failure of the buyer to assign variation in quantity as the reason for his rejection of delivery, at the time, does not prevent him from afterwards relying upon that ground.

VARYING FROM CONTRACT QUANTITY

SECTION 123. THE AMERICAN RULE

Not long ago it was suggested that there existed in the flour and feed trade a general misunderstanding that a shipping seller was not to be regarded as being in default as to the whole of a contract of sale where he shipped less than the contract quantity—that, in such case, he was in default only as to the excess of the goods called for by the contract above those tendered the buyer.

Howsoever general this understanding may be, an examination of the judicial authorities on the subject shows that it is inaccurate. Where a contract unqualifiedly calls for delivery of a certain number of barrels of flour, or a specified quantity of any other commodity, and the seller ships less he is giving the buyer a chance to speculate on market fluctuations.

If the market goes down, the buyer can reject the delivery on the sole ground of the deficiency in quantity, regardless of the actual effect upon him produced by the short shipment. If the market goes up, he can accept the short delivery and hold the seller liable for damages for nondelivery of the excess. As to such contracts, no qualification of the rule just stated seems to be recognized, save where the deficiency is so slight as to be negligible.

It follows that, if the seller desires to reserve leeway in delivery in the matter of quantity, he must do it by appropriate provision in his contract.

Nor is it to be supposed that vulnerability of contracts in this regard can be avoided by merely stating "about" 1,000 bbls of flour, or 1,000 bbls of flour, "more or less," in such sense as to afford opportunity for a material variation from 1,000 bbls. A material variation should be specifically protected by a clause in the contract if there is any likelihood that the seller will not be in a position to deliver the quantity primarily called for by the agreement

The highest court of the land has sanctioned the rules of law involved in the foregoing observations. Norrington vs. Wright, 115 U.S. 188, and Brawley vs. United States, 96 U.S. 168. After reviewing these cases, there are below set forth other appellate court decisions making specific application of the principles to the flour and grain trades. It will be noted that, although the Brawley case did not arise in either of these trades, the United States Supreme Court uses a hypothetical grain transaction with a mill to illustrate the rules laid down in that case.

The main point decided in the Norrington case was that under a contract for shipment from abroad of 5,000 tons of iron rails, deliverable in monthly installments of about 1,000 tons, the buyer might rescind for substantial failure to deliver 1,000 tons each month. The court held that deliveries of 833 tons a month left the seller in default; and that the word "about," used in connection with 1,000 tons, allowed "no more than slight and unimportant deficiencies" to be subsequently made up.

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once," said the supreme court.

The opinion quoted, with apparent approval, suggestions of an English chancellor that no reason for reaching a contrary conclusion is afforded by the fact that it gives "means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped," because "the nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped."

In the Brawley case, the United States Supreme Court said:

"The addition of the qualifying words 'about,' 'more or less,' and the like, in

such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure and weight.

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variation, but by what the receiving party shall require for the use of his mill; and the variation will depend upon his discretion and requirements, so long as he acts in good faith."

* *

Where an item of goods ordered is omitted from a shipment covered by a single contract, the buyer is legally justified in rejecting the shipment, according to the decision handed down by the Wisconsin supreme court in the case of Washburn Crosby Co. vs. Kubiak, 185 N. W. 162.

Plaintiff sued for breach of a contract to buy a carload of flour, feed and 200 bus corn, a shipment having been rejected by defendant. Ruling that there was no right to recover, the supreme court said:

"By the unexplained omission of the 200 bus corn in the carload shipment, the plaintiff came within the provisions of a section of the statutes, which provides that, where the seller delivers to a buyer a quantity of goods less than those contracted to be sold, the buyer may reject the entire shipment as a noncompliance with the contract. Therefore, upon receiving the invoice showing that the shipment did not contain the corn, the defendant was justified in rejecting the entire shipment."

See, also, a decision of the Rhode Island supreme court to the same effect (123 Atl. 144).

* *

How tender of delivery in satisfaction at once of an enforceable and an unenforceable contract may prove insufficient to preserve the seller's rights is shown by the decision of the Springfield, Mo., court of appeals in the case of Moran vs. Thurman-Davis Grain Co., 226 S. W. 84.

It seems that defendant contracted in writing to buy 1,000 bus of corn. A few days later it verbally agreed to buy an additional 500 bus. The 1,500 bus were shipped as a single shipment and defendant refused to accept the car on a declining market, pleading delay in delivery and overshipment as to the 500 bus.

Plaintiff recognized that it had no binding contract as to the 500 bus, because the agreement was not in writing, and sued for damages for refusal to receive and pay for the 1,000 bus.

Deciding the case against plaintiff, the court finds that delay in delivery justified defendant in rejecting the shipment. But, as an independent ground for denying right to recover in the case, the court holds that the 500 bus which defendant was in no event bound to receive were so mixed with the 1,000 bus as to avoid any responsibility on defendant's part.

"There is no showing in the case," observed the court of appeals, "that the plaintiff ever offered the defendant the right of paying for 1,000 bus of this corn and taking it out of the car. The plaintiff therefore imposed a condition, that is, of paying for 1,500 bus of corn, on defendant before any corn could have been gotten out of the car. . . .

"It appears from the testimony that the parties on both sides were acting in the utmost good faith toward one another, and that this is not a case where one of the parties attempted to take advantage of a falling market. . . . The defendant was not bound to take the 500 bus of corn, and the plaintiffs realized this by eliminating that from their amended petition. The fact remains, however, that plaintiff by his own act attempted to require the defendant to do more than pay for the original 1,000 bus, and required it, to comply at all, to pay for 1,500 bus."

* *

The right of a contract buyer of meal to reject delivery of meal on the ground of deficiency in quantity was considered by the Virginia supreme court of appeals in the case of Fielding vs. Robertson (126 S. E. 231). The following is an abstract of the court's principal conclusions on the question:

If the bill of lading covering the rejected shipment showed receipt by the transportation company of the quantity named in the contract, it established the shipping of the proper quantity, in the absence of any showing to the contrary.

A seller is bound to tender or deliver

the exact quantity called for by his contract, neither more nor less. However, where the exact quantity has been shipped, under a contract for delivery f.o.b. destination, but it has been diminished in transit, without the knowledge or fault of the seller, and the buyer is unwilling to accept less than the whole quantity purchased, he should notify the seller and give him reasonable opportunity to make good the deficiency, if the contract time for delivery has not expired.

* *

Right of a contract buyer of flour to reject delivery when only part of a shipment is damaged was the main question considered by the Texas court of civil appeals at El Paso in the case of Lawrence vs. El Paso Grain & Milling Co., 214 S.W. 512.

Plaintiff sued for damages, claiming that after buying 1,000 bbls of Minneapolis flour from a third party he contracted through brokers to sell the same to defendant according to sample and for delivery f.o.b. El Paso, but that defendant refused to accept delivery when the flour arrived there. It was specially alleged that defendant objected to the delivery tendered, because 52 sacks had been damaged in transit, but that plaintiff, the seller, offered to replace this quantity, or allow a deduction from the contract price; which offer was rejected.

On this point the court of civil appeals says:

"The question presented is, Was it a compliance with the provisions of this contract to tender 1,000 bbls of flour, 52 sacks of which were damaged, and then, upon rejection by the purchaser because of the damaged flour, was it a sufficient tender to write to the purchaser, 'I am willing to agree to deliver to you the additional 52 sacks of flour in good condition or I will deduct that amount from the contract price according to the rate agreed to be paid by you'?

"In Norrington vs. Wright, 115 U. S. 188, 6 Sup. Ct. 12, the [United States Supreme] court said: 'The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity.'

"And where, as in this case, the contract provided that the flour should conform to sample and for a specific amount, 1,000 bbls, and for delivery in a specific manner and at a definite place, a failure to comply with any one of the conditions precedent is sufficient ground for repudiating the whole contract. . . .

"There is practically no dispute in this case that the 52 sacks of flour were in a damaged condition; in fact plaintiff has virtually admitted it by his letter offering to replace it by delivering '52 sacks of flour in good condition,' and this does not meet the provisions of the contract. His contract is to place in cars the 1,000 bbls of flour as per sample shown, f.o.b. El Paso, Texas."

After referring to plaintiff's letter, offering to replace the damaged sacks or to allow a deduction, and noting that there was no satisfactory proof of delivery of the letter, the court adds:

"But the view we take of this case is that the wording of the letter is not a sufficient offer or tender to relieve plaintiff from an actual tender under this contract, even though the letter had been delivered, or its contents had been in fact communicated to defendant's agent, . . . for the reason that it does not offer the same kind and grade, nor does it fix a date of delivery within the time limit of the contract.

"Besides, there is no proof that defendant in any way declared that he would not accept if tendered, and mere silence, under the facts of this case, does not constitute a waiver of an actual tender in strict accordance with the terms of the contract."

It will be noted that the Texas decision is quite consistent with the proposition that if a shipment is deficient in the contract quantity of sound goods the seller may nevertheless require the buyer to accept delivery, provided that the full contract quantity be tendered within the time fixed for delivery.

It will also be noted that unless the seller does tender, within the contract time, goods of the contract quantity and quality, he leaves a loophole through which the buyer may escape obligation by refusing to accept a short delivery. Of course, if the buyer accepts a short delivery, he must pay for it at the contract price, less damages for nondelivery of the remainder of goods called for by the agreement.

Reversing the judgment which was awarded in favor of plaintiff seller in the trial court, the court of civil appeals adds:

"The fact that the evidence does not establish that plaintiff has offered 1,000 sacks of flour f.o.b. in El Paso, agreeable to sample, is the reason the case must be reversed for a new trial. . . . Plaintiff has bottomed this case upon the

propositions that he has made such tender of the flour as to place him in the position of having done all that he was required to do under the provisions of the contract to transfer the title to it to defendant, or, if not, then that he has made such offer to tender as relieves him of an actual tender, and the defendant had refused to pay cash as per contract. He has exercised his lawful right to treat the flour as the property of defendant, and the latter's agent resold the flour for what he insists was the highest price he could obtain, and sued for the difference between that price and the contract price. . . . But, as indicated above, there is no evidence of any probative force to support a judgment in his favor upon either theory of the case."

At the trial, defendant buyer attempted to show that the waybill and expense bills covering the shipment bore the notation, "Checked 52 bags of 141 lbs caked at Duluth." The court of civil appeals holds that this as evidence was properly excluded, on the ground that as between the parties to the suit the notation was an unsworn hearsay declaration by a third party.

* *

A case illustrating the point that a buyer need not accept a greater quantity than contracted for is Brunswig vs. East Point Milling Co., 74 S.E. 448. The following brief abstract constitutes all that is reported in connection with the case:

"A contract for the sale of 'one car No. 2 white corn, 1,000 bus bulk, price 91¼c per bu, f.o.b., East Point, Ga.,' is not complied with by the tender at the point of delivery of 1,071 bus corn of the quality contracted for.

"The contract being unambiguous, evidence of a custom of the trade that in sales of the character involved there might be a variance in the quantity contracted for of from 50 to 100 bus was not admissible.

"Failure by the purchaser to assign the variation in quantity as a reason for his refusal to accept is not a waiver of his right, when sued for the purchase price, to plead the failure of the seller to comply with the contract with respect to the quantity tendered."

Stated differently, the second paragraph of this decision of the Georgia court of appeals means that no general understanding of the trade that a contract to deliver 1,000 bushels of corn or barrels of flour permits tender of 950 or 1,050 bushels or barrels can be pleaded to excuse tender of more or less than the contract quantity. This is an application of the general rule of law that proof of trade custom or usage will not be received to contradict the plain terms of an unambiguous contract reduced to writing.

But it is not to be overlooked that it becomes a material matter in some cases to ascertain whether the contract was for delivery f.o.b. the shipping point or f.o.b. the destination. If flour or feed has been sold f.o.b. the mill the mere fact of deficiency at the destination does not show that the shipping seller has not tendered and constructively delivered to the buyer the full contract quantity, except as there may be accompanying proof of circumstances from which it may be legitimately inferred that, in fact, the shipment was short when loaded. An Indiana decision shows that this is true (13 Ind. App. 182), and the cases we have cited are not inconsistent with this view.

See, also, the decision of the Washington supreme court in the case of Kalispell Flour Mill Co. vs. Marshall, 215 Pac. 70.

* *

The opinion of the Pennsylvania supreme court in R. & O. Oil Co. vs. Hughey, 56 Pa. St. 322, shows that the adequacy of quantity loaded may involve the question as to who must bear a loss of the shipment before its actual receipt by the buyer. In that case, defendant contracted to buy four barges of oil in barrels (apparently f.o.b. loading point). Before the loading was completed fire destroyed barges and oil. The court held that the loss was not defendant buyer's, but plaintiff seller's, saying:

"The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than, if he had contracted for a barrel of oil, could he have been compelled to accept one half or quarter full."

* *

In the Maryland case of Salmon vs. Boykin, 66 Md. 541, defendants were upheld in refusal to receive an imported cargo of 508 tons of goods where 573 had been bargained for. The court of appeals incidentally said:

"The appellees were not bound to accept this delivery. They had the right to stand on the very terms of the contract, and it is not for us to speculate as to the reasons and motives by which they are governed. In contracts of this kind, parties may qualify to some extent the quantity by the words 'about' or 'more or less,' or by words of like import, or they may stipulate in precise terms what

excess or diminution shall avoid the contract. In the absence of a stipulation of some kind to the contrary, the seller must deliver, or offer to deliver, goods in the quantity and of the quality contracted for."

* *

Because the United States circuit court of appeals, eighth circuit, is a court of very high authority in a circuit where the largest mill centers of the country lie, its remarks in the case of United States vs. Pine River Logging & Improvement Co., 89 Fed. 907, are particularly pertinent:

"When an agreement is entered into to sell and deliver a certain quantity of an article, the amount specified is often regarded as material and determinative of the amount sold, notwithstanding the use of the qualifying words 'about' or 'more or less' in connection with the amount specified. In many cases the use of such qualifying words in connection with some specified quantity is merely intended to cover the case of a slight variation in quantity, which may be due to accident, or to an inherent difficulty in making a delivery of the precise quantity sold."

* *

We give this brief résumé of the law as stated in 35 Cyc. 202:

"Generally, a specification of quantity in a contract of sale will be regarded as material. The full quantity contracted for must be delivered at the time and place specified, to constitute a sufficient delivery, and the buyer is in general not obliged to accept or pay for a less quantity, the failure of the seller to deliver the quantity specified constituting a total breach of the contract.

"But under the terms of the contract, delivery of all at one time may not be contemplated, and in such case the buyer cannot refuse a partial delivery if it is made in time. If, however, in the case of a deficient delivery the buyer retains the portion delivered, he is liable for the part so accepted and retained.

"Some courts deny the seller's right to recover on a partial delivery. Thus, in New York, the rule has been adopted that on a partial delivery the buyer is not liable for the part delivered, in the absence of any waiver of full compliance. The rule has, however, been modified, and the seller allowed to recover in cases where the buyer by his conduct has waived a full delivery. The New York rule has been followed in some other jurisdictions" (citing decisions of the New Jersey, Ohio and North Carolina courts).

* *

In Minnesota and those other states which have adopted the uniform sale of goods act, this subject is controlled by the following codified rules:

"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform the contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

"Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

"Where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

"The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

See section 210 for the case of Potash vs. Herman Reach & Co., 272 Fed. 658, wherein the United States circuit court of appeals, third circuit, decided that a special contract excluded a buyer's right to reject goods on account of a shortage in delivery.

SECTION 124. THE ENGLISH RULE

It should be noted that the mere fact that goods sold are intended for export to England does not necessarily make the contract subject to the English law. If a contract to sell mill products is made in this country and is to be performed here, as we understand to be the case under the ordinary transaction, as where they are exported under a c.i.f. contract, it is governed by the laws of this country. The courts on both sides of the Atlantic seem to agree on this proposition. (12 Corpus Juris, 450.)

But, after all, the weight of English judicial authority appears to be consonant with the American cases on the

point that a seller's omission to deliver the full quantity called for by his contract gives the buyer a loophole for rejecting the delivery. In fact, the question appears to be settled by the following provision of the English sale of goods act of 1893, which is almost identical in wording with a corresponding section in our uniform sales act:

"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate."

In passing, it is to be noted that the American uniform sales act makes the buyer's obligation to pay for short delivery at the contract rate conditional upon the buyer accepting such delivery "knowing that the seller is not going to perform the contract in full."

Some of the latest expressions of the English courts on the subject here under consideration appear in the following cited cases:

A rule of the London Dried Fruit Association permitted a variation of only 5 per cent in deliveries under contracts calling for "about" a specified quantity. A trial judge held that, under a contract to deliver "about 4,000 cases" of currants, a tender of 4,202 cases—only two more than the rules of the association permitted to be tendered—was not valid. On appeal it was declared that the buyer had waived any right to object to the quantity tendered. But it does not appear that the appellate court took a position inconsistent with the buyer's right to have rejected the tender except for such waiver. (Lomas & Co. vs. Barff, 17 T.L.R. 437, 18 T.L.R. 461.)

Under a similar custom of the coal trade—allowing a variation of 5 per cent either way under a contract to sell "about" a given number of tons—it was held that there was no default, under a contract to deliver "about" 18,500 tons of coal in monthly installments, where the last installment was short 455 tons of filling the contract. But there is nothing in the decision inconsistent with a holding that where a contract calls for a definite quantity of goods, delivery of less leaves the seller in default. (Societe Anonyme l'Industrielle Russo-Belge vs. Scholfield, 7 Com. Cas. 114.)

In Harland & Wolff vs. Burstall, Mew's Digest of English Case Law (1898-1910), col. 1394, it was held that a contract for shipment of 500 loads of timber, c.i.f., Quebec to Belfast, was broken where but 470 loads were shipped.

Referring to older cases decided in England, it appears that a buyer's refusal to receive 97 bales of hides under a contract for 115 was held to be wrongful only because the contract was qualified by providing "or any less number that may arrive." (Beckh vs. Page, 12 Mew's Digest, 541.)

Under a contract to deliver a cargo "of about 2,000 quarters of wheat—say 1,800 to 2,200 quarters," it was decided that the buyer was not bound to accept a cargo of less than 1,800 or more than 2,200 quarters. (Tamvaco vs. Lucas, 12 Mew's Digest, 543.)

Other English cases in point were reviewed by the United States Supreme Court in Norrington vs. Wright, 6 Sup. Ct. Rep. 12, holding that a buyer may rescind a contract for failure of the seller to ship the full quantity required by his contract.

In view of argument of counsel in that case concerning the state of the law on the subject in England, the Supreme Court observed that a careful examination of the recent English cases failed to disclose any rule inconsistent with that laid down by the Supreme Court. It was also remarked that "a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation of contracts of this kind, is greatly to be deprecated."

The Supreme Court shows that in Hoare vs. Rennie it was distinctly decided by an English court that a buyer was not bound to accept delivery of an installment short as to quantity. In that case it was observed by an eminent judge, Chief Baron Pollock, that courts ought not to undertake to make contracts for parties, and that defendant buyers "were no more bound to accept the short quantity than if a single delivery had been contracted for."

On the other hand, it was decided in another case—Brandt vs. Lawrence—that a contract for delivery of 4,500 quarters of oats, 10 per cent more or less, bound the buyer to accept a cargo of 1,139 quarters shipped on time, although the remaining 3,361 quarters sent were not shipped within the contract time.

This conflict in decisions appears to have been settled by the House of Lords in Bowes vs. Shand. Speaking of a contract for shipment of rice from Madras to London, Lord Chancellor Cairns said:

"If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning . . . to say that it puts an additional

burden on the seller without corresponding benefit to the purchaser; that it is a matter of which the seller and purchaser are the best judges.

"Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term found in a contract should not be fulfilled."

Still later, the English court of appeal decided in the case of Reuter vs. Sala, 4 C.P. Div. 239, that under a contract calling for "about 25 tons (more or less) black pepper" to be shipped in November, the buyer was not bound to accept delivery of either a 20-ton shipment in November or a 5-ton shipment in December.

In Honck vs. Muller, 7 Q.B. 239, the converse of the principle was applied in favor of a seller; it being held that, under a contract for 2,000 tons of pig iron to be delivered, at the buyer's option, in November, or equally over November, December and January, the buyer's failure to order out any delivery in November justified the seller in canceling the contract.

So the United States Supreme Court concluded (1885) that the greater weight of English judicial authority was consistent with its holding in the Norrington case. And, as noted earlier in this article, since that time the rule has been codified by the English sale of goods act of 1893 and followed in several other English decisions.

CHAPTER X

WEIGHTS AND MEASURES LAWS

SECTION 125. VALIDITY OF REGULATIONS

"YE shall do no unrighteousness in judgment, in meteyard, in weight, or in measure."—Leviticus, 19:35.

So far as the appellate court reports of this country disclose, millers have religiously obeyed this ancient statute and amendatory provisions enacted by the various state legislatures. The only exception I find appears in the case of State vs. Perry and others, decided by the North Carolina supreme court in 1858. (50 N.C. 252.) That court affirmed a conviction of the defendants, "owners of a certain public steam-mill," under a charge that they "did keep in their said mill a false and fraudulent toll-dish, for the purpose of exacting more toll from the good citizens of the state" than was lawfully due. The prosecution was based on the following quoted statute:

"All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind, and every miller and keeper of a mill, making default therein, shall, for each offense, forfeit and pay five dollars to the party injured.

"All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll-dishes for each measure; and every owner by himself, servant or slave, keeping any mill, who shall keep any false toll-dishes contrary to the true intent and meaning of this chapter, shall be deemed guilty of a misdemeanor."

It was proved that, using toll-dishes which held one sixth and one seventh of a half bushel, respectively, defendants took one sixth of all wheat ground, and one seventh of corn. But it was also shown that this toll rate was well known to all in the community. The court decided that, since there was an exaction of more than the statutory toll rate, there was an unlawful keeping of a false toll-dish.

A technical objection was also taken to the indictment on the ground that it failed to state that the mill was used for grinding wheat and corn. But the objection was overruled, it being decided that it was necessarily to be inferred that the mill was one for grinding corn and wheat, when it was charged that it was a mill where a toll-dish was used to exact more toll than was lawful.

* *

In a case passed upon by the Ohio supreme court, it was asserted that the clause of the federal Constitution which vests in Congress power to "fix the standard of weights and measures" renders invalid all state regulations prescribing such standards. In overruling this contention in the following language, the court gives a brief but comprehensive statement of the main principle which distinguishes the power of the state legislature from the functions of Congress:

"The authorities are uniform in holding that states are precluded from exercising a power only when the power over such subject is in express terms conferred exclusively upon the federal government, or where such grant of authority to the national government is attended by an express prohibition upon its exercise by the state or the exercise thereof by both would be clearly and necessarily contradictory and repugnant.

"It is quite apparent, therefore, that the power to adopt and prescribe a standard of weights and measures was not conferred by the Constitution exclusively upon the Congress, and that it is within the power of the legislatures of the several states to enact laws fixing and regulating standards of weights and measures in all respects in which Congress has not legislated upon the subject." (Williams vs. Sandles, 112 N.E. 206.)

* *

Although the courts have generally upheld the validity of all reasonable legislative regulations tending to avoid the practice of deception in short-weight sales, they have not hesitated to set aside enactments which have seemed to amount

to unreasonable interference with established trade customs and the constitutional right to freedom of contract.

For example, in the Ohio case of Steube, 110 N.E. 250, decided in 1914, the supreme court of that state set aside an act which purported to require certain commodities, including corn, grain, seed, vegetables, flour, corn meal and chopped feed, to be sold by avoirdupois weight or numerical count, "unless by agreement in writing" the parties to a sale should contract to the contrary. The court said:

"The right to contract is recognized as a property right essential to the acquisition, possession and protection of property. The right to the use of measures as a means of trade and commerce has long been established, and the custom of buying and selling by these means the articles enumerated in the act under consideration is one of long standing.

"Under the provisions of this act, however, unless an agreement in writing is made by all of the contracting parties, whoever sells or offers to sell these articles by measure is guilty of a crime, and subject to fine and imprisonment. To require the vendor and purchaser of the articles covered by the act to enter into an agreement in writing, each time a sale is made by measure, that the sale may be lawful, conflicts with the right to make contracts."

On the other hand, it was decided by the Iowa supreme court in the case of State vs. Smith, 96 N.W. 899, that a city (Cedar Rapids) might validly provide by ordinance that agricultural products sold within the municipal limits for consumption therein should be weighed on municipal scales. Incidentally, it was held that corn sold for grinding at a mill within the city was governed by the ordinance.

SECTION 126. WEIGHT OF CONTAINERS

An ordinance of Seattle made it unlawful to sell commodities ordinarily sold by weight or measure, unless the quantity sold or offered for sale should be the true net weight represented.

Interpreting this ordinance in the case of City of Seattle vs. Yocum, 162 Pac. 56, the Washington supreme court held that it did not prevent parties to a sale from agreeing for payment at a gross weight, including the weight of the containing package, wrapper or sack, where the buyer was not deceived.

The court's opinion distinguished the decision of the Tennessee supreme court in the case of State vs. Co-operative Store, 131 S.W. 867, wherein it was held that a sale of corn meal in bags containing 21 lbs was unlawful under a state law declaring the weight of a bushel of meal to be 48 lbs, and forbidding retail sales except in two, one, one half, one fourth, or one eighth bushel bags or packages. In that case, it appears that the actual weight of the package was not mentioned in the sale nor was it marked on the package.

Numerous other appellate court decisions bearing on the subject will be found cited in the opinion of the Washington court.

SECTION 127. ALLOWANCE FOR EVAPORATION

Despite use of care and good faith to avoid conflict with weights and measures laws, doubtful questions still arise as to what constitutes a violation of their provisions. For example, does a miller violate the law by selling a sack of flour which was up to the weight stamped on it when it was packed, but which, through evaporation of the moisture content, has fallen below that weight before being sold by him?

The answer to this question seems to be that there is a technical violation, unless the law happens to contain a clause making an allowance in favor of the miller for loss of weight by evaporation. At least that appears to be the view required by a decision handed down by the Washington supreme court in the case of City of Seattle vs. Goldsmith, 131 Pac. 456.

This case did not specifically involve a transaction in flour, but since the decision was handed down under an ordinance relating to the weighing of commodities in general, the reasoning of the court seems to cover evaporation of moisture content in flour as well as loss of weight by evaporation in the case of salt and raisins.

The ordinance in question forbade sale or possession for sale of any commodity, usually sold by weight or measure, in sacks or other receptacles, unless the true net weight should be stated on such sack or receptacle. Defendant objected that the regulation was void for unreasonableness in failing to make allowances for loss of weight by evaporation, stating that the true weight of salt and raisins when packed would not be the true weight when delivered to the consumer. But the supreme court said:

"This would mean that the loss must fall on the consumer. It does not appear to us that a law is unreasonable because compliance with its requirements shifts this loss to the original packer or manufacturer. It is not unreasonable to require that the packer or manufacturer

shall ascertain this loss by evaporation, as he is best in position to do, and overcome the loss by increasing the size of the package or the weight of the commodity packed therein, or withhold his goods from the market until it is possible to ascertain the true net weight.

"Whatever may be the necessary course to adopt to enable the container to correctly indicate the weight of the commodity it contains, it is not unreasonable to place that burden upon the one who puts the article before the public as a sale commodity, and compel him, if he wishes to retain his trade, to so pack his commodities that the consumer may know the true quantity of the thing he buys, and thus protect himself in paying the value of the thing he buys.

"At all events, we apprehend that there will be little likelihood of the honest merchant subjecting himself to a penalty under this ordinance if he is able to show that, in an honest endeavor to comply therewith, the nature of the article is such that an absolute compliance with its terms is impossible. The power of the city to pass the ordinance being sustained, it will be a simple matter to so amend it, if found to be necessary, as to conform to all natural and uncontrollable conditions."

* *

A statute requiring food packages to contain the net weight sold, but providing for tolerances and allowances for reasonable variations under official rules and regulations, makes the adoption of such rules mandatory, and is invalid and unenforceable if it fails to define the power to allow tolerances and exemptions. This is an abstract of the decision handed down by the Texas court of criminal appeals in the Humphrey Case (244 S. W. 822).

A law enacted in Texas in 1919 declared that "all articles of foodstuff, feed or other commodity which are sold in packages shall . . . contain the net weight of the produce or commodity," but that reasonable variations might be permitted and tolerances and exemptions allowed under rules and regulations of the commissioners of markets and warehouses.

E. R. Humphrey was accused of violating the law by selling a sack of flour as weighing 48 lbs when it weighed but 47 lbs 13 oz. The complaint averred that the commissioner of weights and measures had "allowed no tolerance on flour for shrinkage."

In a habeas corpus proceeding, Mr. Humphrey successfully assailed the validity of the act. The court of appeals noted that on the trial "there was evidence introduced which apparently established, without controversy, that all flour contained a certain percentage of moisture which varied according to atmospheric conditions, and that the variation in the moisture produced a corresponding variation in the weight; that it was not possible to manufacture flour that would not be subject to such fluctuation, both as to moisture and weight. . . . The power is conferred to make rules and regulations from time to time, permitting variations, tolerances and exemptions. The statute places no limitation upon this authority, save that the variations, tolerances, and exemptions must be reasonable. . . . It is deemed essential to the validity of the law that the legislature define the power conferred and place limitations upon the authority to make and promulgate the rules, to the end that they may not be lacking in the imperative elements of a law denouncing an offense."

Measured by the decision of the Texas court, similar statutes in other states are open to attack, but it may be inferred that, had the Texas statute prescribed maximum shrinkage allowances, based on atmospheric conditions, etc., the law would have been sustained as a valid measure.

* *

The Kansas legislature has recognized the reasonableness of making an allowance in favor of the manufacturer on account of evaporation and slight variations in weighing. Under a law in that state, it seems that a miller can excuse short weight due to evaporation occurring between the packing and selling of flour. After prohibiting the sale of commodities at less than their represented quantities, the statute declares:

"There shall be taken into consideration the usual and ordinary leakage, evaporation or waste that there may be from the time the package is filled by the vendor until the selling of the same; a slight variation from the stated weight, measure or quantity for individual packages is permissible, provided this variation is as often above as below the weight, measure or quantity stated."

Although the language of this statute is not as clear as it should be, a decision of the supreme court of the state leaves no doubt that shrinkage allowance is to be made in favor of the manufacturer where a charge of short weight is made against him.

Applying the statute to bread, the Kansas supreme court said: "Allowance is to be made for usual and ordinary evaporation between the time the bread is placed on sale and the time it is sold, and common sense allowance is to be made for slight variations in weight as often above as below the standard." (State vs. McCool, 111 Pac. 477.)

But that no allowance is to be made in favor of a manufacturer or dealer for evaporation unless provided for by express enactment seems to be the rule. In addition to the Washington case above cited, there is the Michigan case of People vs. Wagner, 49 N.W. 609, in which the supreme court of that state intimates that where there is no legislative allowance for evaporation, loss through it must be guarded against in the process of manufacture.

In the Wagner case the Michigan court upheld the validity of a Detroit ordinance that bread loaves must weigh one, two or four pounds. Part of the opinion reads: "It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, 'Water.'

"But they say the process of baking is not always uniform; that the oven may be too hot, in which case the bread crusts or skins quickly, retaining the moisture, and, again, it may be too cold, in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against and the weight of the dough must always be regulated accordingly; that fermentation is not always regular, and when it reaches a certain point the dough must be put into the oven, without reference to the condition of the oven; that the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust."

The court disposed of this argument by stating that experience had failed to develop any practical objections to the ordinance on these grounds; that, notwithstanding close weight inspection for 15 years, there had not been complaints of short-weight breads, and that the short-weight bread involved in this case was made for the sole purpose of testing the validity of the ordinance.

"Again, it is claimed," proceeds the opinion of the Michigan supreme court, "that a barrel of flour will make 250 loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread.

"The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade."

SECTION 128. INTENT AS ELEMENT OF OFFENSE

One of the most instructive decisions on practical aspects in general of weights and measures laws is to be found in the case of State vs. Armour & Co., decided by the Minnesota supreme court June 7, 1912 (136 N.W. 565). The gist of that decision was as follows:

A statute penalizing the sale, or offering for sale, of goods in less quantity than represented is valid, and is violated regardless of specific intent to deceive or defraud. But a later decision of the same court makes knowledge of short weight an essential element of an offense when "knowingly" selling at underweight is prohibited. There is no violation where there is no deception, by reason of agreement between the parties on a special variation in weight—as where it is understood that the represented weight of goods includes the container.

* *

Underweight in only one of numerous sacks constituting a shipment of goods is well-nigh conclusive evidence of the seller's intent to give full weight; but underweight in all the sacks save one will require proof to exculpate the seller. So decided the Alabama supreme court in the case of State of Alabama vs. 22 Sacks of Daisy Horse and Mule Feed, 88 So. 422.

The state sued to forfeit defendant shipment, and finding that 21 of the 22 bags of feed were short in weight, they were condemned and forfeited. The court said:

"One sack weighed 109 lbs. Twenty-

one sacks varied in weight from 88 to 98 lbs—all under 100 lbs. The 22 sacks weighed 2,084 lbs, 116 lbs less than their labels called for, and only 84 lbs over a ton. The 21 underweight sacks total in pounds 1,975—25 lbs less than a ton. Any 20 of the 22 sacks would weigh practically 1,900 lbs. The manufacturer was saving about 100 lbs on the ton. It was selling, by the underweight in the sacks, about 1,900 lbs for a ton.

"If one sack was 9 lbs under weight, and 21 of proper weight or practically correct, it would be a strong, if not conclusive, circumstance of no intent to have an underweight and no intent to deceive or defraud.

"In this case there is one sack out of 22 over weight, and 21 out of 22 under weight, reducing it per ton about 100 lbs. This, with no evidence to the contrary, impresses the court that the weight of the 21 sacks is false, that it was done to deceive or defraud, and, it being for sale or offered for sale, should be condemned and forfeited to the state of Alabama.

"The design of the act is to make the label on a sack of feed speak the truth as to its contents. If it does not, and the proof shows it was done to deceive or defraud, and it was kept for sale or offered for sale, it is subject to condemnation and forfeiture to the state."

CHAPTER XI

QUALITY OF GOODS*

SPECIFICATION BY BRAND, GRADE, ETC.

SECTION 129. DESIGNATING FLOUR BY BRAND

A COURT decision of practical interest to every dealer in flour was handed down by the Kansas supreme court in the case of Kansas Flour Mills Co. vs. Moll, 189 Pac. 940.

Plaintiff sued to recover $270 as damages for nonacceptance of a flour shipment, but the supreme court affirmed a judgment of the district court at Olathe denying the right to recover.

The contract was for the sale of three shipments of Fanchon, a high patent hard wheat flour. The first shipment was of contract grade, and was accepted. The second shipment was accepted, too, but defendant buyer afterwards complained that some of it was soft wheat flour. The third shipment was made under an order bill of lading with sight draft attached, and the trial judge found that this flour was properly rejected, as it contained a substantial percentage of soft wheat. Defendant also sought to justify rejection of the third shipment on the ground that the second contained soft wheat.

The trial judge further found that, as the third shipment was made under a bill of lading, with a draft attached, the defendant had no opportunity to examine or test the flour, and that, when the mill's agent came to adjust the matter and arrange for an acceptance of the flour, the defendant offered to pay for and accept it if plaintiff would warrant that it was straight hard wheat flour; or he offered to accept another shipment with such a warranty. These proposals were rejected by the mill, and the defendant's persistent refusal to pay for the flour tendered was followed by suit by the mill. After referring to the findings made by the trial judge, the supreme court says:

"The plaintiff insists that, under the facts and findings in the case, the plaintiff is entitled to recover. It is said that it was the duty of the defendant to receive the shipment upon arrival, and that there was no justification for his demand of a guaranty.

"The defendant was not required to accept any flour except the kind purchased. He purchased Fanchon flour, and the evidence of both parties agrees that it is a high grade hard wheat patent flour. That which was shipped to defendant was not the kind of flour purchased. The objection to it was not that it was an inferior grade of Fanchon flour, but that it was not that brand of flour. One witness who examined it said that about 25 to 30 per cent of it was made from soft wheat.

"It was shown that flour made from hard wheat differs materially in quality, as well as in value, from soft wheat flour. There is testimony to the effect that flour made from soft wheat is 'kind of sticky,' and that a sack of hard wheat flour yields four or five loaves more of bread than can be made from a sack of soft wheat flour.

"But, regardless of the difference in value of quality in the two kinds of flour, the defendant had a right to insist on the article he had purchased. He was no more required to accept the shipment of soft wheat flour than if it had been buckwheat flour or corn meal. The contract made may not have constituted a warranty in the strict sense, but there was an implied obligation that the seller would ship and tender Fanchon flour; that is, hard wheat flour. That was a condition precedent to liability of the buyer for non-acceptance."

After citing judicial precedents, the court proceeds:

"In the note of the last case cited, it is said: 'Without reference to whether the description of an article in a contract of sale is regarded as a condition precedent, a warranty of identity, or an implied warranty of quality, it is well settled that, where the description refers to an article of a specific kind, an article corresponding with this description must be tendered, in order to place upon the purchaser any obligation to accept it. Strict compliance is usually the test.'

*See, also, section 87.

"Defendant did not demand inspection, but as the flour was shipped there was no opportunity for inspection. He did challenge the shipment on the ground that it was not the article purchased, and he did this because the former shipment was not the kind of flour specified in the contract. Because of that shipment he had some reason to question that the flour sent complied with the contract.

"In refusing it he took the risk of paying damages if the flour had turned out to be hard wheat flour, but, as we have seen, the shipment had a greater proportion of soft wheat in it than was in the second one. If he had paid the draft and taken possession of the flour, he would have had the right to turn it back to the plaintiff and recover the price paid, or if he kept it he could have recovered the damages sustained by the violation of the contract, or he could reject the flour, as he did, for noncompliance with the contract.

"Plaintiff argues that he [defendant] had no right to demand the giving of a guaranty that the flour was the article purchased. It is true there was no stipulation of that kind in the contract but, in view of his experience with the former shipment, it was not unreasonable that he should ask some assurance that the article tendered was that which he had bought. It was at least a notice to plaintiff that defendant must have an opportunity to test the shipment before accepting it.

"Although plaintiff's representative was on the ground in negotiations with the defendant, and had learned the grounds of defendant's objection, he did not offer defendant an opportunity to test the flour, and would not give him any assurance that the flour tendered was the kind provided for in the contract. Even if the defendant had no right to demand the guaranty that was asked, he was entitled to reject the article substituted for that which he had purchased."

See, also, section 140 and other sections below in this chapter on implied warranties.

SECTION 130. "PATENT" FLOUR

What is the effect of the word "patent" in a contract for the sale of "patent flour"? The meaning must be determined according to any general understanding in the milling industry and flour trade. So far as we are able to ascertain, the only authoritative court decision in which the term has been interpreted was handed down by the supreme court of Missouri in the case of Nordyke & Marmon Co. vs. Kehlor, 56 S.W. 287, in 1900. It is to be inferred that the court had the benefit of evidence before it concerning a general understanding among millers, when it said:

"It seems that every flouring mill separates its product into two or more grades. Into the first grade it puts its best quality, which is called its 'patent flour' and is the best product obtained by that mill from wheat handled by it. What is left of that wheat goes into inferior grades of flour. The skill of the miller is directed to getting the largest percentage, compatible with desired excellence, of patent flour out of a given quantity of wheat.

"All patent flour in the market is not of the same quality. The quality may be influenced by the percentage of the product the miller sees fit to set apart for that grade. Therefore, if a mill puts only 50 per cent of its product into its patent flour, that flour would be a better quality than it, using the same skill and machinery, the miller put 70 per cent of the product into it."

This interpretation would no doubt be followed by other courts in the absence of showing that the Missouri court's understanding of the meaning of the term is at variance with the meaning usually ascribed to "patent flour" by millers in general.

SECTION 131. "RED DOG"

A contract containing a provision for sale of a quantity "of red dog in brands of Daisy, Adrian, Arlington flour, or Comet, or something the same analysis," gave rise to the case of Mayflower Mills vs. Hardy, 120 S. E. 861, decided by the Virginia court of appeals. The plaintiff sued for damages for breach of the contract, and the court of appeals ordered a new trial after the suit had been ordered dismissed by a lower tribunal. The higher court ruled that the trial judge erred in instructing the jury that the contract required the mill to "furnish a red dog of equal value as a feed with the brands ordered by" the buyer. The court of appeals said:

"The instruction is misleading in its statement, in substance, that the defendant ordered only certain brands of red dog. As applicable to the evidence in the case, the defendant did not order any brand of red dog, except in the alternative, and in fact ordered merely something of a certain nutritive food value specified in the order. Further, the instruction required the jury to find from the evidence that the red dog tendered was of 'equal value as a feed,' not lim-

iting that value to nutritive food value, which the contract plainly did, thus permitting the jury to erroneously consider, as bearing on the 'food value,' other qualities outside of the provisions of the contract—such as color, the price at which it sold, the preference of the trade, how another dealer in foodstuffs construed the order, how readily the red dog tendered would mix with wheat straw, and the circumstance that such red dog was not as finely ground as the other brands of red dog mentioned."

Concerning the measure of damages recoverable for the buyer's breach of contract, the court of appeals observed that "the measure of such damages is the loss of the plaintiff, consisting of the difference between the contract price of the goods and the net price, after deducting proper expenses of resale, and of care (if any) which they produced, or would have produced, at a resale, fairly made, and made at a time at which reasonable diligence, in promptly disposing of the goods, required that the resale should be made, after the breach of the contract by the defendant."

* *

A Minneapolis firm of flour merchants, asking regarding a controversy existing between the firm and English correspondents over the quality of certain export shipments, wrote:

"You are undoubtedly aware that for the past six months large quantities of red dog were sold from this market to England. One of our correspondents, with whom we had never dealt in this article before, and who had never had a sample of this grade from us, cabled asking for our lowest offer, which we submitted, and subsequently a number of trades resulted. To fill our orders we supplied the product of the X mills.

"On arrival of the shipments, our correspondents took exception to the X Co. product and demanded arbitration. In our reply, we stated that, never having submitted samples, and not having been limited by them to any particular mill's product, we did not think that they were entitled to any allowance, and that we must refuse arbitration, having furnished them what they ordered; that is, what we consider in this market as 'red dog.' They went ahead, however, with arbitration, and different allowances were awarded their buyers, as high as 4s 3d per sack, which is equal to about $7.50 per ton in our money; therefore, from our point of view, exorbitant.

"But, even if the allowances had been considerably less, it is our opinion that we complied with their orders and furnished them what is not only considered in this market, but in all markets of the United States, as 'red dog,' and is accepted as such in all our markets without any distinction being made about the difference in quality. We have to admit that the X Co.'s product is inferior to others made here in Minneapolis, but still we claim it is nothing but red dog, and the X Co. takes the same stand."

I was of the opinion that the merits of this controversy turned upon the question of pure fact, What variation in quality is permitted by the term "red dog," as generally understood in the flour trade, and as applied to Minneapolis products? If the goods delivered came within that term, as so generally understood, the English buyers got what was contracted for, and have no valid claim for allowances. If the flour fell below that standard, there was a valid claim, regardless of any special interpretation the particular mill or the seller may have placed on the term "red dog," at variance from the general understanding in the flour trade.

On this issue, it seemed to me that the weakest point in the seller's side of the controversy was the admission that the particular flour was "inferior to others made here in Minneapolis." This raises the decisive question: was it so much inferior as to take the grade below "red dog"?

In this connection, see the decision of the Springfield, Mo., court of appeals in Lindsborg Milling Co. vs. Danzero, referred to in section 140.

Both the Missouri case and the case presented by our correspondent are governed by the well-settled rule of law: "If the article sold is designated by a particular brand, the buyer is not bound to receive an article of any other quality; and, on the other hand, the obligation of the seller is fulfilled if he delivers goods known by that brand, although they are not in fact of good quality." (35 Cyc. 218.)

SECTION 131A. "NUMBER 1" OR "FIRST CLASS" FEED

Representation by the seller of feed that the same is "number 1" or "first class" is equivalent to a representation that the feed is of good quality, in good condition, not damaged or off grade, nor unfit for feeding purposes, holds the California district court of appeal in the case of Pacific Feed Co. vs. Kennel, 218 Pac. 274.

The court also holds that a breach of a warranty of the quality of goods cannot be excused by the seller on the ground of innocence of knowledge of inferior quality.

Judgment in favor of plaintiff on account of death of cattle traced to unfit beet pulp feed was affirmed by the court.

SECTION 132. "FREE FROM SPECKS"

"We sold a car of soft winter wheat straight flour, free from specks," wrote a mill, "and are interested to know whether to your knowledge any court has interpreted the meaning of the phrase 'free from specks,' as related to straight flour."

A careful examination of the law reports failed to disclose that any court whose opinions are recorded had ever been called upon to determine this question. If any of the lower courts have passed on the question our attention has not been drawn to the case, but perhaps we may make a few suggestions serving as an indication of what a court might be expected to decide, were the question submitted.

In the first place, it would be material to show just what the term "free from specks" is generally held in the flour trade to mean. Under a fundamental legal principle, a court would be very apt to interpret the phrase in accordance with any well-established trade understanding.

Except as the proper meaning may be gathered from what was mutually understood by the parties to the contract, or from trade usage in the absence of any such specific understanding between the parties, we are of the opinion that a judge would say that flour "free from specks" means flour not containing specks of such character or in such numbers as to diminish the value of the flour.

That is, it is not required that the flour be absolutely free from specks. Flour with two specks would not, strictly speaking, be "free from specks," but would seem to be sufficient in quality under this contract, if otherwise sufficient. And we believe that additional specks might be present up to the point that the value of the flour would be diminished.

In the absence of more closely applying judicial authority, we regard the decision of the United States circuit court for the district of Massachusetts, handed down in the case of Adams vs. Bridgewater Iron Co., 26 Fed. 324, as being in point. There the question was whether certain copper tubes or cylinders were "free from blowholes," and the court said:

"It is blowholes which are defects, or which render the tubes unmerchantable, which are here fairly intended. It would be a narrow construction to . . . hold that it only covered a cast copper cylinder absolutely free from blowholes. Probably no such cylinder was ever made by any process. It is a practical question. The claim must be considered to mean a cast copper cylinder so free from blowholes as to be considered sound; that is, sufficiently perfect to be used in the arts for the purpose for which copper cylinders are used.

"The defendants object to any such standard of perfection, on the ground that it is variable, but we deem it sufficiently definite. If it should be found that the defendants use the Adams process, they should not be allowed to shield themselves from the charge of infringement on the ground that the cylinders they produce, though merchantable and sound, practically speaking, are not absolutely free from blowholes."

SECTION 133. "WINTER WHEAT BRAN"

The Gateway Milling Co., Kansas City, won an important lawsuit before the Virginia supreme court of appeals, bearing upon the quality required under a contract for sale of "winter wheat bran."

Defendant, H. B. Walker, of Newport News, placed a written order with the mill for 15 cars of "winter wheat bran," and received six cars, which were resold to a customer. Walker then notified the mill that the shipments were not of uniform grade and that the remaining cars would be rejected.

A few days later he honored draft covering the seventh car, to fulfill a contract made with a customer, but stood upon his rejection of the eight remaining cars. The mill disposed of them at a loss over the contract price, and sued for damages. Trial of the suit resulted in judgment for the mill, and defendant appealed unsuccessfully.

The supreme court of appeals held that there was evidence warranting a finding by the jury that presence of screenings in the bran, the ground upon which rejection of the shipments was placed at the trial, was not the real cause of the rejection, but rather the fact "that Walker overstocked himself in anticipation of a large contract for feeding horses which he failed to get."

Defendant claimed that he was entitled to bran containing no screenings, while the mill relied upon a trade custom and usage permitting the presence of such

screenings as were found in the shipments in question. The trial judge permitted the mill to prove such custom before the jury, and this was complained of on appeal on the ground that such proof amounted to a contradiction of the written contract for delivery of "winter wheat bran." But the higher court decided that the evidence of the custom was properly admitted in explanation of what was commonly understood to constitute "winter wheat bran" in the trade, saying:

"There can be no doubt as to the rule that a usage or custom of either a trade or a locality, which would otherwise form a part of a transaction, will equally form a part when the transaction has been embodied in a writing, unless the terms of the writing clearly exclude the usage or custom."

Responding to the further suggestion made by defendant that proof of the custom infringed upon the state and federal regulations applying to feedingstuffs, the court said:

"There is, we think, no force in this position. It is not claimed that the screenings in this bran constituted an unlawful adulteration, nor that the tags which were in fact placed on the sacks, indicating the presence of screenings, constituted a misbranding. Conceding that the sale could not have been consummated in compliance with the state and federal law without using tags or brands indicating the percentage of screenings contained in the bran, there was nothing wrong or contrary to the law in selling the identical bran which was sold, assuming, as we may properly assume under the evidence and the finding of the jury, that the parties intended the term 'winter wheat bran' to mean the commodity which was actually shipped.

"There is nothing in the statutes, state or federal, to in any way interfere with the rules of evidence in cases where parties have employed trade terms having a definite meaning, even though these statutes require that meaning to be fully defined in the stamps placed on the goods. Whether winter wheat bran would have been a sufficient designation within the meaning of the statutory law is one question, and an immaterial one in this case.

"Whether Walker, as a dealer in commercial feedingstuffs, in ordering winter wheat bran from another dealer, must be held, under a general, long established and notorious custom of the trade, to have contracted for bran with screenings, is another, and in this case a controlling, question, which was submitted to the jury upon proper instructions and found against him."

Another point relied upon by defendant was that the mill gave him no notice of the time and place of the resale under which the bran was sold after he refused to receive it. But the supreme court of appeals decided that the mill did all that was required of it, by making every reasonable effort to make the best disposition possible, after attempting to convince defendant that the shipments conformed to the contract, and by notifying him that the stuff would be sold at his risk. (92 S.E. 826.)

SECTION 134. "MILLING CORN"

See section 27, where reference is made to the case of Hayes Grain Co. vs. Rea-Patterson Milling Co., 223 S.W. 390, holding that a contract to deliver white milling corn was broken, and that the agreement was not invalid as imposing quality requirements in excess of those required by federal law.

SECTION 135. "BEST MERCHANTABLE CORN"

Speaking of the meaning of the words, "best merchantable corn," as used in a sales contract, the Kansas City court of appeals said:

"They meant the best grade of corn generally or usually dealt with in the markets of the country. It would not do to confine the grade to that of the immediate vicinity, for it might be, and often is, that on account of frost, drouth, etc., in certain localities corn would be of such inferior quality as to rank low down in the general markets." (Yontz vs. McVean, 217 S.W. 1000.)

SECTION 136. "SOUND, COOL AND SWEET OATS"

Failure to deliver a carload of oats conforming to a contract to sell "clipped white oats to be sound, cool and sweet," was the ground on which the Massachusetts supreme judicial court permitted plaintiffs to recover damages in the case of Cavanaugh et al. vs. D. W. Ranlet Co., 118 N.E. 650.

Three cars were delivered and accepted under the contract, but the fourth and last was rejected by plaintiffs as being of inferior quality, and suit was brought as for failure to deliver the last installment. It was decided that a description of the oats to be delivered as "clipped white oats to be sound, cool and sweet" amounted to a warranty on the seller's part that the oats delivered would conform to this description.

SECTION 137. SOURCE OF PRODUCTION

It appears to be well-established law that where a contract for a sale of bran, grain, or other commodity does not con-

template production at any certain mill or other place, the seller may deliver the required goods from any source whence he may obtain the necessary supply of the contract goods; but a decision of the California district court of appeals draws attention to the point that, where a contract expressly contemplates a specific source of supply, the buyer is not bound to accept goods obtained elsewhere (Hogue-Kellogg Co. vs. Petit, 192 Pac. 113).

It is held that a contract to deliver beans grown on certain land could not be satisfied by tendering beans grown somewhere else, although no difference in quality might be involved. So it seems to be good law that a contract to sell "bran" permits the seller to deliver bran produced at any mill. But a contract to deliver 1,000 bbls of Pond Lily flour could not be satisfied by a tender of Red Eagle flour, although the two products might be equal in quality.

SECTION 138. MOISTURE IN FLOUR

An interesting and important controversy was brought before the flour committee of the New York Produce Exchange in April, 1921, in arbitrating a controversy between the W. P. Tanner-Gross Co., Inc., and the Russell-Miller Milling Co., the point at issue being the percentage of moisture in flour which might prevent it from being considered a good delivery.

The contention of the buyers, the W. P. Tanner-Gross Co., Inc., was that the flour contained more than 13½ per cent of moisture, and therefore was not a good delivery. The other party to the transaction claimed that when the flour was packed at the mill it did not contain more than the proper percentage of moisture, and that the mill could not be held responsible for any moisture absorbed while in transit.

The buyer's principal point of contention, according to testimony in the case, seemed to be that the local representatives of the enforcement bureau of the Department of Agriculture had indicated that any flour containing more than 13½ per cent moisture would be subject to a recommendation to Washington that it be seized as unfit for human food, but the mill submitted a telegram from Dr. Alsberg, at Washington, reading in part as follows:

"Twenty-sixth paragraph of Food Inspection Decision 154, relating to tolerances allowed in net weight declarations due to unavoidable absorption or evaporation of water, not rescinded. Bureau would not make seizures of flour on account excessive moisture in cases where product was within standard at time of shipment interstate."

After a very careful hearing of the testimony of both sides, the flour committee selected as arbitrators rendered an award in favor of the mill, directing the W. P. Tanner-Gross Co., Inc., to accept the flour contained in the four specified cars as a proper delivery on the contract, "there being undisputed testimony to the effect that the moisture content of the flour in question when packed at the mills was not in excess of the maximum permitted by government regulations as defined in Circular No. 136 issued by the Department of Agriculture in June, 1919, as a guide for the officials of that department in enforcing the food and drugs act.

"It is the opinion of the arbitrators that the manufacturer cannot be held responsible for deviations in moisture content of flour, subsequent to the date of manufacture, that result from causes beyond his control."

However, further investigation of the facts threw a somewhat different light on the question than the one first presented.

The question arose in connection with a contract for 20,000 bbls of flour sold by the mill to the New York house. About half of this flour was accepted by the purchaser as being in proper condition; the remaining half, including the four cars arbitrated before the flour committee, was found by the official chemist of the Produce Exchange to contain more than 13.5 per cent moisture, and the Tanner-Gross concern rejected this flour as not being a proper delivery according to Circular 136 put out by the Department of Agriculture under date of June, 1919, which states that flour shall not contain over 13.5 per cent moisture.

The flour in question was bought for shipment, not from the mill, but from Erie, Pa., where it had been in storage since the close of the lake-and-rail season, and the testimony for the mill showed that this flour had been manufactured anywhere from four to six months before the date of the sale for shipment from Erie.

The arbitration was originally sought with the idea of determining the simple question of whether or not flour containing over 13.5 per cent moisture was a proper delivery, with the understanding that a single car agreed upon should be used as a standard upon which all the others would be judged. Later, upon instructions from the mill, this stand was

changed and the mill insisted that the arbitration should be upon only the four cars in question, and have no bearing upon any other portion of the shipment.

Upon this basis the arbitration was held and the decision rendered, and the Tanner-Gross concern, in accord with the letter and spirit of the award, accepted the four cars upon which the arbitration was held.

The flour committee, in accepting testimony from the mill that the flour did not contain over 13.5 per cent moisture at the time it left the mill, has relieved the mill from all responsibility as to what may have happened to the flour from then on to the time it was again shipped from Erie, Pa., though the flour remained the property of the mill for several months prior thereto. During this time the flour moved from the mill to Duluth, where it lay in storage for a period, and later moved by water to Erie, Pa., where it was stored for a considerable period longer before it was sold to the Tanner-Gross concern.

The latter felt that the reasoning of the flour committee was wrong, and after consulting with the Bureau of Chemistry officials in New York and Washington, and with its attorneys, reached the conclusion that it could not accept the remainder of the flour containing an excess of 13.5 per cent moisture without rendering itself liable to prosecution under the law. Accordingly the company rejected it.

A peculiar feature of the law and the rulings thereunder is that testimony as to the condition of flour, in order to make it subject to prosecution or seizure, must show that the flour was out of condition at the time it began an interstate movement. In this case the mill shipped the flour from Erie, Pa., to New York, lighterage free, on the Pennsylvania Railroad, which brought the flour to the New Jersey terminal of the Pennsylvania Railroad. It is contended that there was no direct testimony as to its condition at Erie, and the buyers claim that the presumptive evidence was to the effect that the flour was excessive in moisture at Erie.

Under the circumstances, the flour was not subject to seizure or prosecution by the government, but if accepted by the Tanner-Gross concern, with the knowledge that the flour contained over 13.5 per cent moisture, and was thereafter moved to New York City or any other destination which would bring the flour again into interstate commerce, the Tanner-Gross concern claims it would have been subject to prosecution under the law.

The flour committee and the mill seem to be of the opinion that, as the flour was not subject to actual seizure by the government at the time it was tendered to the Tanner-Gross concern, it was a proper tender. The Tanner-Gross concern contends that flour must not only be free from seizure at the time it is tendered, but also must be in such condition as to make it free from prosecution or seizure in case the buyer again wants to put the flour into interstate commerce.

While the question of moisture was the only one brought up at the arbitration, it is understood that the buyers of the flour feel that the excess moisture is not only an objection in itself in this particular lot of flour, but that the quality of the flour had deteriorated, due to its long storage on or at the lakes, into its condition of excessive moisture content.

IMPLIED WARRANTIES*

SECTION 139. EXCLUSIVENESS OF EXPRESS WARRANTY

If a written contract of sale contains an express warranty of quality, no additional warranty is to be implied. (Georgia court of appeals in Webb & Maury vs. Smith Bros., 93 S.E. 74.)

SECTION 140. ADAPTABILITY TO BAKING BREAD

A manufacturer of a grade of flour that is known by him to be extensively used by bakers in making bread, and who sells that grade of flour under a certain name, warrants that the flour sold by him under that name is of the grade and character described thereby, and warrants that it will make bread; and if flour that will not make bread is sold to a dealer under that name the seller is liable for the damages thereby sustained by the purchaser.

This important rule of law was laid down in the opinion announced by the Kansas supreme court in the case of Kaull vs. Blacker, 193 Pac. 182.

The plaintiff, a miller at Glen Elder, Kansas, sought to recover from the defendant, a dealer in flour at Kansas City, damages sustained by the plaintiff through refusal of the defendant to accept and pay for flour he had contracted

*As to machinery sales see section 154.

to purchase. The defendant, on a counterclaim, recovered judgment for damages caused by the fact that the flour would not make bread. The plaintiff appealed.

The principal objection relied on by the plaintiff on appeal was that the trial judge erred in instructing the jury as follows:

"If the jury finds from the evidence that Gold Drop 95 per cent flour [the flour in question] was sold on the market at Kansas City, and known and understood by those dealing in it, including the plaintiff and defendant, to be a flour manufactured by removing the bran and feed and 5 per cent of the lower grade flour from the wheat, that there was no agreement or custom among flour dealers, including plaintiff and defendant, by which said flour was understood to have qualities and constituents which would make it fit and proper to make marketable bread when properly prepared and baked, and that the plaintiff delivered to the defendant flour that was manufactured by removing from the entire product of the wheat the bran and feed and 5 per cent of the low grade flour, then you are instructed that the delivery of such flour would be a compliance by plaintiff with his contract, and plaintiff would be entitled to recover in this action from the defendant; but if you find from the evidence that Gold Drop 95 per cent flour was a flour sold on the market at Kansas City as an article of commerce for use largely, if not entirely, by bakers for the baking of bread, and was so understood by those dealing in said flour on said market, including the plaintiff and the defendant, at the time of making the contract for the sale of the flour in question in this case by the plaintiff to the defendant, then you are instructed that the plaintiff was bound to deliver to the defendant flour of kind and quality fit and proper for use of bakers for baking bread; and if you find from the evidence that the plaintiff did not deliver to the defendant flour of that kind and quality, but did deliver flour that could not be used by bakers in the baking of bread, and that by reason thereof the defendant was unable to sell to bakers the flour which the plaintiff had delivered to the defendant, and the samples furnished defendant by plaintiff of the flour which plaintiff expected to deliver in the future to defendant was of the same quality as that already delivered, then you are instructed that the plaintiff did not comply with his contract, and that the defendant was not bound to accept any further delivery of said flour, but had the legal right to refuse to accept it, and your verdict should be for the defendant."

There was evidence to show that "95 per cent flour" was a standard grade, and was extensively, almost wholly, used by bakers in Kansas City in making bread; that Gold Drop was the name given by the plaintiff to the 95 per cent flour manufactured by him; that he contracted with the defendant to sell him Gold Drop 95 per cent flour; that the flour delivered was not of the grade called for by the contract; that the defendant was engaged in selling flour to bakers for the purpose of making bread; that part of the flour purchased was sold to bakers in Kansas City; that the flour thus sold did not make bread; and that the defendant was compelled to take it back and furnish other flour in its place.

There was also evidence of a chemical analysis of the flour delivered to the defendant from which the jury could have concluded that it was of a quality poorer than that of the grade sold. There was further evidence which tended to show that the plaintiff and the defendant understood that 95 per cent flour was sold on the market at Kansas City for use largely, if not entirely, by bakers in making bread. That evidence may be detailed as follows:

The plaintiff's attorneys in their opening statement to the jury said: "Now the Gold Drop flour was a well-known flour. The evidence will show that it was a manufactured article of commerce that had been furnished to the trade, the flour trade, of Kansas and Missouri for perhaps 30 or 40 years, perhaps 40 years; that it was a 95 per cent flour; they knew what it was."

In a letter written by the plaintiff to the defendant this language was used: "Nearly all old wheat, milled after the extreme weather, shows some trace of a stacky odor, and we are informed by bakers that it bakes out all right and with no effect therefrom."

James R. Blacker testified that "95 per cent flour is flour with 5 per cent of the low grade extracted, and also the feed extracted, and to us it means in trade it is a standard piece of goods," and that it was sold to the bakery trade almost universally.

Mr. Estabrook, a chemical expert, testified that the trade recognizes 95 per cent flour as standard patent, and that that is a trade term for it.

John A. Wilson, another chemical expert, testified that there is a grade of

flour known as 95 per cent flour, and to his knowledge that has been a grade of flour dealt with on the Kansas City market for probably 16 years, and that it was used mostly by the baking trade, although it also goes into family trade in some sections. Witness stated that the baking trade, bakers as distinguished from homes, almost universally used that grade of flour.

Overruling plaintiff's objection to the instructions, the supreme court said: "Outside of the evidence, it is well known that practically all flour is sold for use in making bread, and that this is the principal use for which flour as such is sold. Small quantities are used for other purposes, but that use is negligible. Because these are facts known by all, the courts take judicial notice of them. . . .

"The plaintiff cites Ehrsam vs. Brown, 76 Kan. 206, 91 Pac. 179, 15 L.R.A. (N.S.) 877, where this court said: 'Where a known, described, and specified article is sold by a dealer under a contract to be executed by delivery of the specified article, which is actually supplied to the buyer, there is no implied warranty that it shall answer the particular purpose intended by the buyer, although such purpose is communicated to the dealer beforehand.'

"In Field vs. Kinnear et al., 4 Kan. 476, a case that arose over the sale of flour, this court said: 'In an executory contract for a sale of goods by sample, it is the privilege of the vendee to return the goods, if they do not correspond with the implied warranty, and thereby rescind the contract, or he may retain them, and recover damages.' . . . 'In such a contract for goods not yet manufactured, there is an implied warranty that the goods shall fill the terms of the contract.'

"In Bigger vs. Bovard, 20 Kan. 204, a case that arose over the sale of meat, this language was used: 'A vendor impliedly warrants goods sold by him without any opportunity of inspection on the part of the buyer to be of a merchantable quality, and reasonably fit for the purpose intended; and if, when the goods are delivered to the buyer, they are unmerchantable and unfit for use, the buyer may return them without unnecessary delay, and rescind the contract; and if the goods, on being returned to the vendor, are injured or damaged without any fault or negligence on the part of the buyer, such injury does not prevent a rescission of the contract.'

"It must be conceded that, when flour is sold, it is sold for use in making bread; there is therefore an implied warranty that it will make bread. It follows that, if flour sold will not make bread, the purchaser may return it and collect the damages sustained by him. The evidence justified the instruction that has been set out, and there was no error in giving it."

See, also, F. W. Stock & Sons vs. Snell, 134 N. E. 378, decided by the Massachusetts supreme judicial court.

* *

When flour sold under a given brand is understood in the trade as possessing a certain degree of quality, a contract to sell a quantity of it carries no implied representation on the part of the seller that the flour delivered will be suited to the making of any particular kind of bread or adapted to any particular method of baking. But where flour is sold for definite use and no established brand serving as a standard of quality is mentioned, the seller must deliver flour reasonably fit for such use. This is a condensed statement of a decision announced by the Springfield, Mo., court of appeals.

Plaintiff agreed to sell 2,015 bbls of Golden Eagle flour to defendant, a baker. Two shipments were accepted as being satisfactory, but subsequent deliveries were rejected as being deficient in quality. Thereupon plaintiff sued to recover damages as for breach of defendant's contract to buy, and defendant counterclaimed for damages on the theory of plaintiff's breach of contract in failing to deliver Golden Eagle flour.

The trial court denied right of either party to recover under the proof offered, because of insufficiency of basis for assessing damages, and both appealed. In remanding the case to the trial court for further proceedings, the court of appeals said, in part:

"Under the contract, plaintiff was required to deliver flour of the quality for which that term [Golden Eagle] stood. If the flour which plaintiff shipped came up to that standard he is entitled to recover, even though such flour may not have been suitable for making the kind of bread which defendant used and was not adapted to his method of making bread. The plaintiff did not claim for this brand of flour that it was of the highest quality manufactured by it.

"This brand of flour, the testimony tends to prove, was known to the trade generally and the defendant previously used it. If this was true he knew what this particular brand stood for. If he did he has no right to claim that he bought and must have the highest quality of flour. The defendant cannot, however, be required to accept a grade of flour that did

not reasonably measure up to the standard of the brand of flour which was designated as Golden Eagle. . . .

"From what has been said it is apparent that if the term Golden Eagle flour had no recognized meaning as to distinctive grade of flour, but was a mere term used by plaintiff in marking his flour sacks, there would be an implied warranty that the flour sold was reasonably suitable for the purposes and uses intended by the defendant, because all classification and selection of any particular class is wholly eliminated." (Lindsborg Milling & Elevator Co. vs. Danzero, 174 S.W. 459.)

SECTION 141. CONFORMITY TO PREVIOUS DELIVERIES

A sale of flour by brand implies a warranty by the seller that the goods delivered will conform to flour delivered under previous sales between the same parties with reference to the same brand. This is the principal point decided by the Wisconsin supreme court in the case of Reed vs. David Stott Flour Mills, Inc., 185 N.W. 715. The facts, as found by the court, are as follows:

Plaintiff bought two quantities of flour from defendant mill described by brands. Shipment was accepted and paid for, and plaintiff resold a few barrels. Shortly afterwards plaintiff's customers made complaints against the quality. The mill's agent visited plaintiff, and, after examining samples carried by him and samples of the flour delivered, admitted that plaintiff has not gotten the flour he contracted for, and assured plaintiff that the goods would be replaced. But the flour was not replaced, and plaintiff sued to rescind the purchase.

The mill offered no proof as to the quality of the flour delivered, and the trial judge ordered verdict in plaintiff's favor for the return of the purchase price, less a small deduction covering a small quantity of flour resold by plaintiff and not returned to him.

Under an earlier contract between the parties, covering one of the same brands, the mill's agent had indorsed on the instrument a guaranty that the flour was A No. 1. Plaintiff was permitted by the trial judge to prove that transaction as tending to show an understanding intended to cover the continuing contract relationships between the parties. The mill's attorneys objected to this evidence on the ground that the contract referred to had been fully performed and had no legal relationship to the contracts in suit. On this and the other points involved in the case the court said:

"Passing for the moment this contention, we think it appeared by plaintiff's proof, and to which there was no denial, that he purchased 210 bbls of Princess flour and 100 bbls of Norseman flour. The proofs show that these brands represented high grades of flour. The proofs also show that, instead of getting these two brands of flour, plaintiff got an inferior grade of flour, which he could not sell. As soon as he learned of this inferior quality, he notified defendant, and made an effort to have it corrected. The defendant refused to do so.

"Under these circumstances plaintiff had a right to rescind the contract. He certainly had a right to insist upon having the kind of flour he purchased. The contract carried upon its face an implied warranty that the flour sent was of a like quality as previous shipments of those brands. When plaintiff learned that the shipment was not of the quality of these brands, which he had heretofore purchased, he at once notified the defendant, and rescinded the contract. If the court was impressed with this testimony, plaintiff was entitled to recover what he had paid for the flour, independent of the guaranty indorsed on the contract of Feb. 4. . . .

"The contract of Feb. 4, upon which the guaranty was indorsed, was received in evidence. How far this affected the court's conclusion we cannot say. His charge in directing a verdict does not indicate that he was influenced by it. But, whether the guaranty was considered or not, he reached the right conclusion under the proofs. Both counsel requested a directed verdict, defendant at the conclusion of plaintiff's proofs, and plaintiff at the conclusion of all the proofs.

"Under the view that the proofs justified a recovery outside of the contract of Feb. 4, it will be unnecessary to consider the several questions of agency raised by the defendant.

"Defendant complains because the trial court refused to admit in evidence the loading slip, which was made at the time the flour was loaded into the car at Detroit. It was not proven, and the court rejected it. We think he was right, as it was not identified by the person who made it or knew of the facts which it purported to show.

"We are of the opinion that, under plaintiff's proofs, he was entitled to recover. The other questions need not be considered."

It will thus be seen that the court intimates that doubt might exist as to the guaranty indorsed on one contract ap-

plying to a purchase under a later and independent contract, and as to the authority of the mill's representative to indorse such a guaranty or to agree to replace flour delivered and found unsatisfactory. And under other court decisions it would seem that the mill would have had the better side of the argument had these questions had a material bearing on the merits of the case.

* *

Right of a buyer to rescind an agreement to buy flour was upheld by the Indiana appellate court (141 N. E. 533) on the ground that the salesman who took the order made an excessive guaranty of quality.

The order called for flour of a certain brand manufactured by the seller, for shipment on instructions to be given by the buyer. Across the face of the order was written the words, "Guaranteed to equal any standard baker's patent on the market." The flour was not ordered out within the time fixed in the contract formed by the mill's acceptance of the order, and the selling mill claimed damages on electing to cancel the agreement. The buyer established a defense that the flour designated by the brand mentioned in the contract was not "equal to any standard baker's patent on the market." It was claimed that this fact had been ascertained on receipt of another shipment of the same brand, bought before but shipped after the contract in suit was entered into.

SECTION 142. SATISFACTION OF CUSTOMERS

It has been held that sale of flour by a miller to a middleman, designated according to brand, does not imply a warranty on the miller's part that the flour will prove satisfactory to the middleman's customers. Said the United States circuit court of appeals on this point: "If the known, described and defined thing be actually furnished, and the same is of merchantable character, there is no warranty that it will answer the particular purpose intended by the buyer; and under such circumstances, clearly in the absence of express warranty or fraud, no liability would attach to the seller for the failure of the article supplied to meet the requirements of the defendant's customers—that is, either what sellers of the brand desired, or customers demanded." (223 Fed. 969.)

SECTION 143. SOUNDNESS AND WHOLESOMENESS

The liability of manufacturers to third persons for negligence in manufacture is mainly covered in section 580. See, also, section 131A.

The Kansas City court of appeals said in the case of Glasgow Milling Co. vs. Burgher, 122 Mo. App. 14: "The sale was manifestly a sale of merchantable flour. The plaintiff can be held, on proper plea to that effect, on an implied warranty that the flour should be delivered in merchantable condition."

* *

"The general rule, established by the weight of authority in the United States and England, is that accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human consumption." This language was used by the New York court of appeals in the case of Race vs. Krum, 118 N.E. 853, in affirming judgment in favor of plaintiff, who was poisoned by unwholesome ice cream manufactured and sold by defendant.

But the court qualified its statement of the law above quoted, by limiting the rule to the manufacturers. That is, a manufacturer might be held liable for placing unwholesome products on the market, where a retail dealer with no opportunity for knowing of the unwholesomeness, would be exonerated from liability. But it would seem that, even as to the retail dealer, care commensurate with opportunities for detecting the unsound character of food must be used.

"The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended," said the court of appeals. "The rule is an onerous one, but public policy, as well as the public health, demand such obligation should be imposed.

"The seller has an opportunity, which the purchaser does not, of determining whether the article is in proper condition to be immediately consumed. If there be any poison in the article sold, or if its condition renders it unfit for consumption, and the consumer be thereby made ill, some one must of necessity suffer, and it ought not to be the one who has had no opportunity of determining the condition of the article, but rather the one who has at his command the means of doing so."

* *

The liability of a dealer in food products for damages for delivering unwholesome goods to a consumer, as affected by

the provisions of the uniform sales act, was considered by the New York court of appeals in the case of Rinaldi vs. Mohican Co., 121 N.E. 471.

The court noted that, prior to the adoption of the sales act in New York in 1911, it had been determined by a decision of that tribunal that a sale of food for immediate consumption carried with it an implied warranty of wholesomeness. But it is shown that the act, by reason of its application to all kinds of personal property, has abolished certain principles of judicial law relating to implied warranties, and the court laid down the law as follows, after reviewing pertinent sections of the sales act:

"In a sale of food, therefore, there is no longer an implied warranty of fitness, unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase, and unless it appears that the buyer relies on the seller's skill or judgment. Even then, if the buyer has examined the goods and should have discovered the defect, there is no warranty. The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of an implied warranty.

"If either of these two essential facts does not appear, he fails in his claim. Whether they exist or not may often become a question of fact to be solved by the jury. But often, also, where the facts are undisputed, and no differing inferences may be drawn from them, the question becomes one of law for the court; and we have to determine just what and how much evidence is necessary to show conclusively the evidence of these essential elements.

"We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inferences. . . . But we think, further, that such a purchase, where the buyer may assume that the seller has the opportunity to examine the article sold, unexplained, is also conclusive evidence of reliance on the seller's skill or judgment.

"We here limit the rule. We do not pass upon the question as to whether it applies to a sale in the original package bought by the vendor from others. In such circumstances it is possible that the inference of reliance would not properly be deduced from the purchase alone."

In this case the court affirmed a judgment in favor of plaintiff for illness caused to her by latent unwholesomeness of meat bought from defendant; the suit proceeding upon the theory of an implied warranty of wholesomeness based on the fact that defendant must have known that the meat was intended for human consumption.

* *

Plaintiff bought a sack of flour from a retail dealer, and a baking from it caused her husband to become ill. An examination of the flour showed that it contained arsenate of lead, a poisonous substance indistinguishable from flour when mixed with it. His widow sued, as his administratrix, for damages sustained as a result of the poisoning. The retailer and the miller were made co-defendants. The former disclaimed liability because he handled the flour in sacks. The miller resisted on the ground that the sacks were readily openable, thereby avoiding a necessary conclusion that the poison was in the flour when the sack left the mill; and on the further ground that the mill had no contractual relations with plaintiff or her husband.

The trial court entered judgment in defendants' favor, but the Wisconsin supreme court reversed it on appeal, and granted a new trial on account of errors committed by the trial judge (Hertzler vs. Manshum, 200 N. W. 157). The most important passages of the opinion of the higher court are as follows:

"If the poison was in the flour when furnished by the dealer to plaintiff's decedent, one or both defendants are liable, unless they can excuse themselves. Even ordinary care ought to keep arsenate of lead out of flour. Prima facie, the poisoned flour was the result of some one's negligence. . . . If the poison was in the flour when delivered by the dealer, plaintiff was not bound to show how or when it became so mixed, or offer substantive evidence of want of care on the part of either or both defendants. The ruling, confining plaintiff's right of recovery to an affirmative showing of negligence on the part of defendants, placed an unwarranted burden upon her, and relieved defendants from fighting out between themselves the issue of where the blame, if any, lay for the injury done, and was erroneous."

Replying to the miller's contention for nonliability under the general rule that the manufacturer of a commodity sold to a retail dealer is not liable to a subsequent purchaser upon an implied war-

ranty for injuries due to defects or impurities therein, the supreme court said:

"This general rule is based on want of contractual relation. But foodstuffs do not fall within the rule of privity between the manufacturer and ultimate consumer, with a retail dealer intermediate. Flour is a food product, prepared and distributed for human consumption, and it comes from the manufacturer to the dealer for sale to consumers with the guaranty to consumers that it is free from poisonous foreign substances."

Laying down rules to guide the court on a new trial, the supreme court adds: "The burden rests upon plaintiff to show that the poison was in the flour when purchased from defendant Manshum [the retailer]. If such fact is established, plaintiff will make out a prima facie case against both defendants, and the burden will shift to defendants to excuse themselves. If defendant Manshum satisfied a jury that the flour was delivered by him to plaintiff's decedent in the same container, and exactly as furnished him by the manufacturer—in other words, that the poison did not get into the flour while in his possession—then he is not liable, and excuse, if any, is to be made by the manufacturer. If the manufacturer satisfies a jury that, in making and packing and marketing the flour, the highest degree of care was exercised, then no actional negligence or breach of duty exists, and plaintiff is without remedy. . . .

"Much is said in the briefs upon the question of whether the sacks of flour put up at the mill for the trade are, in the eyes of the law, sealed packages. While in some of the reported cases the answer to such question has constituted a determining factor, we do not feel that it is decisive here. Plaintiff's rights do not rest upon the character of the container employed, whether capable of being misused or tampered with or not, but upon the fact that the poison was in the flour."

The supreme court decided that negligence on the part of the miller could not be predicated upon use of secondhand paper flour sacks, or intermingling of such sacks with new ones.

* *

In the case of Barfield vs. Heinemann, 207 S.W. 58, 62, the Arkansas supreme court upheld judgment against defendant, a retail dealer in flour, on the ground that an employee in his store carelessly placed "Rough on Rats" in such position near a flour bin, with intent to rid the premises of rodents, that some of the poison became mixed with flour afterwards sold to a customer. Eating biscuits made from the flour resulted in the customer's death, and in severe illness of other members of the family.

The Arkansas supreme court affirmed judgment for $3,000 in favor of decedent's wife, Mrs. R. H. Barfield, a Negress, on account of her own injury, and for $5,000 on account of the loss to decedent's estate through his death. In related suits brought by two other members of the family the court holds that the trial judge improperly ordered dismissals. Defendant, therefore, was required to defend against these suits, too.

The flour in question had been resacked in the store after the original sacks had been torn and some of the flour had spilled out into the large bin in which it was kept. The court holds that there was evidence enough to warrant the jury in finding that the poison was so placed that it was carried by rats or mice to the bin, where it became mixed with the flour before the resacking.

An analysis of flour identified as part of that purchased from defendant showed that it contained 35.3 per cent arsenic. No poison was found in flour contained in the lower or middle parts of the sack, indicating that it was the loose flour in the bin which had been poisoned before being scraped up and placed in the sack.

"The duty which a retail seller of food for immediate consumption owes to his customers," declared the court, "is succinctly and correctly stated in 'Ruling Case Law' as follows:

"'Persons who engage in the business of furnishing food for consumption by man are bound to exercise care and prudence respecting the fitness of the articles furnished, and they may be held liable in damages if, by reason of any negligence on their part, corrupt or unwholesome provisions are sold and persons are made ill thereby.'

"Actionable negligence in such cases is the failure to exercise such care as a man of ordinary prudence would exercise under the same circumstances to prevent injury and damage to his customers by the sale of articles which he knows are bought by them for immediate use as food. . . .

"Where the cause of action is predicated, not upon implied warranty, but upon the negligent sale by a retail dealer of unwholesome food products for immediate consumption, liability for the damages resultant from the sale of such food products is not confined alone to the im-

mediate purchaser thereof. The liability extends to any persons who might reasonably be expected to suffer injury therefrom.

"The liability in such cases does not grow out of the contract, and is not based upon implied warranty, but upon negligence; that is, a failure to exercise ordinary care to prevent injury to those whom the seller of the unwholesome article of food might reasonably anticipate would be injured."

However, as to the suit to recover for death of the customer himself, the court recognizes that liability might be imposed upon defendant solely on the theory of a breach of an implied warranty by the latter that the flour was wholesome and fit for food.

* *

When claim is made against a mill or dealer in feed on account of injury to live stock caused by the presence of a foreign substance, or on account of deterioration in quality, two appellate court decisions may become pertinent. The case of Lukens vs. Freiund, 27 Kansas Reports, 664, although decided as long ago as 1882, still seems to be the leading case in the mill's favor. The opinion in this case is entitled to special weight because written by a judge who became one of the greatest authorities on law that the United States has produced, Mr. Justice Brewer, afterwards sitting on the federal supreme bench.

Plaintiff farmer bought a sack of bran from defendants, a firm of millers at Atchison, Kansas, for 40c. In the bran were two copper clasps such as were used about the mill. These clasps were swallowed by one of plaintiff's cows, resulting in her death. Thereupon suit was brought to recover the value of the animal, and judgment was awarded in plaintiff's favor.

On an appeal, however, the judgment was reversed on the grounds that there was no proof of negligence on the part of defendant millers, and that the circumstances did not warrant a conclusion that there was any implied warranty against the existence of such foreign substances in the bran. The salient parts of the opinion on appeal are as follows:

"The amount in controversy in this case is small, yet the principle involved is important. . . . The unquestioned rule of the common law was, caveat emptor [let the buyer beware]. As is said by the author in 1 Smith's Leading Cases, p. 242: 'The policy of the common law seems to have been to limit the effect of a sale to the transfer of the right of property from the vendor to the purchaser, and to throw the hazards of the purchase upon the latter, unless he had expressly stipulated that they should be borne by the former. No warranty of quality or value was consequently implied from the sale, either of personal or real estate.'

"Upon this recognized policy of the common law, there have been repeated efforts to engraft exceptions, and now it may be conceded that a few have become successfully established. Among them may be mentioned these:

"Where an article is ordered from a manufacturer, to be by him manufactured for a special purpose, of which the manufacturer has knowledge, there is an implied warranty that the article when manufactured shall be reasonably fit for such purpose.

"Again, where goods are sold by sample, there is an implied warranty that the goods when delivered shall correspond in quality with the sample.

"And a third is, where food is sold by a dealer for domestic consumption, there is an implied warranty that it is sound and wholesome. Other exceptions may also exist, but it is unnecessary to mention them.

"In this case, we have nothing to do with the second exception, but the right to recover is claimed under both the first and the third. It is at least doubtful whether any recovery can be had within the principles of the first exception; for while the defendants were manufacturers, and the bran a product of their own manufacture, yet the contract of purchase was in no respects an executory one [one for future manufacture or delivery]; and in respect to the sale of the bran, they occupied the position of dealers, rather than of manufacturers.

"The disposition, as manifested in the authorities, is to limit the scope of the first exception to contracts which are in their nature executory, and where the agreement is for the manufacture and delivery of some special article, and not where the contract is simply for the purchase of a complete and existing chattel.

"In Broom's Legal Maxims, p. 614, the rule is thus stated: 'Where an agreement is for a specific chattel in its then state, there is no implied warranty of its fitness or merchantable quality; but if a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used.'

"In 1 Smith's Leading Cases, p. 250, the author says: 'The doctrine that a sale

made for a particular purpose implies a warranty that the thing sold shall be fit for that purpose has been advanced on a number of occasions in this country, although seldom made the ground of direct and positive decision. The sounder view seems to be that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory, and that in this case it is not in the nature of a warranty, but of an implied stipulation, forming part of the substance of the contract.' . . .

"The reasoning of these cases seems applicable to the case at bar. While the bran was the product of the defendants' manufacture, yet it was not manufactured on any contract with the plaintiff. They had on hand a supply of bran, an article already manufactured, and that article the plaintiff purchased. There is nothing in the dealings between the parties which would seem to raise any other implication than would arise if a like purchase had been made by plaintiff of the same article from a dealer; and unless an implied warranty would be raised by the purchase of bran under like circumstances from a grocer, it would then seem that none ought to be implied in the case at bar.

"There was no express representation by the plaintiff of the purpose for which he was purchasing the bran; it was not manufactured upon his order, and there were no representations or express warranties on the part of the defendants. They had on hand a manufactured article which they desired to sell. and the plaintiff, finding it there, purchased it. It would seem, therefore, that a recovery could not be sustained under the principles controlling the first exception.

"Passing now to the third, the scope of that exception is limited by the decisions. There is not in every sale of provisions an implied warranty that they are wholesome. Such implied warranty does not exist where one dealer purchases from another. It exists only where they are sold for immediate and domestic use, and even then is denied by some authorities. In such cases it seems to be decided, upon principles of public policy, that there is an implied warranty that the provisions sold are sound and wholesome.

"Now the application of this exception to the case at bar is denied. It is said that the principle upon which the exception rests does not apply where the articles sold are not intended for consumption by man, but only for use as food for cattle. No authorities have been found by counsel on either side of this question. We are left, therefore, to determine it upon general principles.

"Upon what ground is an implied warranty rested in the case of the sale of provisions, which does not exist in the case of a sale of other articles? Obviously it is not upon any proper grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge.

"One may not place poison where it is likely to be taken by one ignorant of its qualities. Regard for human life compels this. No more may he sell food unfit to be eaten to a man who, he knows, is buying it to eat. The same reason controls, to wit, regard for life and health. But this, it will be remembered, is an exception to the general rule of the common law, and the exception should not be extended beyond the reach of the reasons upon which it is based.

"If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered. Now the claim of the plaintiff is simply of a property loss, that his estate has been diminished, and that alone is his cause of action. His injury is similar to that which he would have sustained if he had purchased from a wagon maker a defective wheel, and thereby his wagon had broken down. No matter of life or health of himself or family is involved. We think, therefore, that no recovery can be had under the principles of this third exception.

"Still further, it may be remarked that bran comes very nearly within the description given by some of the witnesses of it as the mere refuse or offal of the mill. It is true, the jury call it in their verdict a secondary product, resulting from the manufacture of flour. It certainly is not the principal product of the grinding of wheat—not that for which the mill is worked. It is that which is left after the flour has been manufactured.

"It is no uncommon thing in manufacturing establishments, after the principal product is manufactured, that there remains a refuse which is of some value, and which is disposed of by the manufacturer as refuse and for whatever it will bring. Now it would seem to enlarge

very broadly the doctrine of implied warranty to extend it to this refuse. It is not that for the manufacture of which the manufacturer engages in business; it is not that to which he devotes his special attention and care; it is always of inferior value. This all parties understand. They deal upon that basis; and to hold that the manufacturer warrants the quality of this refuse, would seem to cast an unnecessary burden upon its disposal.

"Still again, it will be borne in mind that, as the jury find the defendants guilty of no negligence, and also that these clasps were foreign substances, easily recognizable, which had not been manufactured into or become a part of the bran, but which had accidentally dropped into it, it would seem that the purchaser had the same facilities for examining the bran and detecting the presence of any foreign article that the defendants had. It would be as easy to search through the contents of a sack of bran as to search through the contents of a bin for any extraneous substances.

"If there had been any minute particles of foreign substances like lead or copper, too small to be noticed upon ordinary examination, which in the process of manufacture had been incorporated into and become a part of the bran, or if the defendants had been guilty of any negligence in the manufacture or handling of this bran, there would be greater justice in holding them responsible.

"Taking the whole case together, it seems to us that it must be held to be a case of pure accident, a case without negligence on the part of either party, a case in which the doctrine of implied warranty does not exist, and therefore a case in which no recovery can be had."

It is doubtful, however, that this Kansas decision can be safely relied upon to exonerate a seller of bran from liability for injury to or death of the buyer's stock because of unwholesomeness consisting in decay of the ingredients, assuming that the buyer himself has not been guilty of contributory negligence in feeding the bran after he discovered or should have discovered that it was unwholesome.

The Texas court of civil appeals, in the case of Houk vs. Berg, 105 S.W. 1176, held that a sale of bran by a dealer to a consumer implied a warranty of wholesomeness, although it was decided that there was no such implied warranty to defendant on the part of the dealer from whom he in turn bought.

Plaintiff sued for damages resulting from death and sickness of live stock caused by decayed bran sold by one of the defendants, L. W. Houk, to plaintiff. Houk brought in as a co-defendant the Josey-Miller Co., from which he had bought the bran, asking that, if judgment were awarded against him, he be given judgment over against that company. The court of civil appeals decided that plaintiff had a valid claim against defendant Houk, but that Houk was not entitled to reimbursement from the Josey-Miller Co.

The court of civil appeals said in its opinion: "We think, under such circumstances, proof of an implied warranty was sufficient to make out a case. Appellant was a dealer in grain, and bought the grain he sold to Berg from another dealer, the Josey-Miller Co., and the rule, as between dealers, is not the same as between dealer and consumer.

"It is the rule that, where a dealer or ordinary trader sells goods for immediate consumption by the buyer, an implied warranty arises that the goods are wholesome and fit for food; but where one dealer sells to another, not for his consumption, but merely as an article of merchandise, no implied warranty that the commodity is good food arises.

"In a case in Massachusetts a cow had been poisoned by hay, and the rule of implied warranty as between dealer and consumer is clearly expressed. The court said: 'And it is perfectly well settled that there is an implied warranty, in regard to manufactured articles purchased for a particular use, which is made known to the vendor, that they are reasonably fit for the use for which they are purchased.'

"That case fully covers this case as between appellant and Berg. Appellant knew that Berg wanted to use the bran as food for his horses, and knew that he did not want a mixed food, but pure wheat bran. He sent the mixed food, and is liable for the consequences.

"In another Massachusetts case a farmer sold a cow to a butcher, who killed it and prepared it for market, and the court said: 'But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim, caveat emptor, applies, and there is no implied warranty or representation of quality or fitness.' It is not pretended that there was any representation as to quality of the bran made by the Josey-Miller Co. to appellant, and they were both dealers in grain."

* *

Plaintiff sued for $149.86 as the price of wheat sold for chicken feed, and

emerged from court with an adverse judgment for $250, plus costs, in the case of Thatcher Milling & Elevator Co. vs. Campbell, 231 Pac. 621. The Utah supreme court affirmed the judgment on the ground that there was a breach of an implied warranty that the wheat was fit for feeding poultry. The money was allowed the buyer to console him for the loss of 105 hens, which died from eating the moldy wheat, and in the partial disability of 225 chickens which had to be sold to the butcher at half price.

* *

In the case of Batesville Hog Co. vs. John Wade & Sons, 104 So. 145, decided by the Mississippi supreme court, plaintiff sued for damages for loss of hogs, and shrinkage of others, attributed by plaintiff to inferior corn and chicken feed. Holding in favor of defendant, the court found that the evidence was insufficient to show that the damage to the hogs resulted from the feed. The court added:

"We find, further, that the proof . . . does not clearly establish that the corn and chicken feed was of such a bad and defective quality as would be poisonous or injurious when fed to animals; and, moreover, it appears there was no express warranty of soundness of the feed, and in the absence of an express warranty, and as implied warranty does not apply to feedstuff for animals, there could be no liability for injuries resulting from the condition of the feed."

In the absence of agreement to the contrary, a contract to sell a quantity of grain carries with it an implied understanding that the grain delivered will be good and merchantable, according to an opinion of the Mississippi supreme court, announced in the case of D. Rosenbaum's Sons vs. Davis & Andrews Co., 71 So. 388.

The same opinion is authority for the further point that the buyer's acceptance of unsound and unmerchantable grain under such a contract does not preclude him from claiming the amount of damages accruing to him through the seller's failure to furnish proper quality.

In this case the shipment was made to the seller's own order, with draft on the buyers attached to the bill of lading, and it was asserted that the buyers precluded themselves from making any claim on account of the quality of the shipment because they took possession of the car before paying the draft. But the court disposes of this claim as follows:

"In the first place, the premature unloading of the car was made possible through the indulgence and grace of the railroad company, which had a right to expect and receive from the buyers, not only the freight on the shipment, but the bill of lading then in the hands of the bank. In the next place, the proof shows that the damage was not fully detected until after the grain had been unloaded and placed in the buyers' store."

See, also, first case cited in section 148.

SECTION 144. PARTICULAR MARKETS

When mill products are sold, an implied warranty that they are merchantable does not refer to any particular market, the South Carolina supreme court held in the case of Simmons et al. vs. Roanoke City Mills, 107 S.E. 903.

Plaintiffs sued to recover damages on a theory of breach of warranty of the quality of meal bought from defendant mill. It was alleged that by receiving and charging a full price for the meal the mill warranted that the meal, which was unbolted, was wholesome and suitable for human consumption in Columbia, S. C., and vicinity.

Defendant counterclaimed for damages for plaintiffs' refusal to receive all the meal called for by the contract, in addition to defending against plaintiffs' claim. A jury returned a verdict in the mill's favor, and judgment entered on this verdict has been affirmed by the supreme court.

The appeal taken to the supreme court involved the question whether the trial judge erred in instructing the jurors as follows:

That plaintiffs could not rely on both an express warranty and an implied warranty; that a seller's acceptance of a sound price for goods implies, in the absence of express warranty or disclaimer of warranty in the making of the sale, that the goods will be sound; but that, in a case like this, mill products need not be adapted to "the eccentricities or peculiarities of any one community, but fit for the ordinary purposes for which that commodity is usually intended."

Counsel for plaintiffs contended that "where merchants order a certain commodity to be sold them in a certain community, and explain what kind of commodity they want, and pay a full price for the same, upon the acceptance of the price the seller warrants the goods to be as ordered and salable by the merchants in his community," and that the mill in this case, by selling meal to plaintiffs for resale in Columbia, impliedly warranted that it would "satisfy the eccentricities and peculiarities of plaintiffs' community."

The supreme court, in a concise opinion, rules that plaintiffs' objections "cannot be sustained, for the reason that an action cannot be maintained both upon an express and an implied warranty, . . . and for the further reason that, even if the action is upon an implied warranty, the only warranty upon the part of the defendant was that the meal was of value for the purposes for which it was ordinarily used, without reference to a particular market."

SECTION 145. CONFORMITY TO FEED LAWS

A contract to sell mixed feed implies that the commodity will comply with the registration requirements of the state where the sale is made, according to the decision of the Georgia court of appeals in the case of Inman Grocery Co. vs. Williams, 119 S. E. 341.

But any implication that a seller of feed warrants it as conforming to the standard fixed by a commercial feedingstuffs law in force in the state where he knows the buyer intends to resell it is overcome by proof that the buyer was advised that the goods to be delivered would contain an element forbidden by that law. So held the Florida supreme court in the case of Consolidated Grocery Co. vs. Steinhardt, 86 So. 431.

Plaintiff sued to recover damages for claimed breach of an implied warranty of a quantity of rice bran sold by defendant to plaintiff and lost through seizure by the Florida authorities as containing rice hulls, in violation of the Florida commercial feedingstuffs law. The controversy came before the supreme court on a question as to whether the pleas filed by defendant stated a legal defense. The views of the court on this point are as follows:

"The pleas could bear no other construction than that the plaintiff bought the feedstuff with full knowledge that it contained rice hulls. If the plaintiff had such knowledge, and bought the feedstuff under such a contract, then there was no implied warranty that the material was salable in Florida as a commercial feedingstuff, because the plaintiff was charged with notice of the provisions of chapter 5661, Laws of 1907, forbidding the sale in Florida of feedstuff containing rice hulls.

"It needs no argument or citation of authority to establish the proposition that a dealer in commercial feedstuff cannot in his eagerness for profit deliberately violate the law of his state by undertaking to sell a forbidden article and, when caught in the dishonorable business, pass the loss on to his vendor under pretense of an implied warranty that the article was salable, when he had notice that it was not. He cannot plead ignorance of the law, and the pleas averred that he was not ignorant of the fact. . . .

"The declaration alleges that the defendant sold to the plaintiff 'rice bran,' which it is alleged is a commercial feedingstuff. This would seem to be an express warranty that the feedingstuff contained no rice hulls. In other words, the sale of the article by the name or description of 'rice bran' constituted a warranty that the article was of the designated variety. . . . But the pleas averred that, while it was sold as rice bran, it in fact was sold under a specification or description showing the presence of rice hulls. If that is true, there was no express warranty in the use of the name 'rice bran.' "

SECTION 146. SEED WHEAT

Dealers who sell wheat for seeding purposes will be specially interested in the decision handed down by the Minnesota supreme court in the case of Johnson vs. Foley Milling & Elevator Co., 179 N.W. 488. The court affirmed judgment against defendant for damages on the ground that there was a misrepresentation by defendant's representative as to the variety of wheat sold plaintiff for seeding purposes.

The gist of the court's opinion is that, upon a sale of seed wheat by a particular name, a warranty that the seed is of the kind named arises; and that a purchaser of seeds under a warranty of kind is entitled to recover, for the breach of such warranty, the difference between the value of the crop raised from the seed furnished and that of a crop such as would ordinarily have been raised from the seed had it been of the kind warranted.

The contract of sale was made orally and the court finds that, as claimed by the plaintiff, the wheat in question was sold as "genuine marquis wheat." It was further found that the wheat delivered was not of the specified variety, being a bearded wheat of inferior quality. Affirming judgment in plaintiff's favor, the supreme court says:

"The doctrine that a bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description is sustained by a great weight of authority. And where a dealer sells an article, describing it by name the identity of which

is not known to the purchaser, he must understand that the latter relies on the description as a representation by the seller that it is the thing described. So, on a sale of seed by name, a warranty that the seed was of the kind named arises.

"We think the jury was justified, under the evidence and instructions, in finding that the defendant warranted the wheat sold to the plaintiff to be marquis wheat and that the seed delivered was not of the kind named. . . .

"The measure of damages was the difference between the value of the crop raised from the seed furnished and that of a crop such as would ordinarily have been raised from the seed had it been of the variety contracted for."

This decision inspires the suggestion that when mills and grain dealers are unwilling to guarantee the results of a crop to be grown from seed sold by them, there should be used an express disclaimer of warranty. Such disclaimers are now very generally in use by seedsmen.

But a Kentucky firm of millers who sold a quantity of Missouri wheat, which they had bought through a commission firm, did not impliedly warrant the fitness of the wheat for seeding purposes, although they knew that it was bought for sowing, where they told their customer that they knew nothing concerning the wheat beyond information derived from the commission firm.

In reaching this conclusion, the Kentucky court of appeals held that, under the circumstances, both parties to the sale had equal opportunity for knowing the character of the wheat, and that the purchaser must be deemed to have acted upon his own judgment after being informed that the selling millers had no personal knowledge concerning the adaptability of the wheat to seeding purposes. (Yandell vs. Anderson & Spilman, 174 S.W. 481.)

SECTION 147. SALES BY SAMPLE

Mere exhibition of a sample to a buyer does not constitute a sale by sample. The following statement of legal principles applies where there is no controlling contract for delivery of goods specifically described and thereby brought within the rules already discussed:

"The mere exhibition of a sample by the seller does not amount to such a designation of quality as to constitute a sale by sample, especially when the quality of the article to be furnished is expressly described in the contract without reference to the sample, or the parties agree that the goods ordered shall differ from the sample in some important particular.

"To constitute a sale by sample it must appear that the parties contracted solely with reference to the sample, with the understanding that the bulk was like it, and whenever the designation of the quality is by reference to a sample the sale is by sample.

"As a circumstance tending to show a sale by sample, the fact that an examination of the goods in bulk was inconvenient or impossible may be considered. But a sale is not a sale by sample when there is full opportunity afforded to examine the goods in bulk, and it is expressly stated that the sale must be on examination. The sale is not the less one by sample because the purchaser personally took the samples from the bales, or tested the correctness of the sample by taking a second sample.

"On a sale by sample the obligation rests on the seller to deliver goods corresponding to the sample, and if they do not correspond there is a breach of the contract on the part of the seller entitling the buyer to reject the goods and relieving him from liability for the price if he returns them, or entitling him to sue for and recover the difference if he retains them.

"If only part of the goods are defective and the contract is divisible, or the buyer reserves the right to return all or a part of the goods, he may return those not corresponding to the sample, and retain the remainder. For the purpose of determining whether the goods do conform to the sample, the buyer has the right to an inspection and examination of the goods in bulk. The inspection should be made within a reasonable time, and at the place of delivery." 35 Cyc. 223, 224.

* *

On questions relating to the conformity of goods to a sample under which they have been sold, the United States circuit court of appeals said in Cardiff vs. Lewiston Milling Co., 266 Fed. 753:

"Generally, where goods are sold to be delivered, the rule supported by the weight of authority is that 'If the goods, upon arrival at the place of delivery, are found to be unmerchantable in whole or in part, the vendee has the option either to reject them, or to receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover damages for a breach of the warranty, or set up a counterclaim for such dam-

ages in an action brought by the vendor for the purchase price of the goods.' . . .

"It is said by the court, in Grisinger vs. Hubbard, . . . that the 'acceptance of the goods does not waive the warranty, and the warranty survives the acceptance.' This was not a sale by sample. It is, however, a rule of equal significance that, if the goods conform to the contract between the parties, the vendor has his right of action for goods sold and delivered, without any formal acceptance by the buyer. . . .

"Sale of goods to be manufactured is governed by the same rule; but, in order that title may pass, the goods must conform as to quantity and quality with the specifications of the order or contract. In case they do not so conform, an acceptance by the purchaser would be necessary to complete the sale. . . . The authorities speak of a sale by sample as usually accompanied by an implied warranty—more properly, a condition precedent—that the bulk delivered shall conform to the sample by which the sale is made, in kind, character, and quality. . . .

"It must be conceded, however, that where the sale is by sample, and where there has been an acceptance after inspection of the commodity, or there has been reasonable opportunity for inspection, either before or after delivery, to determine whether the commodity conformed to the sample, the sale is concluded, and the vendee is bound by his contract of purchase; and while it may be said that an implied warranty of kind and quality accompanies the purchase, there must be a time when the controversy comes to an end, and it is unreasonable and unusual for the purchaser to insist that, at any time after acceptance, however remote, he has a right to resort to the warranty for recoupment of damages. The principle should not be lost sight of that, where the commodity conforms to the sample, there is a complete performance of the contract of sale."

* *

An interesting question concerns the legal effect of exhibiting samples to buyers, where there is an accompanying description of the goods at variance with the sample. For example, let us suppose an instance where there is a sale of flour by sample, but a representation by the seller that the flour is "patent," which proves to be untrue. Is the buyer bound to accept delivery of flour conforming to the sample, but not to the description?

This question is answered by the following quoted provisions of the uniform sales act now in force in several states:

"Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description."

"In the case of a contract to sell or a sale by sample: (a) There is an implied warranty that the bulk shall correspond with the sample in quality. (b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided. . . . (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."

These statutory provisions appear to constitute a mere codification of legal principles well established by appellate court decisions. It was so decided by the New Jersey supreme court in the case of Lissberger vs. Kellogg, in an opinion quoting from "Benjamin on Sales" the following statements applicable in England as well as the United States:

"The implied condition that goods bought under specified commercial description should conform therewith is not excluded by the fact that the sale is by sample, or even after an inspection of the bulk. A sample is looked on in such case as a mere expression of the quality of the article, and not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet if the bulk does not reasonably answer to the description the seller is liable."

This rule was followed by the St. Louis court of appeals in the case of Ungerer & Co. vs. Cheese & Fish Co., 134 S.W. 56, in which controversy arose on defendant's refusal to accept delivery of goods described as "powdered gum tragacanth." It seems to have been proved that defendant rejected delivery because the goods tendered did not conform to the description; but plaintiff, the seller, insisted "that the sale was by sample, and that if the goods furnished or tendered corresponded with the sample it was sufficient." Overruling this contention, the court of appeals said:

"We do not understand that a sale by sample relieves a seller from the obliga-

tion assumed by him in selling by description. If the sample is an imitation not discoverable by mere inspection, it does not follow that the bulk which follows may also be an imitation of what the contract calls for."

One court decision in point involved an instance in which a buyer attempted to hold a seller on contracts under which the goods described were inferior to the standard of a sample submitted. In this case—Davis vs. Reisinger, 105 N.Y. Supp. 603—plaintiff sued to recover damages for failure to deliver 1,000 bags of "Bassein rice like sample."

The sample was not Bassein rice but Java rice, which was of superior grade, although neither party to the contract knew of the mistake, both being unfamiliar with the two kinds of rice when the contracts in question were made. The mistake was made by some one in preparing the sample. The sales were made in two lots of 250 bags each and one lot of 500 bags.

Disposing of the case, the appellate division of the New York supreme court said: "As to the first lot, and possibly as to the second lot, plaintiff [the buyer] and defendant [the seller] dealt on equal footing, neither knowing the sample was not Bassein rice, and defendant must be held to his bargain to deliver the rice which the sample called for.

"When the last purchase of 500 bags was made, however, it is manifest from the evidence that the plaintiff had learned of the defendant's mistake, and knew or had reason to believe that the sample was Java rice and not Bassein rice, which the defendant mistakenly supposed it to be. When this last contract was made, therefore, the plaintiff knew that defendant had made a mistake respecting the sample, and was offering a high grade and high-priced rice for sale at the price of a low or medium grade rice which he supposed, from the description of 'Bassein,' he was selling.

"The plaintiff cannot recover any damages under a contract entered into under such circumstances for, having knowledge of the mistake under which defendant was laboring, it would be a fraud on his part to take advantage of it. . . . From the facts appearing, the extent of plaintiff's recovery should be his damages on his first and second purchases, and nothing for his last purchase of 500 bags."

* *

An opinion was requested on the merits of a controversy existing between an Indiana mill and an eastern customer upon a claim of the latter that a carload of flour received from the mill was below the quality called for by the contract under which it was purchased.

It seems that the mill authorized one of its eastern brokers to sell two of its brands, one "a very high grade patent," and the other, Old Times, second grade flour. Negotiations conducted by the mill through the broker resulted in booking of an order for "one car, 200 barrels of our Old Times flour, packed in wood, freight paid at $10.85."

The sale was made on a sample submitted by the broker's salesman to the customer, and there was nothing in the written negotiations to show any special representation of quality; the confirmations of the contract merely calling for Old Times flour. The customer asserted and the salesman denied that there was a verbal representation by the latter that the flour was "first patent."

The customer paid an arrival draft, with bill of lading attached, covering the purchase price, but about the same time, apparently, telegraphed the mill: "Car flour here not patent flour. Very dark. What are you going to do about it?" The mill replied that the shipment was not sold as best patent, but that it was "good ordinary patent flour."

I was of the opinion that if the flour delivered was up to the standard of the Old Times brand and conformed to the sample submitted to the customer as basis of the sale, the mill fulfilled its contract, and the customer had no valid claim.

There is no more firmly settled rule of law than that where goods are sold with reference to a sample as a standard of quality, the seller fulfills his contract by delivering goods conforming to the sample. The same common sense reasoning applies to sales by reference to brands.

It is assumed that the sample submitted in this case was of Old Times flour. If so, the mill's position is doubly strengthened, because the buyer was charged with notice of the quality of the flour to be delivered, both by designation of its brand and by the character of the sample. If, however, the sample was superior in quality to the standard of Old Times flour, then the buyer would be entitled to receive the higher quality, especially if he did not know just what grade Old Times stood for.

See, also, Field Case, cited in section 140, and Lukens Case, cited in section 143.

WAIVER AND ENFORCEMENT OF RIGHTS

SECTION 148. WAIVER BY BUYER

The case of Courtesy Flour Co. vs. Westbrook, 225 S. W. 3, before the Arkansas supreme court, involved an unsuccessful attempt on the part of plaintiff, a flour and feed dealer at Vicksburg, Miss., to recover damages on account of inferiority of a shipment of meal found to be hot, caked and musty on arrival.

Defendant, a grain dealer and miller at Pine Bluff, Ark., sold plaintiff two carloads of meal, f.o.b., Pine Bluff, and shipped them to defendant's own order, with privilege of inspection. The drafts were paid, but plaintiff found on unloading that the first car was partly unsalable because of heated, caked and musty condition. On complaint being made through the broker who negotiated the sale, defendant seller telegraphed plaintiff instructions: "Unload car, advise extent, nature, damage, give plenty of air."

This occurred March 20, 1918. Plaintiff then completed unloading, and afterwards unloaded the second car, although it was found to be in the same condition. Plaintiff followed defendant's instructions to the extent of separating the salable part of the meal, and then proceeded to sell it to local merchants at Vicksburg. But no report was made by plaintiff to defendant until May 4, 1918, when a damage claim for $1,823.93 was presented.

Trial of the suit resulted in a judgment for defendant, and this was affirmed by the supreme court on appeal, the latter tribunal saying, in part:

"There was no express warranty of the quality of the meal sold, but there was an implied warranty that the commodity sold was of the kind and quality specified, and was wholesome and reasonably fit for use. Under the terms of the shipment, appellant had the opportunity to inspect the meal before he accepted it, and he did in fact inspect it immediately after the payment of the draft, and he then discovered that it was not in accordance with the specifications and was unfit for use.

"The law on the subject is that, where chattels are purchased under express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the articles sold, but is not bound to do so, and, on the contrary, may retain the articles purchased and sue on the warranty or recoup the damages when sued for the price.

"In case, however, the contract is to deliver goods of a particular description or quality without express warranty, and the purchaser accepts them after inspection and discovery of the inferior quality, or after having had a fair opportunity to make such inspection, he waives the right to claim damages for defects or inferiority of the goods sold. . . .

"In the present case the purchaser, before making any use of the commodity purchased, notified the seller of the inferiority of the commodity, which was tantamount to a refusal to accept, and if that position had been maintained throughout the subsequent dealings with regard to the commodity purchased there would not have been any waiver of the right either to rescind the sale or to sue for the damage.

"Such, however, was not the effect of appellant's [plaintiff's] conduct in his subsequent dealings. He was instructed by appellee to 'unload car, advise extent, nature, damage, give plenty of air.' This meant that appellant was authorized to unload the car and separate the meal so as to give it plenty of air, and then to advise appellee of the extent and nature of the damage. This was the extent of the authority conferred, and appellant had no right to do anything more, and the implication which necessarily arises is that the instructions were to be obeyed within a reasonable time.

"Instead of obeying those instructions, appellant sold the meal and waited about five weeks before he made any report to appellee as to the extent and nature of the damaged condition of the meal. This can only be construed as a waiver of the right to complain of the inferior condition of the meal. The case of Rosenfield vs. Swenson, supra, is directly in point. There was a delay of six weeks before complaint was made of the inferiority of the commodity sold, and the court in disposing of the case announced the applicable rule as follows:

" 'Where goods are sold and delivered upon condition as to kind and quality, it is the duty of the vendee to promptly examine them, and, if the conditions are not complied with, to notify the vendor within a reasonable time of his refusal to accept. If he unreasonably delays such notification, he must be held to have accepted, in fact.' The court held that the delay of six weeks was unreasonable. . . .

"We are of the opinion that appellant's conduct in proceeding to sell the meal without authority from appellee, and his delay in making a report to appellee of the condition in which he found the meal

after unloading it, constituted a waiver of the defective condition, and an acceptance of it in fulfillment of the contract, which precluded him from claiming damages."

* *

A decision handed down by the Kentucky court of appeals in the case of Lykens vs. Bowling & Lawson, 221 S.W. 519, defeated a counterclaim for damages claimed to have resulted from the delivery of inferior flour by plaintiff to defendants.

Plaintiff sold defendants 100 bbls flour for $1,300, of which price they paid $1,050. In a suit to recover the balance, defendants set up a counterclaim for $1,000, alleging that the contract called for a good grade of flour known as Dewey's Best; that the flour delivered was a bad grade, called Trinco; that it was rotten and full of worms; "that they refused to use the flour until they had communicated with the plaintiff, and he told them to go ahead and do the best they could with it, and they did sell some of it under his directions; that, because of the fact that it was of such an inferior grade and so full of worms, they were compelled to and did sell this flour at a loss and a damage to their trade; and that by the failure of plaintiff to comply with his said contract and ship them the flour they bought, and in order to supply their trade, they were compelled to sell this shoddy flour at a small price, and were by such failure damaged in the sum of $1,000."

Plaintiff challenges the sufficiency of this answer as being insufficient to state a legal defense or counterclaim. The trial judge overruled plaintiff's position in this regard, and a trial resulted in a verdict and judgment in defendants' favor. But the decision has been reversed by the court of appeals on plaintiff's appeal.

"As the amount in controversy, so far as appellant [the seller] is concerned, is only $250, we could not [under the Kentucky statutes] entertain the motion for an appeal in this case, or grant it," says the court of appeals, "except for the flagrant violation of the rights of the plaintiff by the trial court in overruling his demurrer . . . to the answer, averring that the flour delivered was not of the quality and brand purchased by the appellees.

"This paragraph of the answer . . . did not present a defense to plaintiff's position, nor was it sufficient to sustain the counterclaim. . . . While it alleges that the flour was of an inferior grade, rotten, and full of worms, it admits that the defendants received the flour and sold it out after discovering its bad quality. This they were not entitled to do.

"The rule is that, where there is a contract to deliver goods of a particular description or quality at a future date, and the vendor tenders goods not of the agreed description or quality in discharge of the contract, and the merchant, after inspecting them or having had a fair opportunity to do so, receives them in discharge of the contract, he cannot thereafter maintain an action against the vendor to recover damages for the defects in the descriptions or quality. . . .

"If the goods which are tendered in discharge of a contract do not come up to the terms of it as to description or quality, the merchant has the right to reject them and hold vendor responsible in damages. If, after having inspected them, or after having had a fair opportunity to do so, the merchant receives them in discharge of the contract, although they do not, as to description or quality, comply with its terms, he thereby waives all defects, and he cannot recover damages on account of the inferior quality.

"The answer in this case alleges the goods were not of the quality purchased, but if Bowling & Lawson received the goods in discharge of the contract, even though not of the quality purchased, they have no ground of complaint and cannot maintain a counterclaim in a suit to collect the purchase price. Neither does the allegation, 'He [Lykens] told them to go ahead and do the best they could with it, and they did sell some of it [flour] under his directions,' show that appellant, Lykens, had agreed to adjust or compromise the difference with appellees, or to make a deduction in the price of the flour."

* *

An instructive court decision on defense of claims arising under an assertion by a buyer of flour that deliveries were off quality is to be found in the case of Conly vs. Lavinsky, 17 Pa. Dist. Rep. 119.

Plaintiff sued for a balance due for flour delivered. Defendant, a baker, pleaded in an affidavit of defense that some of the flour shipped was damp and spoiled; that defendant was not able to determine whether the flour was of good or bad quality until it had been worked up into bakery products; that in so using it loss of yeast, other materials and labor was entailed. He, therefore, counterclaimed damages. Holding that no valid

defense was pleaded, the court of common pleas for Philadelphia said:

"The affidavit does not aver that the defendant refused to accept the flour, but, on the contrary, states that he did accept and use it. . . . It does not aver with sufficient clearness and definiteness that the defective quality of the flour could not have been detected upon inspection. The affidavit, it is true, does aver that the defendant was unable to determine whether the flour was of good or bad quality until same had been mixed with yeast, kneaded into dough and set in defendant's oven to bake. But we think this averment is inconsistent with the prior averment that the flour was damp, spoiled and utterly unfit for use and of no value whatever. The rest of the affidavit is, in our opinion, vague and evasive. It says that 'after the flour was made into bread, the defendant found the same was utterly unfit for use as food.' But the defendant does not aver distinctly that the failure of the baking of the bread was due to the defective character of the flour."

* *

In a case passed on by the United States circuit court of appeals, fourth circuit (223 Fed. 969), in which, on a declining market, a buyer refused to permit completion of deliveries of flour, it was declared that the defendant, "after thus ordering the flour under its contract, and continuously for some months receiving the same thereunder, ought not in good faith and fair dealing, having partly performed the contract, to be permitted to rescind the same at its option, because of the alleged defect in the quality of some of the flour furnished. Its remedy, if any, under such circumstances, would be by way of offset or recoupment from the purchase money, or a suit for damages for breach of the contract."

* *

A buyer of goods, having inspected them before agreeing to buy, is deprived of any right to deny liability for the purchase price on the ground of inferiority in quality. (195 Ill. App. 233.) See, also, Smith Brothers Grain Co. vs. Adluh Milling Co., 122 S. E. 868.

* *

A buyer of goods cannot recover damages on account of defective condition of the shipment on its arrival at the destination and place for delivery, where he has accepted delivery with knowledge of that condition, held the Minnesota supreme court in the case of Lowry Coffee Co. vs. Andresen-Ryan Coffee Co., 190 N. W. 985. In the course of the opinion, the court referred to the provision of the uniform sales act that "If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

Where a mill accepts delivery of corn or grain, knowing that it is inferior to the quality bargained for, can there be recovery against the seller of damages based on resulting poor quality of products manufactured from the corn or grain?

The law governing this question was laid down by the Minnesota supreme court in Wavra vs. Karr, 172 N.W. 118, and the decision shows that such damages are not recoverable.

In the course of its opinion, the court cites a decision of the Georgia supreme court, handed down in the case of Henderson vs. North Georgia Milling Co., 55 S.E. 50. In that case it appeared that the plaintiff sold a quantity of corn to defendant for milling purposes under a representation that the corn was of particular grade and quality. The corn delivered under the contract did not comply with the contract, being "wet, soggy, and unfit for milling."

But with knowledge of that fact, defendant ground the corn into meal which subsequently spoiled. In plaintiff's suit to recover the purchase price, the mill interposed a counterclaim for damages. The Georgia supreme court held that, since defendant mill accepted the corn with full knowledge of its condition, it was not at liberty to grind it into meal, under a misdirected endeavor to lessen the damage and loss, "and then hold plaintiff liable for the disastrous results of the misadventure."

In the Minnesota case, which specifically involved the rights of a farmer who unsuccessfully sought to recover damages for loss in crops due to inferior seed, although he knew the seed was inferior when he sowed it, the court said:

"It is well-settled law, in this state and elsewhere, that a party who is subjected or exposed to injury from a breach of contract is under legal duty and obligation to minimize and lessen his loss, and he can recover only such damages as he could not with reasonable diligence and good faith have prevented."

Under the reasoning of the courts, which is manifestly sound, if a seller of grain tenders a quantity which is obviously inferior to that bargained for, the buying mill's recourse is to either reject the delivery, buy substitute grain of the

contract quality elsewhere, and hold the defaulting seller liable for the cost above the price at which he agreed to sell, or to accept the proffered delivery and claim damages measured by the difference between the values of the grain bargained for and that delivered.

If, as decided by the Minnesota court, a farmer who knowingly sows inferior seed cannot recover damages based on inferiority of the crop grown therefrom, it must follow that, as decided by the Georgia court, a miller who knowingly uses inferior raw products cannot recover from the seller damages based on the inferiority of the flour or other mill product manufactured from such raw products.

* *

In the case of Nelligan & Son vs. Knutsen, 175 Pac. 18, decided by the California district court of appeals, and involving a sale of corn, it was said:

"Plaintiffs accepted all the corn offered them by defendant except 100 sacks . . . rejected because of being moldy. If, as stated by the witness Thompson, there was no No. 1 corn, but that corn was 'rated as No. 1 1916 corn,' and if corn so rated had been accepted by plaintiffs, it must be assumed that they would continue to accept a similar grade of corn from defendant until his contract was fulfilled. And if plaintiffs accepted corn that was inferior in quality to that called for by the terms of the contract, such acceptance constituted a waiver of the defect in the quality."

But that plaintiffs had taken up draft and bill of lading was held by the court to show nothing against their right to reject delivery on discovering any inferior character of oats tendered, in the case of Cavanaugh vs. D. W. Ranlet Co., 118 N.E. 650, passed on by the Massachusetts supreme judicial court.

* *

Inferior quality of a carload of corn shipped by defendant to plaintiff and rejected by the latter gave rise to the case of Norman Milling & Grain Co. vs. Bower-Venus Grain Co., 207 Pac. 297, in which the Oklahoma supreme court affirmed judgment in plaintiff's favor for return of the purchase price, because of defendant's failure to deliver corn of proper quality.

The contract called for destination weights and grades. Nevertheless, defendant insisted that, because plaintiff took up a draft and the bill of lading before arrival of the shipment, plaintiff thereby became owner of the corn and could not recover the purchase price. The supreme court ruled against this contention.

See, also, similar case cited in section 143.

* *

In the case of Marshall Milling Co. vs. Hintz-Cameron Co., 194 N. W. 772, decided by the Minnesota supreme court, the flour sales contract there involved contained a clause providing that retaining any part of a shipment for more than 30 days after receiving it "without reporting defect, breach or default" to the seller before the expiration of such 30 days should constitute an acceptance of such shipment; and that acceptance of goods should estop the owner from claiming a breach of warranty, defect in quality, or other breach or default as to such goods.

All of the flour delivered was shipped between May 25 and Sept. 3, and all of it except 60 bbls was shipped by July 24. Defendant retained all the flour delivered, and paid for it. No complaint was made until Dec. 6, when defendant stated, in a letter requesting a correction in accounting, that customers complained that the flour was too soft to use for bread and was good only for pies, as it contained too much winter wheat flour, and that defendant had a large quantity on hand. Commenting upon this letter, the supreme court remarked:

"Whether defendant intended this as a claim that the flour was not of the quality contracted for is not clear, for it made no statement to that effect. However this may be, it was then too late to make such a claim. The contract gave defendant 30 days after receiving a shipment in which to discover and report defects in quality, and provided that defendant should be estopped from claiming any such defect unless reported within that time. It was competent for the parties to make such an agreement, and they are bound by it.

"Defendant received 900 bbls of the flour some five months before writing that letter, and the remaining 60 bbls about three months before writing it; and accepted and paid for the flour, and during all that period proceeded to dispose of it without making any claim that it was not of the quality contracted for. The contract gave defendant a reasonable time in which to discover and report defects; and having failed to report any within the prescribed time, defendant cannot hold plaintiff liable for those now alleged. . . .

"The evidence shows that between the time when the contracts were made and the time when they were terminated on account of defendant's refusal to accept further deliveries, the price of wheat declined an average of more than $1 per bu, and perhaps this unusual drop in price may have inclined the parties to look at the contracts from antagonistic standpoints."

SECTION 149. PROVING CONDITION OF GOODS

Where goods are stored in sacks, evidence as to the deleterious condition of the contents of one of the sacks is corroborative of evidence as to a similar condition in every one of the sacks stored in the same place and under the same conditions and surroundings at a time several weeks prior thereto; the probative value of such evidence being for the jury (Georgia Court of Appeals, E. T. Comer Co. vs. Joyner, 124 S. E. 356).

* *

Solving a conflict in evidence concerning the quality of flour delivered under a contract of sale was the task presented to the Michigan supreme court in the case of Bay State Milling Co. vs. Szucs, 196 N. W. 355. The court held that a lower court had erred in instructing the jury as to the effect of an official inspection, and further held that the burden of proving that the flour was unfit was on the buyer, under the particular circumstances of the case.

Defendant receipted for the flour as being in "good condition," but later refused to pay for it. Trial of the mill's suit to recover the price ended in judgment for defendant, but this was reversed and a new trial ordered on the mill appealing.

It appeared that one Hill, a board of health inspector in Detroit, the place where the flour was delivered for use in defendant's bakery, inspected the flour and had it analyzed and found it to be all right, but the trial judge refused to admit the testimony. Disposing of the case, the supreme court said:

"Objections to the report of analysis of the flour from Chicago and an attempt to show plaintiff received an approval, or O.K., of the flour from the board of health were sustained.

"It is fairly inferable, and had not objection to that inquiry been peremptorily sustained it could perhaps have been more fully shown, that the so-called O.K. was given plaintiff by Hill, of the health bureau, who in fact so stated in effect. He promptly acted in the matter officially on defendant's complaint, went to defendant's shop, retained the flour during investigation as he described, had a sample analyzed, made a practical test by baking bread with it; says he had direct charge of settling this complaint from the time it was made until it was entirely straightened out; that the flour measured up to the market standard; made 'good, marketable, eatable bread; he found nothing wrong with it' and it 'was released.' He acted officially and was the only disinterested witness. At best the instruction complained of tended to prejudicially mislead and was, we think, reflected in the verdict.

"Defendant was furnished the brand of flour he ordered. He receipted for it when delivered as received in good condition, used up about half of it, and made no complaint until the bills for it were past due. Title to the flour had then passed to him. He refused to pay for it, and when sued his only ground of defense was the special affirmative one, in avoidance, that it would not make good bread and was unfit for use. Upon the trial, plaintiff proved a prima facie case and rested. Defendant only sought to meet this by proof of his special defense, and plaintiff introduced testimony in rebuttal to meet that issue. The court erroneously charged the jury in effect that the burden of proof rested upon plaintiff throughout the trial."

* *

The legal weight of a chemist's report as to whether flour was bleached or not was considered by the United States district court for the eastern district of Pennsylvania in the case of David Stott Flour Mills vs. Richardson, 6 Fed. (2d Ser.) 332.

On defendant's rejection of a shipment of bakers patent flour, under a claim that it was bleached and therefore not in compliance with the contract of sale and not merchantable under the laws of Pennsylvania, the parties agreed to submit samples of the flour to Dr. Tybout, chemist, through the Philadelphia Commercial Exchange. He reported that the samples reacted negatively to tests for bleaching by nitrous oxide and chlorine, and that he did not believe they were bleached.

The court ruled that on defendant's failure to produce the original report a carbon copy of the same was admissible in evidence in plaintiff mill's favor, as tending to establish the mill's claim that the flour was not bleached.

The defendant, on the other hand, presented evidence of another chemist, Dr.

Carlitz, who testified that he found samples submitted to him to have been bleached by chlorine. It seems that this testimony was permitted to stand, but the court excluded copy of a report the witness had made to defendant. The ground for excluding this report was that Dr. Carlitz was employed by defendant without plaintiff's knowledge or consent, whereas the report of Dr. Tybout was admissible because he was selected by mutual agreement to make the test.

* *

The Sheffield-King Milling Co. won a favorable decision before the Kentucky court of appeals in a suit brought to recover damages from one F. J. Sorg for breach of a contract for the purchase of flour, after a trial in a lower court had resulted in a judgment in favor of defendant. (203 S.W. 300.)

The contract was dated in 1912, and defendant's refusal to receive shipments thereunder entailed upon the mill a loss of $878.38. When the suit was brought, Sorg interposed a counterclaim for damages for claimed inferiority of flour bought from the mill under a prior transaction.

On the main point of the case the court of appeals said:

"The second paragraph of the original answer alleges that the first carload of flour was inferior. The third paragraph alleges 'that, by reason of the inferior quality of said flour, the defendant's trade was damaged.' As the defendant never accepted or used any of the flour embraced in the contract sued on, and as his trade could not have been damaged by its inferior quality, it is clear that the allegation in the third paragraph respecting the inferior quality of the flour applies only to the first carload ordered in June, and that the purpose of this paragraph was to interpose a counterclaim or set-off, based on the loss of trade resulting from the inferior quality of that particular flour.

"It follows, therefore, that there was no plea that the flour covered by the contract sued on was worthless. Furthermore, there was no competent testimony that the flour last mentioned was worthless. The only testimony bearing on the question was that the flour ordered by defendant in June and delivered in July, as well as other flour ordered by other persons, was of inferior quality and of the same brand as the flour in controversy.

"There is no such persistency in the character of flour that the worthlessness of one carload may be regarded as evidence of the worthlessness of another carload, regardless of the time of its manufacture or of the quality of the wheat from which it was made. One carload of flour may be bad, while another carload, made from different wheat, may be good.

"Hence, evidence of the inferior quality of one shipment of flour is not admissible for the purpose of showing the inferior quality of another shipment, unless it is made to appear that the two shipments were manufactured under the same circumstances and conditions, and out of the same quality of wheat. . . . There being neither pleading nor proof that the flour covered by the contract of July 8 was worthless, it was error to submit this issue to the jury."

* *

In F. W. Stock & Sons vs. Snell, 116 N.E. 263, decided by the Massachusetts supreme judicial court, a contract between the parties called for three shipments of flour from plaintiff to defendant, and plaintiff claimed damages for refusal of the defendant to accept the third installment.

The defense under this branch of the case was that plaintiff had warranted the flour to be "O.K.," merchantable, and fit for the purpose of making bread, and that the first two shipments, which were received, did not conform to the warranty.

To refute this claim, the mill's attorney attempted to show by plaintiff's testimony what care was used in preparing Mikota flour—the brand in question. The trial judge refused to receive the testimony, and the reviewing court holds that this was error, saying:

"As the first step in order of proof that the flour was Mikota flour, merchantable and O.K. when delivered, it was relevant to show the quality of the wheat when milled, the condition of the product when placed in suitable barrels at the mill, the shipment of the barrels containing the flour, and all facts tending to prove that the condition and quality of the flour was that of O.K. Mikota flour when it left the mill, and by direct and inferential testimony prove that the flour as delivered was the same in quality as it was when manufactured, barreled and shipped. We are of the opinion that there was a clear connection between the collateral fact offered in evidence and the fact directly involved in the issue."

On a subsequent appeal in the same case (134 N.E. 378) the court approved

an instruction given by the trial judge to the jury as follows: "In order to recover in this action, the burden of proof is on the plaintiff to establish by a fair preponderance of the evidence that this flour delivered by it to the defendant was O.K., merchantable, wholesome and fit for making bread; that the defendant refused to receive the flour without justifiable reason, and that it suffered damages thereby."

* *

A buyer of feed failed to show a cause of action against the manufacturing mill under a claim of inferior quality, according to the decision of the United States circuit court of appeals, eighth circuit, in the case of Hottelet Co. vs. Garden City Milling Co., 285 Fed. 693.

Plaintiff sued to recover damages, on a theory that sugar beet meal purchased from defendant was not of merchantable character. The trial judge decided in favor of the mill, and plaintiff appealed. The circuit court of appeals affirmed the judgment.

It appears that the meal was shipped to consignees designated by plaintiff, and was afterwards reshipped to plaintiff; and that at least some of the feed was adulterated and misbranded by some one other than defendant, after the meal had left the mill. In proceedings brought by the government the feed was condemned as being adulterated and misbranded. In plaintiff's suit it was contended on his part that the adjudication in those proceedings was conclusive as to the quality of meal, making it improper for the court to admit evidence tending to show that the meal was in merchantable condition, but the courts decided that there was no such identity of issues in the two cases as to make the decrees in the condemnation proceedings conclusive in this suit.

On another phase of the case, and answering a contention made by plaintiff's attorneys to the effect that the trial judge improperly refused to instruct the jury that the violation of the pure food law by a manufacturer is evidence of neglect in the preparation of a food product, and that if the jury found that the defendant had violated that law in the preparation of the meal they should render a verdict for the plaintiff for such damages as the evidence convinced them it suffered, the court said:

"This was not an action for damages for neglect, but one for breach of a contract. If the defendant did not break its contract it was not liable in this action, however negligent it may have been in the preparation of its product, and if it was guilty of a breach of its contract to the plaintiff's damage, the plaintiff was entitled to recover, although the defendant had exercised extraordinary care in manufacturing its meal."

Incidentally, the opinion recognized the correctness of a rule of law contended for by plaintiff, that "where a manufactured food product is purchased from the manufacturer for resale at another place and the object of the purchase is known to the seller, the latter impliedly warrants that the article is merchantable, in proper condition to stand shipment by the means of transporting it, and to remain merchantable for a reasonable time after it has been received by the purchaser."

* *

In a suit brought by a mill to recover for chicken feed sold, the Washington supreme court decided that defendant buyers failed to establish a counterclaim based on alleged deleterious condition of the feed, resulting in the death of poultry to which it was fed. (Magnolia Milling Co. vs. Clark et al., 223 Pac. 1042.) In holding that there was no proof that the feed was unwholesome or that it caused the death of defendants' poultry, the supreme court said:

"As to the meal containing an excess of free fatty acid, no one knows or pretends to say that 5 per cent, or any other per cent, of free fatty acid in the meal, or of 5 per cent, or any other percentage, of free fatty acid in the fat contained in the meal actually makes the meal unwholesome or dangerous.

"The nearest approach to testimony to this effect is that of a witness describing himself as a feed specialist, who testified to what was no more than a prejudice on his part against meal containing more than 5 per cent of free fatty acid, and he so little understood his subject that he did not and could not distinguish between 5 per cent of free fatty acid in the meal, and 5 per cent of free fatty acid in the fat contained in the meal, though closely pressed by counsel upon both sides; and while at the worst the meal in question contained no more than 2.68 per cent of such acid, the witness, though condemning this meal, freely said, and repeated, that any meal containing not more than 5 per cent of the acid was all right for feed, though he preferred and was then recommending and selling meal containing 2½ per cent of free fatty acid, practically the same as the meal now complained of.

"Substantially all of the witnesses agree that while free fatty acid is released by putrefaction, it is also released by other agencies when there is no putrefaction present, and that it is, and must be, released in the process of digestion. It is also agreed that the whole subject is a new one; that it has not been customary to analyze feeds for the presence of this acid; that there are no state or governmental regulations upon the subject; and that science has not yet classified free fatty acid as dangerous or to be guarded against, or attempted to say what percentage may be considered as making the feed or food in which it is found unwholesome.

"That the feeding of the meal caused the conditions of which complaint is made has even less semblance of support. No one attempted to say that in his opinion this particular feed was the cause of the conditions said to have been found upon post mortem examination of the chickens which died, or that free fatty acid was ever known to cause like conditions. . . .

"True, there was testimony that the stock was carefully selected; that the chickens were well cared for, free from vermin and worms, and not afflicted with cholera or chicken pox; but we find no testimony, from either expert or practical sources, from which it can be reasonably inferred that the chickens were not afflicted, and their condition caused, by some other known disease, or perhaps by a disease heretofore unknown, and unnamed, not in either case induced or aggravated by the feed."

The rights of a miller in cases where one who has contracted to buy flour repudiates the contract ostensibly on the ground that the flour is deficient in quality, but under circumstances that warrant an inference that a decline in the price of flour after making of the bargain is the real cause, were considered in an opinion handed down by the United States circuit court of appeals for the fourth circuit. (223 Fed. 969.)

Defendant contracted to buy from plaintiff milling company 5,000 bbls of a certain brand of flour in bulk, to be delivered as called for, at $5.20 per bbl. Defendant received 1,650 bbls in the course of six months, but later countermanded the order as to the remaining 3,350 bbls, on the ground that the flour did not prove satisfactory to its customers. In the meantime the market value of the flour had fallen off 60c per bbl.

Thereupon, plaintiff sued for damages for breach of the contract, and recovered judgment, which was affirmed by the decision of the court of appeals. Defendant unsuccessfully counterclaimed for damages alleged to have resulted from failure to furnish flour of the grade contracted for.

On review of the case in the court of appeals, defendant complained because the trial court admitted evidence to prove that during the term of the contract defendant was the only customer that had complained of the quality of the flour, although as much as 38,000 bbls of the same kind of flour had been sold elsewhere.

But the higher court says that this evidence was properly received to rebut evidence offered by defendant tending to show that flour previously bought from plaintiff had proved satisfactory; and to rebut other evidence offered by defendant to show that plaintiff changed its millers and the quality of wheat used in manufacturing the flour delivered under the contract in suit.

"This testimony in rebuttal was manifestly proper," declares the court of appeals, "as controverting the questions of fact thus raised by the defendant, with a view of showing that there had been no deterioration in the quality of the flour, either by reason of the change in employees or because of the quality of the wheat used; and the fact that the complaints were confined to this particular customer was material from another point of view, as tending to throw light on whether the decline in the price of wheat at and about the time in question may not have influenced the action of the defendant in seeking to avoid its contract, rather than the lower quality of the flour furnished."

In the case of Kauffman Milling Co. vs. Stuckey (37 S. C. 7), plaintiff mill sued to recover the contract price of flour delivered. Although defendant resisted liability on the ground that the flour was of inferior quality, the South Carolina supreme court decided that the mill was not entitled to show that flour of the same brand sold to other customers gave satisfaction. Concerning this kind of evidence, the court said:

"It made no difference how fair plaintiff was in its dealings with people other than defendant, for the issues tendered by the defendant to the plaintiff in the case at bar were strictly confined to the dealings between them. . . . We can easily see how tastes of men may differ: what to one man is good, wholesome bread is not to another. Why should the taste of one man not concerned in a con-

troversy before the court be forced upon an unwilling party whose taste was different? Besides, who was able to say that the grade of flour in each case was the same?"

But another point raised was ruled in favor of the mill; the supreme court holding that the trial judge properly instructed the jury that defendant had the burden of proving how much of the flour purchased had failed to come up to the sample under which the sale was made, and was entitled to damages only to the extent that the flour proved to be defective.

SECTION 150. CONCLUSIVENESS OF OFFICIAL INSPECTION

When corn or other commodity is sold on a basis of grade or quality determined by official inspection at the place of shipment, such inspection, in the absence of anything to impeach it as dishonest or collusive, is conclusive as to the grade and quality shipped to the purchaser.

And, in an action against a grain dealer for breach of contract in refusing to receive corn of a certain grade purchased by him according to official inspection at the place of shipment, the question as to when the title passed is immaterial, defendant being obliged to receive it, regardless of its condition when it reached him, if the official inspection showed that it was of the grade ordered when placed on the cars.

In the case of Citizens' Independent Mill & Elevator Co. vs. Perkins (152 Pac. 443) the supreme court of Oklahoma laid down the above-stated rules of law, following a similar decision of a Missouri court of appeals.

To the same general effect is the decision of the Arkansas supreme court in the case of Federal Grain Co. vs. Hayes Grain & Commission Co., 255 S. W. 307.

See, also, Moore-Seaver Grain Co. vs. Blum Milling Co., 264 S. W. 551.

* *

An opinion filed by the appellate division of the Alberta supreme court is of practical interest and importance to millers and flour merchants in the United States, as well as in Canada. It was announced in the case of Omand vs. Alberta Milling Co., Ltd., 69 Dominion Law Reports, 6, an action for damages claimed on the grounds that flour delivered by defendant to plaintiff was deficient in quality and quantity, and contained excessive moisture. A trial judge dismissed the suit as for want of proper proof, and the plaintiff appealed. The higher court decided that the trial judge erred in excluding evidence offered by plaintiff, consisting of official inspection reports, and awarded judgment for plaintiff.

The contracts called for delivery of "government standard 74 per cent extraction Manitoba flour," f.o.b., seaboard, and were made in 1918 and 1919. The agreements also specified that the moisture content should not exceed 13½ per cent, and that the "bags weigh 140 lbs to avoid claims for s/weight."

Samples of shipments were taken by inspectors of the Wheat Export Co. and the Canadian Wheat Board, immediately on arrival at the seaboard, and were tested. Other samples were sent to Dr. Shutt, at Ottawa, for moisture test, and some of the bags were weighed. Under these inspections plaintiff became bound to pay the export company and the wheat board $3,473.86 for quality, moisture and short weight claims, and sought reimbursement against the mill.

The appellate division found that the mill was aware that the plaintiff bought the flour for export through the government mediums above named. It was further found that the facts "that the inspection reports and debit slips were forwarded to the defendant from time to time and practically admitted as being correct in the correspondence, all went to show that it was an implied term of the contracts that the defendant would pay whatever claims the plaintiff would be compelled to pay, and would accept the findings of the Wheat Export Co. and the Canadian Wheat Board, as it would have had to do had it sold direct."

The point mainly dealt with on appeal concerned the exclusion of evidence offered through W. A. Flavelle, official flour inspector, with 30 years' experience in milling and handling flour. The trial court refused to permit Mr. Flavelle to refresh his memory by referring to the inspection reports and refused to accept the reports as evidence of the truth of their contents, although the witness was prepared to vouch for their correctness because of his knowledge of the system under which the reports were made.

The majority opinion on appeal holds that there were three distinct grounds on which the trial judge erred in refusing to receive the evidence:

"(1) Because, taking all the surrounding circumstances, it was quite plain to the defendant company from the very commencement of the business that the flour was being sold to the government and had to come up to the government standard, and there was the necessary

implication that the decision of the recognized government officials acting in the regular course of their duties should prima facie be binding as between the parties; such inference arising of necessity out of the circumstances, because it would not be practicable to check the inspection of particular shipments out of so vast a number of shipments requiring the various experiments involved in the work of testing in respect of quantity and especially quality. Even if it had occurred to the parties to provide some method of checking, the project would, I should judge, in all probability have been abandoned as impracticable, or at least too inconvenient and expensive, assuming, about which there perhaps is room for doubt, the government authorities would have permitted the intervention of inspectors for the manufacturers of flour, with whom the government had no direct contracts.

"(2) Because the various processes of testing the flour, the records of these processes and the reports compiled as the result of these processes, and the copies of the various entries of data and of the reports were all respectively made under the direct supervision of the witness Flavelle in such a way and under such circumstances as to give the same moral certainty as if these several things were done by Flavelle personally and, consequently, that the case is one in which Flavelle was in a position to 'refresh his memory' by reference to any of the entries and reports. . . . A witness 'refreshes his memory' although the document placed in his hands does not revive his memory in fact, but merely enables him to assert his belief that its contents are true.

"(3) Because there was proved to have been in existence and operation a carefully devised and a carefully conducted system established for the express purpose of ascertaining and determining the quantity and quality of all flour purchased by the government and requiring in its operation a large body of officials, among whom divers particular duties were distributed, and it was a part of the system that the particular results and a synopsis of the accumulation of these results should be regularly recorded. All this leads to a high probability of the correctness of the ultimate results, especially in a public or quasi public office, as was the case here, and such a general system having been proved by Flavelle, under whose supervision the whole system was carried on and the records made, and he having verified the copies or duplicates of the reports issued in pursuance of the system, the contents of the reports were proved and are prima facie correct."

The opinion further states that any one of these three principles covers questions of weights, as well as other questions of quantity or quality, but that on the question of weights acquiescence on the part of the defendant as to the inspection reports could well be inferred from the correspondence between the parties. Accordingly it was decided that plaintiff was entitled to judgment for the amount claimed.

In a concurring opinion, Mr. Justice Stuart observes that the inspection reports necessarily must be resorted to, because it would be sheer impossibility for the inspectors to have independent recollections concerning the results of specific inspections; and that there was a circumstantial guaranty of the trustworthiness of the reports arising from disinterestedness and official duty.

He adds: "Of course it may be suggested that the plaintiff should have had his own special expert to do his testing, so that there could be an individual memory of the result, but I think that the defendant company must be held to have impliedly agreed, in view of all the correspondence, to abide the result of the government tests and government records."

SECTION 151. DUTY TO NOTIFY SELLER

When a contract buyer of goods rejects a shipment tendered him, on the ground that it is not up to the quality required by the agreement, it devolves upon him to notify the seller promptly of his reasons for rejecting delivery, held the Alabama supreme court in the case of Holmes & Dawson vs. Henderson, 85 So. 536. If the buyer rejects the goods without giving such specific notice, the circumstance will give rise to a strong presumption that the goods were of contract quality.

* *

The suit of Cavanaugh vs. D. W. Ranlet Co., 118 N. E. 650, passed on by the Massachusetts supreme judicial court, was defended on the ground that the agreement was controlled by a rule of the Boston Chamber of Commerce, binding the buyer of grain found to be below the contract quality to notify the seller "not later than the following business day after arrival of the car at destination," that the latter may "order inspection if so desired by him." Answering an ob-

jection that timely notice was not given under this rule, the court said:

"On ample evidence the jury could say that the oats were in a damaged condition before the train entered Manchester. The buyers, moreover, were not bound to take the oats in whatever condition they might be in, and under appropriate instructions it could have been found that the word 'arrival,' . . . even if read with the rules, was understood and intended by the parties to mean that until the car had been detached and placed on a siding where it could be reached, inspected and unloaded in the course of the carrier's business, and notice given to the plaintiffs or to their vendee, possession had not been taken, and the warranty had not been waived or discharged."

SECTION 152. ATTACHMENT BY BUYER

The statutes of Montana will not permit a contract buyer to levy an attachment on flour, grain, or other commodities, shipped in performance of the seller's contract, on a claim for unliquidated damages based on asserted inferiority of the shipment, held the supreme court of that state in the case of Beartooth Stock Co. vs. Grosscup, 189 Pac. 773.

Plaintiff alleged a purchase of alfalfa hay from defendant for delivery, f.o.b., loading points in Washington and transportation to plaintiff in Montana, and that defendant shipped hay of inferior quality. The hay being rejected, plaintiff attached it to satisfy its claim for damages. But the supreme court approved the trial judge's conclusion that the attachment law of the state was not so worded as to sustain an attachment in a suit to recover unliquidated damages for breach of contract.

ASSESSING BUYER'S DAMAGES*

SECTION 153. MEASURE OF DAMAGES

The measure of damages for breach of warranty of the quality of goods sold is the difference between the actual value of the property and its value if as warranted, held the Minnesota supreme court in the case of McGuire vs. Chambers, 180 N.W. 1013.

Plaintiff sued for damages for inferiority of corn sold and shipped to him by defendant. The trial judge instructed the jury that the measure of plaintiff's recovery was the "difference" between the contract price and the "fair market value of the corn that was delivered."

"This was wrong," observed the supreme court in affirming judgment in plaintiff's favor. "This being an action for breach of warranty of quality, the measure of damages was the difference between the actual value of the corn and its value if as warranted. . . . The contract price is immaterial. This error was, however, without prejudice, since plaintiff's testimony was that corn equal to sample was worth $1.40, that is, that the contract price and the actual value were the same, and defendant's witnesses did not dispute this."

The Georgia court of appeals disposed of the case of Atlanta Milling Co. vs. Acme Mfg. Co., 104 S.E. 457, with this brief statement of a rule of law:

"Where goods of a certain quality are ordered on contract for future delivery, and goods of an inferior quality are delivered, the measure of damages is the difference between the market value of the goods delivered, at the time and place of delivery, and the value of the goods of the character ordered, at the time and place of delivery."

* *

In F. W. Stock & Sons vs. Snell, 116 N.E. 263, a suit before the Massachusetts supreme judicial court to recover damages for defendant's rejection of flour, a point involved related to the insufficiency of defendant's proof of damage, if any, on account of claimed breach of warranty of the quality of the flour.

Applying the general rule of law that the measure of damages for breach of warranty as to the quality of goods sold is the difference between the actual value of the goods delivered and the value they would have possessed had they conformed to the warranty, the supreme judicial court held that the trial judge erred in permitting defendant to testify to the prices obtained by him in making resales of the flour delivered by plaintiff, and in permitting his counsel to ask him the question, "What was your total loss?" The higher court said:

"No evidence was offered to prove the difference between the actual value of the

*The question whether a transferee of a draft attached to a bill of lading becomes liable with the seller to the buyer for deficient quality of the goods sold is discussed in the chapter on Drafts, Chapter XLIX.

The right of a buyer to rescind his contract on the ground of deficient quality of goods tendered or delivered to him is treated in the chapter on Rescission by Buyer, Chapter XXI.

flour and its value had it been as warranted, other than the testimony excepted to, to wit, that the defendant had never received any pay for 50 or 60 bbls of flour, 'because the flour was of so poor quality,' that he sold portions of the flour for $4.50, $4 and $2.50 per bbl, and that his total loss was 'about $700.' Besides being incompetent, the evidence was manifestly highly prejudicial, and there was nothing in the charge to the jury to minimize its effect."

* *

The right of defendant to counterclaim damages on account of defective quality of a previous shipment of flour, on plaintiff suing him for the price of a later shipment, was sustained by the Kansas supreme court in the case of Rock vs. Vandine, 189 Pac. 157.

At the trial of the case the evidence showed that defendant was a baker who had a large patronage and tended to show that use of the flour in question resulted in loss of business. Defendant further claimed that the unused portion was of no value to him until government war regulation permitted the use of substitutes for flour in making bread. At that time the defendant had on hand 44 bbls of the flour, which cost him $9.60 bbl. Taking advantage of the regulation, the defendant used the flour as a substitute, and in that way was able to use one sack with two sacks of good flour.

He did not testify definitely as to the price of authorized substitutes at the time he was using this flour as a substitute. The price of substitutes kept going up. The price of rice flour reached $20 bbl; shorts were worth $3 per 100 lbs. The only substitute the defendant was able to obtain was a poor grade of corn flour. What it cost he did not say. However, under cross-examination by the court itself, he finally fixed the value of the flour as a substitute at one third what it cost him.

Deciding the controversy in defendant's favor, the supreme court said:

"The plaintiff says the defendant should have returned the flour. The evidence was that the defendant complained of the flour, and retained it only because of a promise of adjustment, which was never made.

"The plaintiff says it was the defendant's duty to mitigate his damages by using the flour in the way which would occasion the least possible loss. The defendant claimed nothing on account of loss of custom before he was permitted to make inferior bread under the substitute regulation. When the regulation became effective, he did use the flour in the most beneficial way.

"The defendant rested under no duty to the plaintiff to mitigate damages by using the flour to the best advantage. If so, he himself would have been subject to an action for damages resulting from breach of the duty. The correct statement would be that the defendant rested under legal disability to counterclaim for damages which he might have prevented. See comment in 29 Yale L. J. 130, on decision in Saxony Mills vs. Huck (Mo. App.), 208 S.W. 868, a case involving counterclaim for loss of business on account of bad flour.

"The plaintiff says the defendant admitted he sustained no loss, and refers to the following questions and answers:

"'Q. State whether you sustained any loss by mixing up this flour and selling it. A. I did not lose any, for the substitute law went in, but I did when I was trying to make bread out of it.

"'Q. You lost by not having as good bread as your competitors? A. Yes, sir.'

"The defendant's testimony, as a whole, shows that, when answering the questions, the defendant probably had in mind loss of trade after the substitute regulation became effective, and shows with certainty that he did not mean to say he had not been damaged at all.

"Finally, the plaintiff says the proof of the defendant's damages was too indefinite. The proof has been outlined. There was no objection to the method by which the value of the flour as a substitute was arrived at, the stated value was not disputed at the trial, or at the hearing on the motion for a new trial and, consequently, the court concludes the plaintiff has suffered no prejudice.

"The judgment of the district court is affirmed."

In the Missouri case of Saxony Mills vs. Huck, referred to by the Kansas court, it was decided by the St. Louis court of appeals that where the buyer of flour discovered a defect in it the night of its arrival, but nevertheless used the flour in his bakery, though good flour could have been bought in the same city, he was not entitled to recover, as damages for breach of warranty, for loss of business as a result of continued use of the defective flour. The court said in this case:

"It is next assigned as error that the court admitted evidence tending to prove a loss of business on the part of the defendant covering a period of some weeks immediately following the receipt of the flour by the defendant, when, according

to defendant's own testimony, the alleged bad quality of the flour was discovered the night of its arrival, and good flour could have been bought by the defendant at retail in the city where the defendant's bakery was located. This point, we think, is well taken.

"While in general the measure of damages in an action for breach of warranty is 'the difference between the value which the thing sold would have had at the time of the sale if it had been sound or corresponding to the warranty, and its actual value with the defect' (2 Sedgwick, Damages, sec. 762), 'where an article is warranted fit for a particular purpose the purchaser can recover his damages caused by an attempt to use it for that purpose' (2 Sedgwick, Damages, sec. 766), but where it is sought to recover for consequential damages on a breach of warranty the plaintiff himself must be without fault (2 Sedgwick, Damages, sec. 764).

"In the case before us the defendant, according to his own testimony, realized the night that the flour arrived, when he used the flour to make his first batch of bread, that the flour was unfit for his purpose; and he testified that he could have bought flour in Crystal City, where his bakery was located, at retail.

"In view of this testimony, defendant could not go on using the flour, as he testified he did, for some three weeks, though he knew that day after day more than one half of the bread sold was being returned as unfit for use, and that in addition it meant a loss of his trade.

"We hold, in view of defendant's own testimony, it was his duty, when he found out the character of the flour and that it was unfit for his use, to have stopped the use thereof, and thus have minimized his losses. Therefore defendant should not have been permitted to adduce testimony as to the damages he suffered by reason of his continued use of the flour after he knew it was unfit for making bread.

"Not alone was such testimony admitted over plaintiff's objection, but the case was submitted to the jury upon an instruction as to the measure of damages, which told the jury that, if they found for defendant on his counterclaim, they should find for 'such an amount as will fully compensate him for the loss he has thereby sustained by said expense (if any), labor (if any), valuable time (if any), valuable material (if any), or lost business (if any) defendant has sustained or lost by reason of his use or attempts to use the said flour delivered to him by plaintiff, but not to exceed the sum of $250.'

"This was clearly prejudicial error, and the judgment is accordingly reversed and the cause remanded."

* *

In Sheffield-King Milling Co. vs. Sorg (203 S. W. 300), it was intimated that a seller of flour would be liable for loss of trade resulting to a buyer through disposing of inferior flour innocently. But it was found that, since the buyer in that case did not accept certain delivery, his trade could not have been injured through any inferiority in its quality.

* *

The case of L. Teweles Seed Co. vs. Fairbanks, 195 Pac. 40, passed upon by the Washington supreme court, involved a sale of peas. It being found that the goods were defective, question was raised as to what was the proper measure of the buyer's damage. The peas were shipped from Seattle to Milwaukee, and the buyer had no opportunity to examine them before their arrival in Milwaukee.

On the defective condition being ascertained, the buyer notified the seller that the goods were held subject to the latter's order. The seller failing to take any action in the matter, the buyer sold the peas at current market price. In a suit to recover damages, the buyer having paid for the peas before their arrival, the court holds that the damages were properly computed on the basis of the Milwaukee market price, and not with reference to market values in Seattle.

* *

One of the most important legal principles having a bearing on one's right to recover damages for breach of a business contract is the rule that, where loss is entailed through such default, the aggrieved party must take all reasonable steps to keep his damage down.

The principle has its most common application in cases where the seller under a contract of sale refuses to deliver. If the buyer can readily secure substitute goods in the open market, any increased cost over the price agreed upon under the broken contract is the just measure of damages. So far as loss results from the buyer's omission to protect himself in this way, he must shoulder it, because he could have avoided it.

The point was applied by the Texas court of civil appeals in a suit brought to recover damages for claimed inferiority of stock feed, resulting in plaintiff's cattle failing to put on the flesh they

would have acquired had the feed been up to contract grade.

The court decided that if the plaintiffs, after discovering that the meal delivered was unfit for feed, could, by reasonable effort, have secured other feed with which to fatten their cattle, it became their legal duty to do so, and that if they continued to use the feed delivered by defendant, knowing its condition, they could not recover for injury resulting thereafter. In such case the only damages plaintiffs could recover would be based on the price at which proper feed could be bought in the market. (Kincannon & Gaines vs. Independent Cotton Oil Co., 196 S.W. 878.)

* *

According to the holding of the Pennsylvania supreme court in the case of Smith, De Macedo & Co. vs. Swift & Co., 110 Atl. 141, where goods are sold for export and resale abroad, and on arrival there are found not to be of the contract kind and are sold by the buyer for the seller's account, the buyer is bound to exercise good faith and reasonable judgment and diligence in making the resale, in order to preserve the right to hold the seller liable in damages measured by the excess of the value of goods of the contract kind, at the contract time and place for delivery, above the value at that time and place of the goods delivered.

* *

There can be no recovery of damages as for breach of warranty of the quality of goods sold without proof as to the actual value of the goods delivered, for consideration in connection with the value the goods would have possessed if conforming to the warranty, according to the decision of the Tennessee supreme court in the case of Lambron & Co. vs. Green & Green, 262 S. W. 467.

As to damages for inferiority of seed wheat see section 146.

SECTION 154. SALES OF MACHINERY, ETC.

The Minnesota supreme court has decided that where a contract for the sale of mill machinery, etc., specifically describes what kind of machinery is to be delivered, including size, power, etc., no warranty is implied on the part of the seller that the machinery will serve to operate the mill at its full capacity. (66 Minn. 156.)

But where a scale manufacturer knew the purpose for which a mill ordered flour scales, there was an implied warranty on the part of the manufacturer that the scales were reasonably well adapted to that use; and on breach of this warranty, the mill was justified in resisting liability for the agreed purchase price.

This is the substance of a decision reached by the Texas court of civil appeals in the case of Detroit Automatic Scale Co. vs. G. B. R. Smith Milling Co., 217 S.W. 198.

Plaintiff sued for the agreed price of four flour mill scales, and defendant mill denied liability on the ground that plaintiff had represented that the scales would weigh accurately, and that they proved to be worthless after having been installed in defendant's mill.

Plaintiff replied that there was but one warranty made in the sale, and that in writing, as follows: "Should said scales prove defective within two years from date of shipment, with ordinary use (not dropped or broken), the Detroit Automatic Scale Co. agrees, if properly notified, to repair the same free of charge."

Affirming judgment in favor of defendant, the court of civil appeals says:

"Assuming that plaintiff did, in all respects, comply with the provisions of the clause just quoted, we are nevertheless of the opinion that the language does not constitute an express warranty so as to relieve plaintiff from all further responsibility. [There is a well-settled rule of law that the expression of a warranty in one or more particulars in a contract of sale is presumed to state all the warranties undertaken by the seller.] 'Warranty' is said to be an express or implied agreement by which the seller undertakes to vouch for the title, quality or condition of the thing sold. . . .

"Simply stated, the clause of the contract relied upon as fixing the extent of plaintiff's liability declares that plaintiff will repair free of charge any defect in the scales which develops in two years under ordinary use. . . . There being, then, an absence of any express warranty, and plaintiff knowing the purpose for which defendant desired to use the scales, which is not denied and which the evidence amply supports, there arose by implication of law the agreement on the part of plaintiff that the scales were reasonably fit or adapted to the purpose for which they were sold. . . .

"However, in that respect the plaintiff further contends that when a known and described article, to wit, four No. 72 flour mill scales, manufactured by the Detroit Automatic Scale Co., is purchased, there is, in the absence of an express warranty, no implied warranty as to quality and fitness, merely the duty to

deliver the precise article furnished, and that, plaintiff having delivered the articles described, it was entitled to recover."

The court then proceeds to review a decision of the United States Supreme Court relied upon by plaintiff, and in which that court decided that where a refrigerating machine was sold by description there was no implied warranty that it was adapted to any particular refrigerating purpose. Distinguishing that case from the one before it, the Texas court says:

"In the case cited the machine would operate as a refrigerating machine should. In the case at bar the scales would not correctly register weight. The evidence . . . shows that the scales would not weigh accurately nor meet the government test in that respect, and that plaintiff's agents were unable to correct them. One of the witnesses for defendant relates that between 400 and 500 sacks of meal, when reweighed on government tested scales, were found short between 300 and 400 lbs."

One objection made by the plaintiff on appeal was to a ruling of the trial judge, permitting the mill to show by plaintiff's own selling representative that he stated to defendant's representative that the scales were so accurate that they would save flour, etc., to induce defendant to buy the scales.

It was contended that admission of such testimony violated the rule that the terms of a written contract cannot be varied or contradicted by proof of contemporaneous or previous verbal understandings. But the court holds that the case falls within the equally well-established exception to that rule, to the effect that it is always open to one sought to be held on a written contract to show that he was induced to enter into it through false representations of material facts.

* *

An opinion handed down by the United States circuit court for the northern district of Ohio in 1886 is one of the interesting and important judicial decisions which constitute the body of non-statute law governing the milling industry and flour trade. It was rendered in the case of Knowlton et al vs. Oliver et al, 28 Fed. 516, and deals with several matters of practical interest to millers and dealers.

Plaintiffs sold and agreed to install in defendant's millhouse in an Ohio hamlet certain mill machinery, warranting in writing that "this mill, when completed and ready for operation," would "have a capacity of from 10 to 12 bushels of wheat per hour and make a grade of flour equal to the straight flour made at the Delphos Mills, and satisfy the trade of the second parties" [defendants].

Defendants refused to permit installation of the machinery, claiming that they had ascertained that it would not comply with the guaranty above mentioned. Plaintiff's suit to recover damages as for breach of the contract raised an issue as to whether the machinery would conform to the contract. The jury found in favor of plaintiffs under instructions given by the court as follows:

"Three things are provided for in this guaranty: (1) The capacity of the mill to be 10 to 12 bushels per hour; (2) that the mill would make a grade of flour equal to the straight flour made at the Delphos Mills; (3) that the flour it would make would satisfy the trade of the defendants. There is no contention as to the first, but the controversy is as to the last two items of the guaranty.

"The defendants might refuse to take the machinery before its delivery, and before it was placed in the mill building, if the machinery was not such as was provided for in the contract and guaranty. They were not required to allow the machinery to be put up in the mill, and rely on the guaranty afterward if it did not comply with the guaranty. The plaintiffs must show that they have complied with their contract, or that they were ready and willing to do so, and were prevented by the defendants, to entitle them to recover for the breach of the contract, as claimed in this case.

"Your finding in this case will necessarily depend upon the construction given to the words used, 'Delphos Mills,' being the standard of the grade of flour it was to make. This is important, for the reason that there were two mills at Delphos at the time, and it is claimed that one made a better grade of flour than the other. A contract must be construed as a whole; and to ascertain, as far as possible, the intent and understanding of the parties to it, at the time it was made.

"Words are to be given their usual and common signification,—the sense in which they are commonly used. The language used must be understood in its plain and ordinary sense, as read in the light of the surrounding circumstances, the situation of the parties, and the objects of the contract or guaranty, and that con-

struction given which most nearly conforms to the intentions of the parties.

"In the light of these rules of construction, you will carefully examine all the evidence, and ascertain what was intended by the parties in the use of the term 'Delphos Mills.' The plaintiffs claim it meant the old mill, called 'Delphos Mills,' and the defendants insist it meant all the mills at Delphos, including the one called the 'Eagle Mills.'

"Having settled the construction of the guaranty in that respect, you will next find, from the evidence, whether such machinery was being furnished by the plaintiffs as would make the grade of flour provided for in the guaranty. A large part of the evidence upon this question consists of the opinion of experts in the milling and machinery business. This class of evidence is proper to be carefully considered. The value of it greatly depends upon the knowledge of the witness, and his experience and capacity, as well as reasons given for opinions expressed.

"As to the third item of the guaranty, that the flour should 'satisfy the trade of the defendants.' This mill was to be erected at the village of Venedocia. The trade in flour there, and the surrounding country in which it would be sold, would constitute the standard of this part of the guaranty. It would mean that the character of the flour should be such as would, fairly and reasonably, enable the defendants to compete with other mills the flour of which might be sold or used in that part of the country.

"If you find that the plaintiffs complied with their contract, and the machinery was such as would comply with the guaranty, then you will return a verdict for the plaintiffs, and assess such damages as they may have sustained by reason of defendants' failure to comply with the contract. There are several elements to be considered in this assessment, consisting of loss in the value of the machinery actually manufactured below the contract price, loss of the profit on the sale of machines purchased by them for the purpose of completing the contract, and the profits to be realized from the work to be performed in setting up the machinery.

"If you find for the defendants, on their counterclaims, you will assess to them such damages as they may have sustained; and the measure of such damages would be the decrease in the value of their millhouse, and the lot thereon, by reason of the failure to complete the mill for them as provided for in the contract."

The decision of the Kentucky court of appeals, in the case of Cook vs. St. Marys Machine Co., 218 S. W. 733, recognizes the right of a miller to recover damages based on loss of profits directly and naturally ensuing from breach of warranty by the seller as to the capacity of machinery bought. But it was found that plaintiff failed to prove a valid claim under the rules of law applicable to his claim. He unsuccessfully sued for damages asserted to have followed breach of a warranty as to the power of an engine bought by him to operate his mill.

* *

A decision announced by the Kentucky court of appeals in the case of Shady Grove Milling Co. vs. Vaughn, 239 S.W. 37, is more important in the rules laid down than in the amount of money involved in the litigation.

Plaintiff sold defendant a Midget flouring mill for $1,800, taking notes for part of the price. When sued on the notes, defendant filed a counterclaim, asserting that the mill was sold under a warranty that, although it was secondhand, it would do everything that a new Midget mill would do. A jury allowed $200 on the counterclaim and defendant appealed, claiming that the allowance was insufficient.

The evidence showed, the court states, "that the mill made fine, high quality flour, but that for some reason unknown to Vaughn, and apparently undiscoverable by experts whom Vaughn employed to examine the mill and make repairs, would not properly separate the flour from the bran, but left a large quantity of the heart of the wheat in the bran. . . .

"He also expended about $300 in employing expert millwrights to examine and repair the mill. Failing in this, he bought and installed a middlings machine, which not only brought the Midget mill up to standard on production of high class flour, but made it even better than the warranty on which he relies for recovery of damages in this action. He operated the mill several months before he installed the middlings machine."

Affirming the judgment of the lower court, the court of appeals said: "If the mill was defective, and would not produce as many pounds of high grade flour from a bushel of wheat as a new Midget mill produced, the warranty, if made as contended by appellant, Vaughn, was broken, and the milling company was liable in damages to Vaughn. He had a

right in his answer to set up his counterclaim for such damages.

"We think, however, that the measure of damages to which he was entitled did not include the loss which he incidentally suffered by reason of the mill making too much bran, nor can he have a recovery for the cost of the middlings machine, or the sums expended by him in employing expert millwrights to correct the defects in the mill.

"The correct measure of damages is the difference between the flour mill in the condition in which it was delivered to him and its value in the condition in which it was warranted to be.

"He chose by his conduct, as well as his counterclaim, to retain the mill and to sue for damages for breach of warranty. The defect in the mill which he charges to be a breach of the warranty is its failure to produce as many pounds of high class flour per bushel of wheat as a new Midget mill would produce under like conditions and circumstances.

"It therefore became a question of fact for the determination of the jury whether the mill as sold and delivered to appellant, Vaughn, was of less efficiency than it was warranted to be by the seller, and, if so, of how much less value was the mill in the condition in which it was sold and delivered by the company to Vaughn than it would have been, had it been in the condition which it was represented and warranted to be by the seller."

CHAPTER XII

INSPECTION OF GOODS BY BUYER*

SECTION 155. RIGHT IN GENERAL

THE court decisions seem to be at variance on the question as to a buyer's right to inspect goods before accepting or paying for them, where the point is not covered by special agreement. The prevailing rule appears to have been codified in the uniform sales act, as follows:

"Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining," etc.

"Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery,' or otherwise, the buyer is not entitled to examine the goods before payment of the price, in the absence of agreement permitting such examination."

* *

Giving effect to the right in the case of Beals vs. Hirsch, 211 N. Y. Supp. 293, the appellate division of the New York supreme court decided that defendant buyer was entitled to reject delivery on the plaintiff seller refusing to permit inspection. Interpreting the provisions of the uniform sales act, embodied in the New York personal property law, the court said:

"The buyer may waive his primary right of examination before accepting delivery of the goods, and have recourse to the right of examination within a reasonable time after delivery; but the statute clearly accords to the buyer the right to examine before delivery."

* *

It was held by the appellate division of the New York supreme court in the case of Plumb vs. J. W. Hallauer & Sons Co., 130 N. Y. Supp. 147, decided May 3, 1911:

"Under an ordinary executory [unperformed] contract for the sale of goods to be delivered by the seller to the buyer at a distant point, although for cash on delivery, the buyer has the right of inspection, and the seller must accord him reasonable opportunity to inspect before he is bound to accept. . . . Although the buyer has this right, and although it is his duty to make such inspection under pain of losing the benefits of certain implied warranties if he does not make it, still he has the right, if he chooses, to make a contract that he will pay the purchase price before inspection. . . .

"When the defendant made a bargain to pay 50c per 100 lbs by sight draft to be attached to the bill of lading, it realized that it could not obtain possession of the bill of lading without paying the draft, and that it could not make an inspection without the bill of lading, because the carrier would not be justified in permitting inspection without its production. The court can take judicial notice of the fact that the draft would be received by mail before the freight would arrive, and, being payable at sight, must be paid before the freight could be delivered. . . .

"Such a contract precludes the idea of inspection before payment of the draft and taking possession of the property. When the agreement of purchase is that the buyer will pay the purchase price by sight draft to be attached to the bill of lading, he is not entitled to an inspection of the property before paying the draft, and he cannot refuse to accept the property because such inspection is refused."

* *

In the absence of special agreement to the contrary, a buyer of flour under an order bill of lading is not entitled to

*The buyer's right to inspection, as against a delivering carrier, is dealt with in section 337. See, also, section 84.

inspect the shipment before taking up the attached draft, according to the decision of the Indiana appellate court in the case of Southwestern Milling Co. vs. Niemier, 131 N.E. 831. The court said:

"By her contract appellee agreed that the payment for the flour should be made by honoring draft attached to the bill of lading; and under such a contract the buyer has no right of inspection before payment, unless such right is given by the custom of business. 'Williston on Sales,' par. 479. No such custom was shown by the evidence. On the contrary, the evidence, without conflict, showed the custom to have been otherwise."

The Arkansas supreme court has decided that a customer of a mill and elevator company was guilty of breach of contract in refusing to pay a draft drawn on him for the price until opportunity should be afforded him to inspect the shipment. Because the buyer's order and the acceptance thereof did not provide for inspection, the court holds that there was no such right. (Cochran vs. Chetopa Mill & Elevator Co., 114 S.W. 711.)

* *

A contract of sale providing for payment of the price in "net cash against delivery order" conclusively negatives any right in the buyer to inspect the goods before accepting the delivery order and paying the price, according to a decision of the appellate division of the New York supreme court. (177 N.Y.S. 309.)

But in an action against a railway company for permitting a contract buyer of flour to examine it before taking up draft and order bill of lading (Model Mill Co. vs. Carolina, Clinchfield & Ohio Railway Co., 188 S.W. 936) the Tennessee supreme court said, in part:

"It has long been the settled law of this state that a purchaser such as Murphy & Co. is disclosed to have been has the legal right to inspect such a shipment as that here involved before payment of the draft, and without production of the bill of lading. Murphy & Co. had this right of inspection in order to ascertain if the flour was in quality, quantity, and condition such as it had agreed to purchase, and in the event that it was not, to reject the flour and refuse to take it."

* *

To the same effect is the decision of the West Virginia court of appeals in Old National Bank vs. People's Bank, 108 S. E. 716. But in that case it was decided that payment of the draft attached to the bill of lading constituted an acceptance, precluding the buyer from rescinding the payment.

"When the sale is by sample, and delivery is of the essence of the contract, the purchaser, before accepting delivery, has the right to inspect the goods, and if the quality of the goods is inferior to the sample, or if they are damaged, the purchaser may reject them and recover the price if it has been paid," declared the Alabama court of appeals in a case involving a shipment of chops. (Veitch vs. Illinois Central Railroad Co., 68 So. 575.)

* *

"In the case of Newmark & Co. vs. Smith, 26 Cal. App. 339, 149 Pac. 1064, it is said: 'The purchaser under a contract of sale of a certain quantity of beans is entitled, in the absence of a waiver of the right, to inspect the property sold, as a condition precedent to the making of payment, and the seller is not entitled upon the tender of delivery to refuse such inspection and demand payment, and for failure to make payment to declare the contract annulled.'"

This quotation appears in the opinion of the California district court of appeal in Humphry vs. Farmers' Union & Milling Co., 190 Pac. 489, where it was decided that the buyer's right to inspect goods at the destination was implied.

* *

Where a contract to sell goods does not provide for inspection at the point of shipment, and no such inspection is contemplated by the parties, the buyer is entitled to inspection at the destination within a reasonable time, in the absence of any provision in the contract to the contrary, held the Springfield, Mo., court of appeals in the case of N. W. Helm Feed & Coal Co. vs. Butler County Milling Co., 269 S. W. 630.

* *

A buyer has no implied right to inspect goods at their destination where they have been sold f.o.b. place of shipment and he has had ample opportunity for inspection there, held the California district court of appeal in the case of Whitaker vs. Dunlop-Morgan Co., 186 Pac. 181.

* *

In the case of N. P. Sloan Corporation vs. Linton, 103 Atl. 1011, the Pennsylvania supreme court decided that under an agreement for sale of goods f.o.b. destination, with privilege to the buyer to examine the goods at the point of shipment, exercise of the privilege is not essential to taking effect of the contract. Inspection might disclose ground for

rescinding the contract and refusing to accept the shipment, but until such rescission the contract remains valid, regardless of inspection and regardless of the condition of the goods.

* *

Generally, if a seller is to ship goods to the buyer, with the privilege of inspection, the place for inspection is the destination, in the absence of mutual understanding to the contrary. But it seems that mutual understanding to the contrary might be inferred from established trade custom, as well as by express agreement. (New York supreme court, appellate division, in A. O. Anderson Trading Co. vs. Brody, 184 N.Y. Supp. 383.)

CHAPTER XIII

TIME FOR DELIVERY*

SECTION 156. TIME AS VITAL ELEMENT

WHEN a contract to sell goods fixes a definite time for delivery, it will be deemed to be an essential element of the contract, especially if the goods have a fluctuating value, and the seller cannot recover damages for repudiation of the agreement by the purchaser, unless delivery was tendered within that time. Nor can the seller recover on account of the buyer's claimed breach of contract without showing his own readiness, ability and willingness to perform the contract. In other words, before one can be held legally liable for repudiating a contract to buy flour, the seller must show that he had flour of the contract grade available for delivery at the time fixed by the agreement.

* *

According to a decision of the Rhode Island supreme court (Newton Tea & Spice Co. vs. Narragansett Wholesale Grocery, 123 Atl. 144), a seller ships goods at his peril where the contract time for delivery has passed and the buyer has not signified willingness to accept belated delivery. It was held that a buyer is under no obligation to notify the seller that he will not take the goods. In that case a trial judge instructed the jury:

"If I make a contract to buy goods of you, and if they do not come, why, ordinarily, I would notify you in the lapse of time that, the time having expired, I did not want them, and these people should have notified the plaintiff to that effect."

Reviewing the case, the supreme court said: "The order for the goods specified no time for sending them, and the plaintiff was bound to send them to the defendant within a reasonable time. . . . This principle of law is well settled. . . . We find no authority for the proposition that the buyer must notify the seller that he will not accept the goods when the seller has neglected to make delivery of them according to the terms of the contract."

* *

In Stock vs. Towle, 54 Atl. 918, decided by the Maine supreme judicial court, it appeared that plaintiffs in negotiating a sale of flour were advised that the buyers desired the same for immediate use. Later the buyers gave an order for a "transit car," which order was accepted. The sellers, however, tendered a car which was shipped three days after the order was accepted, and the buyers refused to receive or pay for it.

In upholding the action of the buyers in this respect, the court decided that, since plaintiffs were advised as to the immediate need for the flour, the "stipulation for a 'transit car' was, therefore, a substantial and important element of the proposal. Time was of the essence of the contract, and a condition precedent to the plaintiffs' right and the defendants' obligation."

* *

In American Bag Co. vs. Taylor Milling Co., 230 S.W. 782, the plaintiff sued for the price of flour sacks delivered, and the mill counterclaimed for damages for nondelivery of other sacks bargained for. The bag company replied that the mill had lost its right to delivery of such sacks through failure to take them within the time agreed on.

Concerning the question whether the specific time for delivery of the sacks was a vital element of the contract, the Texas court of civil appeals said:

"Whether or not time is of the essence of a contract is a question of fact for a jury, unless the contract expressly makes it so, or unless the subject matter of the contract is such that a court will take judicial knowledge of the fact that the parties obviously intended that time should be of the essence of the contract.

"Such would be the case in a contract to deliver cotton or wheat, or any article of which there was a constantly fluctuating market, ascertainable by established market quotations. The modern tendency is to hold that time is not of the

*Liability for failure to make or receive timely delivery is dealt with in subsequent chapters. As to the effect of trade custom see section 82. Responsibilities of carriers for delays are treated in Part II.

essence of a contract, except under the circumstances above stated. . . .

"If it be assumed that the salesman's order sheet and the seller's letter of confirmation constitute a written contract, there is nothing therein to show that, as a matter of law, time was of the essence of the contract. The phrase in the one, 'When ship, 30 days,' and in the other, 'When ship, 9-23,' may, under the circumstances of the transaction, mean no more than that shipment was to be made in a reasonable time. . . . That appellee so construed these phrases seems to be indicated by the fact that it did not ship any of the sacks on Sept. 23. It ought not to be presumed, in the absence of evidence to that effect, that appellee deliberately intended to breach its contract.

"Appellant alleges that for years it had been buying sacks from appellee on similar contracts, and that appellee had always shipped same at the price named in such contracts, at such times and in such quantities as ordered to meet appellant's requirements in the conduct of its milling business. This, if true, would indicate that the parties themselves had not regarded time as the essence of such contracts. Appellant alleges that it was expressly agreed that this usage should apply to the contract here under consideration. If time was not of the essence of the contract, proof of such agreement would not contradict the contract, but would serve to explain the same.

"Appellant alleges that, if the contract was in writing, it contained technical language, which it was competent to explain by expert testimony, namely, 'Apply usual quantity differentials'; that this language meant that the prices stated are for lots of 1,000, but, if the sacks were shipped in greater quantities, a less price should be paid for same. This, if true, clearly indicates that the sacks were not all to be shipped on Sept. 23, 1916, but as ordered within a reasonable time."

SECTION 157. WHEN TIME EXPIRES

When the seller has latitude as to time, as where delivery is to be made f.o.b. cars at a mill in a certain month, he is entitled to defer delivery until the very last day without incurring liability to the buyer, even though delay in transportation may result in the shipment arriving at its ultimate destination at a later date than the buyer expected.

"Delivery" in this sense must, of course, be understood as relating to the time when the title passes to the buyer. For instance, if flour is to be delivered f.o.b. car at the seller's mill in July, the seller makes timely delivery by placing the flour free on board the car at that place July 31, and is legally unconcerned as to when the buyer receives the car. But if the agreement calls for delivery at the buyer's place of business in July, the seller takes the risk of deferring shipment to so late a date that it fails to arrive at its destination before Aug. 1.

The following statements taken from 35 Cyc. 177, 178, are fortified by decisions of the highest courts of the country:

"Where delivery is to be made between certain dates, the seller is not bound to deliver until the last day. So if the agreement is that delivery shall be made within a designated month, the seller has until the last day of the month to make delivery; and a delivery by carrier at the usual place on that day is good, although the buyer did not actually receive the goods until the next day.

"As a general rule, the seller has the whole of the last day named in which to deliver, especially if the buyer is present to receive the goods, and there is time to weigh and inspect the goods before midnight. If, however, time must be allowed for the examination of the goods by daylight, delivery must be made before sunset.

"So, too, the parties may by their contract limit the hour of delivery, and where the contract provides for delivery during the first half of a month of 31 days, delivery must be made by noon on the sixteenth day."

But it would seem that a seller, by deferring loading until the last day or hour, assumes the risk of liability for failure to deliver, if some unforeseen event prevents completion of delivery, especially if it appears that there would have been no obstruction to delivery at an earlier time within the contract period.

SECTION 158. VARIOUS TERMS INTERPRETED

Apart from trade customs, which become parts of contracts made in contemplation of such customs, it is generally held by the courts that where a contract of sale calls for shipment "quickly," "promptly," "immediately," "forthwith," "as soon as possible," etc., the seller still has a reasonable time in which to make shipment, notwithstanding the fact that these terms indicate a purpose to hasten delivery.

Contracts of sale, and especially those which contain trade terms, will be interpreted in the light of trade customs not at variance with the express provisions of an agreement, if it appears that the parties knew of the custom invoked, at

the time the contract was entered into. In many cases, attempt has been made to raise a conclusive presumption that a person engaged in a particular line of business knows of all general usages and customs affecting that trade, but the rule generally followed by the courts is that the presumption is merely prima facie, and hence rebuttable.

So, where a Boston contract called for "prompt" shipment of grain sold, the Connecticut supreme court of errors interpreted the agreement in the light of a then existing custom of the Boston grain trade to regard "prompt shipment" as meaning within 10 days. The same interpretation was placed by the Illinois appellate court upon a contract for "prompt shipment" of corn.

In this case the corn was offered for "prompt shipment," but the buyer, in ordering, directed shipment "at once." Under the circumstances, the court decided that the acceptance should be regarded as one for "prompt shipment" and not literally construed as requiring delivery "at once."

When unaffected by trade custom, the Alabama supreme court finds that "promptly" merely means within a reasonable time, and the appellate courts of New York and Colorado have declared that "prompt" and "quick" are ordinarily synonymous.

Giving effect to a custom in the coal trade, a court has decided that a contract for "immediate" shipment permits delivery on board cars during the month in which the order is given and accepted.

When there is no controlling custom, the Georgia supreme court holds that "immediately" means without delay, except such as necessarily arises in the usual course of the particular business in hand. This court recognizes the principle that if manufacture of the goods sold is contemplated, and not delivery of goods already produced, "immediate" shipment will require longer time than it would in the latter case.

The Montana and California courts say that what might be regarded as an "immediate" delivery of one class of commodities might not be such delivery of another; that "immediate" delivery is such as the circumstances permit, considering the nature of the goods, their situation at the time of sale, etc.

* *

The principles which were involved in the case of Hopkinsville Milling Co. vs. Guin, 60 So. 270, decided by the Alabama supreme court, are somewhat related to this subject. The milling company contracted to sell defendant a quantity of flour to be shipped "at the buyer's option," subject to understanding that the order should be "carried 60 days free, and 5c per bbl per month till taken out," and subject to terms and conditions printed on the back of the order form.

Those conditions embraced a rule of the Southeastern Millers' Association to the effect that purchases must be ordered out within 30 days, with a maximum possible limit of 90 days, with carrying charges of 10c per bbl per month for flour not ordered out within 30 days.

On these facts, the Alabama court held that the express provisions of the contract must control the printed conditions, so that no carrying charges could be imposed until after 60 days, and then at the special rate of 5c.

It is to be noted that, to be binding upon the parties to a particular flour sales contract, it is not necessary that a trade custom placing an interpretation upon "quick," "prompt," or "immediate" be applied throughout a broad scope of territory or by sellers and buyers in the flour trade at large; it is sufficient if the parties have, through a previous course of dealing, given those terms a special meaning; but the advantage of fixing a standard which will apply to all domestic shipments throughout the country is obvious.

* *

In the case of the Jennings Farms vs. Watson-Higgins Milling Co., 187 N.W. 253, passed on by the Michigan supreme court, it was established by the evidence that under usage in the grain and milling business the term "time, shipment prompt," in a sales contract calls for shipment within 10 days.

An agreement for "prompt delivery" calls for delivery within a few days at the most. (194 Ill. App. 543.)

Although a contract called for shipment "at once," placing in transit within two days was held by the Virginia supreme court of appeals to have been timely, where the buyer knew that the seller must obtain cars for loading, and where the seller did not unnecessarily delay in procuring them. (Lawson vs. Hobbs, 91 S.E. 750.)

* *

Because a shipment of flour intended for export was tendered too late, the seller was held by the appellate division of the New York supreme court to be without legal recourse on the buyer rejecting it. (Consolidated Flour Mills Co.

vs. Picard Grain & Produce Co., Inc., 205 N. Y. Supp. 574.)

The plaintiff mill sold to defendant a quantity of flour under a standard form of contract, for delivery at an eastern seaport. Shipment was to be made "seven days prompt," and "subject railroad accepting shipment." The contract was made June 9, and the buyer was to obtain a government permit authorizing reshipment of the flour to Belgium. That permit was obtained June 18. Shipment was made from Kansas about July 9, and was rejected. Dismissing the suit on appeal from a judgment in plaintiff's favor, the appellate division said:

"In the contract the time of shipment is stated as 'seven days prompt.' This seven days, by all reasonable construction, would mean seven days from the time of the receipt of the government permit to ship. But, as the government permit to ship was received by the seller June 18, shipment must then be made promptly within seven days; but none was made until July 9, which exceeded the seven days.

"On Aug. 7 the buyer wrote to the seller that it had advised it that it could make use of the car, if delivery was had July 31; but the car did not actually arrive at seaport, where delivery was to be made, until Aug. 31, so that there was no extension of time to that date shown wherein the seller had the right of delivery.

"I think the plaintiff is barred from recovery here, because the shipment was not made seven days after the receipt of the government permit. It is claimed, however, that it had trouble getting cars, and there is a provision in the contract, 'subject railroad accepting shipment,' but that provision in the contract refers to the validity of the contract itself, and not merely to the time of shipment. If the seller, for instance, was unable to get shipment within proper time, he might cancel the contract. If the contract had read that the time for delivery was subject to railroad accepting shipments, another question would be presented, but the mere provision in the contract, 'subject railroad accepting shipment,' refers to the obligation of the contract itself.

"I find no liability on the part of the defendant for these goods. There was a claim made that the flour was wormy and deteriorated, and not first class flour. But that question, as I read the record, does not arise here, because no objection was made on that ground. The objection was made on the ground that it was not shipped in time, and clearly it was not shipped within contract time."

* *

The Texas court of civil appeals affirmed judgment for defendant in the case of Gladney Milling Co. vs. Dement, 230 S.W. 1038, a suit to recover damages for rejection of a quantity of corn chops. The court adjudged that there was not a timely tender of delivery, and that dedefendant was properly permitted to offer testimony showing that, under provision in the contract to ship "at once with Market Grocery Co.," it was verbally represented by the salesman who took the order that the mill was sending part of a carload to the grocery company and would send the chops with it. Speaking generally of the term "at once," as an agreed time for delivering goods, the court says:

"This contract expresses no time of delivery except 'at once,' and the [trial] court committed no error in submitting the issue to the jury as to its meaning. It is ambiguous as used in the contract, and parol testimony was admissible for the purpose of explaining it.

"In Words and Phrases, under the subject 'at once,' there are a number of cases collated and cited, showing its meaning as used in such contracts. To ship goods 'at once' in an order does not always mean instantaneously, but requires action to be taken within a reasonable time under the circumstances of the particular order, for performance according to its strictly technical meaning might not be within the contemplation of the minds of the parties at the time, for that would have meant instantaneous, which would have been impossible. . . .

* *

"The phrase, 'ship as soon as possible,' has been often defined, generally being held to mean within a reasonable time under the circumstances of the case. . . . In considering the question as to whether the goods were shipped as soon as possible, all the facts and circumstances connected with the purchase are to be considered." (St. Louis court of appeals in Colorcraft vs. American Packing Co., 216 S.W. 831.)

* *

Writing to The Northwestern Miller concerning understanding in the trade as to the meaning of the word "shipment" in sales contracts, Fred W. Rickert, of New Orleans, made the following observations, based on 25 years' experience:

"Interpretations of the term 'shipment' and the final and faithful execution of a contract or agreement to make 'ship-

ment' within specified time seem to be varied and based upon no generally accepted national or international definition of the term, but rather upon custom existing in particular localities, or upon individual interpretations.

"Thus, definitions of 'shipment' vary, starting from the date of actual delivery to the carriers and their signed receipt therefor, thence to the date of the actual loading, thence to the actual date of departure, and in some cases even to the actual date of delivery to consignees, all of which interpretations I have known to be given as to when 'shipment' has been actually effected.

"'Shipment,' as most generally construed and understood, contemplates the actual delivery to the carrier against the signed receipt of the carrier, dated in accordance with the contract, constituting execution of the shipment; 'shipment' does not constitute what is known as 'final delivery,' or the intervening processes of 'loading' or 'transportation,' and therefore it must be construed that 'shipment' has been actually started and accomplished in accordance with the date of the signed receipt of the carrier, in so far as it is within the power or control of the shipper to effect same.

"The shipper having no power or control of the operations of the carrier, to all intents and purposes he has, therefore, executed 'shipment' in cases where no additional guaranty has been given to the consignee.

"The above opinion is given only in cases of contracts or agreements where 'time of actual loading,' 'time of actual departure,' or 'time of actual delivery' are not specified; in such cases the agreement of the shipper to guarantee 'time of loading,' 'time of departure,' or 'time of delivery' would simply extend such responsibility on the part of the shipper for 'shipment' up to the point of transportation so specified and agreed to by the shipper.

* *

"The date of bills of lading signed by the carrier should be prima facie evidence of when the shipment was started and finished within the control of the shipper; likewise the clause 'on board' in the bills of lading would show that the goods were actually loaded as far as it was possible within the shipper's control; the port records should be the evidence of the actual date of the departure.

"Should the carriers subsequently fail to actually load a shipment on the vessel agreed to and named in the signed bills of lading, the circumstance is one over which the shipper has had no control, and he is, consequently, not responsible therefor, the liability in such a case being clearly on the part of the carrier to the consignee.

"The opinions given above are based on 25 years of actual experience in shipping merchandise, both domestic and export, and although my mind is open to conviction on the subject, the opinions given are based on custom and the generally accepted interpretation of what 'shipment' means."

* *

Under a contract for "shipment during" a certain month, tender of bill of lading to the buyer within that month shows compliance with the agreement, although the goods may have been loaded before the first of the month, held the Oklahoma supreme court in the case of Alexander vs. Walker, 173 Pac. 439.

Five thousand bushels of wheat were contracted for sale by the plaintiff to the defendant, to be delivered f.o.b. Galveston, the destination, and "shipment to be made during August." On the closing days of July the wheat was loaded by the plaintiff, and bills of lading obtained. These bills were presented to defendant Aug. 5, attached to draft for the price. The documents were, however, rejected on the ground that the bills of lading were issued in July. Plaintiff sold the wheat at a loss elsewhere, and sued to recover the excess of the price defendant had agreed to pay. Affirming judgment in favor of plaintiff, the supreme court said:

"In order for plaintiff to comply with this contract it was not necessary for him to ship the wheat from any particular point or to ship it at all. A tender of 5,000 bus of wheat to the defendant in Galveston during the month of August would have constituted a substantial compliance with the contract. The fact that the wheat was loaded and bills of lading issued before Aug. 1 did not constitute a performance of the contract, but it was only when the bills of lading for the wheat so loaded were tendered to the defendant that plaintiff could be held to have tendered the performance of this contract. . . .

"It seems clear that the words in their respective confirmations as to the time of shipment are intended to govern the time of the performance of the contract, to control the time when the defendant would be required to accept or would be entitled to demand the wheat purchased by him."

* *

Under a c.i.f. contract of sale, provid-

ing for shipment from a given port (in this case, Marseilles) not later than Jan. 31, the seller made good delivery by placing the goods on board a vessel scheduled to sail Jan. 25, although the vessel did not depart until Feb. 8. In so holding in the case of Jacob Glass, Inc., vs. Banca Marmorosch, Blank & Co., Soc. Anon., 204 N. Y. Supp. 636, the city court of New York said:

"The contract was a c.i.f. sale. Under both the common law and the statutes of this state it is clear that in the circumstances herein submitted the defendant fully performed its contract by a timely delivery of the merchandise to a carrier, especially where, as here, the carrier's conveyance was scheduled to leave the point of shipment before the stipulated date. The sender was not liable for delays thereafter. . . . The court cannot agree with plaintiff that the use of the expression 'ship from Marseilles,' in the contract, changed the ordinary responsibility of the defendant shipper."

* *

"In a contract for continuing sales with monthly deliveries, and if no other intent sufficiently appears, the seller has the option to delay his delivery until the end of the month," declared the United States circuit court of appeals, sixth circuit, in the case of Vogt Brothers Mfg. Co. vs. Sloss-Sheffield Steel & Iron Co. (297 Fed. 54).

On the other hand, of course, if the contract is appropriately worded, it will be held to entitle the buyer to delivery at such time within the stated period as he may give shipping instructions.

In the case of Stern vs. Wohl, South & Co. (207 N. Y. Supp. 669) decided as late as Jan. 16, 1925, the appellate division of the New York supreme court held that a contract requiring deliveries to commence "April, May" did not require that they commence until the end of May.

In the case of C. Bahnsen & Co. vs. Leaf (197 N. Y. Supp. 160), the same court ruled that a contract for "Delivery, August/September/October" permitted the seller to make delivery at any time within the three months.

Also under an agreement for delivery "in the months of June, July, and August, 1918," the same court decided that the sellers had until the last day of August in which to deliver, in the case of Crown Embroidery Works vs. Gordon. (180 N. Y. Supp. 158.)

In Morel vs. Stearns (88 N. Y. Supp. 416), another New York court said: "The contract called for delivery during April and May. . . . If the six bales should be tendered before the end of May the defendants would be bound to receive them."

The Illinois supreme court went so far as to declare that a contract to deliver 5,000 to 7,000 tons of coal from June 1, 1902, to April 1, 1903, "would have been complied with by a delivery of coal at any time up to April 1, 1903." See Harman vs. Washington Fuel Co. (81 N. E. 1017.)

To the same effect see the decision of the Maine supreme judicial court in the case of Hoyt vs. Tapley (116 Atl. 559).

The decision of the Georgia court of appeals in the case of Moultrie Grocery Co. vs. Caddick Milling Co. (96 So. 583) is in line with the authorities above cited. The contract in that case called for shipment of flour, "Nov. and Dec." The buyer was held to be entitled to order the flour out by the end of December. The substance of the decision appears in the official syllabus:

"The true construction of the contract in this case is that the time of shipment of flour is limited to the months of November and December, and that as to this provision time is of the essence of the contract. The plaintiff, not having ordered out the flour within the time specified in the contract, had no right of action for breach of contract against the defendant for failure to deliver the remainder of the flour."

* *

When a contract for a sale of goods provides for delivery within a stated time at "buyer's option," the seller is entitled to reasonable notice before he can be held to be in default, according to the opinion of the appellate division of the New York supreme court in the case of Levant American Commercial Co. vs. W. Wells & Co., 174 N.Y. Supp. 303.

In this case an order for delivery on 12 days' notice was held to have been reasonable, where the goods were to be delivered in New York for export under a contract made in that city, the goods being in New York for aught that appeared in the proof as to the negotiations.

Defendant sought to show at the trial that the goods were actually in the West, and that one week would not allow reasonable time in which to transport them to the seaboard, but this evidence was excluded on the ground that there was no proof of mutual understanding that the goods, at the time of the making of the contract, were elsewhere than in New York.

And, since the contract, dated Sept. 27,

called for delivery at the buyer's option any time before Jan. 1, and since notice given Nov. 10 to deliver Nov. 22 was found to have been reasonable under the circumstances, it was decided that damages for nondelivery should be assessed with regard to market values on Nov. 22.

* *

The suit of O. A. Talbott & Co. vs. Byler, 217 S.W. 852, which was brought to recover damages for nondelivery of corn, was successfully defended on the ground that plaintiffs refused to receive tendered delivery within the contract time limit.

The contract of sale provided for delivery "on or before the 10th day of December, 1917." The evidence tended to show that defendant offered to make delivery Nov. 30, 1917, and a few days later, but that plaintiffs were unwilling to accept delivery then. Under these circumstances, the Kansas City court of appeals, in affirming judgment in defendant's favor, said:

"The phrase 'on or before' a certain date in a contract, with reference to the time it is to be performed, limits the time of performance to the date last mentioned if the subject matter of the contract and the circumstances are such that time may be deemed as of the essence. . . .

"The contract was for the sale and delivery of a commodity the price of which was subject to change and fluctuation on the market, and the contract fixed the time within which delivery and consequent acceptance were to be had. In such cases time is of the essence of the contract, and if the buyer refuses to accept delivery at or within the time designated, the seller is not obliged to deliver after that date."

* *

The case of F. Marroquin & Co. vs. Wormser Bros., 249 Fed. 428, decided by the United States circuit court of appeals, fifth circuit, involved a contract to sell corn for shipment into Mexico while disorders there interfered with commerce.

In the course of telegraphic negotiations had wholly within Mexico, defendants asked for "best price of white corn in bulk to be shipped when communication is opened." In quoting a price, plaintiffs attached as conditions that $500 be deposited to their credit, and that draft be attached to bills of lading, and added, "We sell on no other conditions." Defendants wired: "We will take five cars, shipping when communication is open," etc.

It seems that no corn was actually received by defendants, although shipment was made, and that the drafts were not paid. Plaintiffs sued to recover the value of the corn.

The court holds that defendants' liability depended upon whether communications in Mexico were open when plaintiffs shipped the corn, and that under conflicting testimony on this point it was for the jury to determine whether shipment was made at a proper time or not.

SECTION 159. CONTRACTS SILENT AS TO TIME

If a contract of sale does not specify a time for delivery, it will be presumed that the parties intended that it should be made within a reasonable time. This general rule of law was applied by the Kansas City court of appeals in the case of Glasgow Milling Co. vs. Burgher, 97 S.W. 950, which involved a shipment of flour. The court said: "There being no specific time mentioned, a reasonable time to make the delivery would be implied by law."

Under all the decisions, the question as to what constitutes a "reasonable time" must be determined upon a consideration of the peculiar facts and circumstances of the particular case.

* *

On the subject of time for delivery, the opinion of the Oregon supreme court said in Hurst vs. Hill, 188 Pac. 973:

"This being a contract in which no time for delivery was fixed by the terms of the instrument itself, it is conceded . . . that there could be no default which either the buyer or the seller could take advantage of until one party or the other had made a demand for delivery or acceptance. And this is unquestionably the law.

" 'If no time is fixed for delivery, the buyer must make a demand.' 35 Cyc. 165.

" 'Neither party could put the other in default, without performance or an offer to perform upon his part.' . . .

" 'If both parties are present, and neither of them tenders performance, then both are in default, and neither of them can sue the other for the breach.' . . .

"And we think it equally clear that, if either party lets a reasonable time expire without a demand, then the contract lapses, and neither party can enforce a performance."

The court concludes that where several months pass by without demand by the buyer for delivery of goods under a contract specifying no time for delivery, and where the price materially ad-

vances in the meantime, the seller will not be held bound to make delivery.

* *

Delivery must be made within a reasonable time if the contract specifies no time. (Kansas City court of appeals in Heller vs. Ferguson, 176 S.W. 1126.)

Under a contract to sell f.o.b. place of shipping, with no time for loading fixed, the seller is bound to complete loading within a reasonable time, without special demand by the buyer, where no shipping instructions are required. (Washington supreme court in Sussman vs. Gustav, 186 Pac. 882.)

SECTION 160. EXTENDING DELIVERY TIME

A holding of the Tennessee supreme court in the case of Wildberg Box Co. vs. Darby, 223 S.W. 855, serves to clarify the law on the subject of mutual rights under a contract for a sale of goods where time for delivery is indefinitely postponed beyond the time originally agreed upon. The following is the substance of the court's conclusions, which appear to be in line with what the courts in other jurisdictions hold:

When time for delivery passes and the buyer elects to waive his right to declare a breach on the part of the seller, by giving the latter to understand that belated delivery will be accepted, although without agreement as to any particular time when the postponed delivery shall be made, the seller is entitled to a reasonable time in which to make delivery. Or the buyer can reinstate time for delivery as a vital element of the contract by giving the seller notice that delivery by a specified date (so far distant in the future as to afford the seller reasonable opportunity to deliver) is required.

But the buyer himself becomes guilty of contract breach where he waives an original requirement for delivery by a certain date, acquiescing in an indefinite postponement of delivery, and then suddenly gives the seller notice of termination of the contract, without any opportunity for delivery.

See, also, 262 S. W. 467.

* *

In Strong vs. Thurston, 191 Pac. 575, passed on by the Kansas supreme court and involving breach of a contract to sell grain, it appeared that after the contract remained unfulfilled from the agreed date of shipment—Nov. 6—until Nov. 17, the buyer sent a letter confirming a claimed telephone conversation, extending the time for shipment to Nov. 25. Further extensions were similarly confirmed, and the sellers did not object to any of them. Under these circumstances the supreme court said:

"We see no obstacle to holding the extension agreement valid. The course of the defendants in failing to object in any way to the supplemental confirmations sent them was plainly adopted to induce the plaintiff to believe that they acquiesced in them, and they must be held to have intended the natural result of their conduct. The original confirmation contained a provision that any change might be a part of the contract, if incorporated in a written supplement, but that any verbal understanding, not written in the [original] confirmation, should be of no effect. We regard the incorporation of the terms of the extensions in written statements sent to the defendants, and received by them without objection, as amounting to their incorporation in a supplement, and as giving them the force of written agreements.

"Each extension operated to the advantage of the defendants [the sellers]. By their failure to meet their obligation with promptness they had already incurred a liability to the plaintiff for damages. His forbearance gave them renewed opportunity to discharge all their obligations by performance.

"If they had at any time concluded that a further rise in price [value] was probable, they could have brought matters to a head, and avoided the risk of an increase in the amount of their loss as then indicated, by buying at the market and filling the order. They could perhaps have accomplished substantially the same result by merely notifying the plaintiff that they would not make delivery, creating an immediate breach of the contract, for which the measure of damages would turn upon the then state of the market. . . .

"The situation is not the same, however, as that presented in Flour Mills Co. vs. Dirks, 100 Kansas 376, 164 Pac. 273, where the original contract in so many words gave the buyer the right to make extensions, or in Wichita Mill & Elevator Co. vs. Liberal Elevator Co., 243 Fed. 99, 155 C.C.A. 629, where a rule of the Kansas Grain Dealers' Association, which was made a part of the contract, authorized an extension by including it as one of the options given to the buyer upon the seller's default.

"But here the extension contracts, the terms of which were evidenced by the supplemental confirmations, were supported by a sufficient independent consideration in the mutual agreements of the parties. The plaintiff waived his

right to close the deal before the date named, and the defendants substituted for their existing obligation to make delivery at some indefinite time to be selected by them a promise to deliver within the new period fixed."

* *

The decision of the United States circuit court of appeals, eighth circuit, announced in the case of Consumers' Bread Co. vs. Stafford County Flour Mills Co., 239 Fed. 693, throws important light on the subject.

Defendant agreed to sell 10,000 bbls flour to plaintiff at a stated price to be delivered in equal monthly installments covering January, February, March and April, 1912. Concessions as to time for delivery were made by both parties during and after this period, neither treating the other as being in default.

On June 1 only 3,425 bbls had been delivered, and the milling company had expressed inability to state just when the delivery could be completed, but tacitly treated the contract as remaining in force. June 15, plaintiff bought flour elsewhere to cover the shortage in delivery, and subsequently brought suit for reimbursement against the increased cost over the agreed price.

Trial of the suit resulted in judgment in favor of the mill, the United States district court holding that each of the four installments of flour called for by the agreement constituted a distinct obligation, with time for its delivery as a vital element of the contract, and that, since plaintiff had failed to make purchases elsewhere to make up the deficiencies in delivery as they occurred each month, all right to damages was forfeited. But, on plaintiff's appeal, the circuit court of appeals reversed the judgment, saying:

"The action of the trial court was wrong. Beyond question the contract was entire. . . . Upon default by either party as to any installment, the other party might, if it saw fit, treat the contract as abandoned by the other party. Neither party, however, was obliged to do this. It was open to them to waive strict performance. That is especially true in regard to the matter of time. There is no element of a contract with which parties are so free to deal as the time of performance. Waiver of a breach as to that element will be more readily inferred than as to any other feature.

"Here correspondence between the parties leaves no room for doubt as to the waiver. Both parties treated the entire contract as in force. Each continued to express in unequivocal terms its desire and purpose to adhere to the performance of the balance of its terms. Surely, parties have the right to thus modify a contract as to the time of performance.

"It was only when the breach took the form that it did in June, of a total failure, that either party insisted upon its rights. The bread company then gave reasonable notice to the mills company that it required the shipment of the balance of the flour. Failure to meet that requirement was a breach of the contract, and authorized the bread company to do what it did, and it was clearly entitled to recover the difference between the contract price and the market price of the flour. A verdict should have been directed in its favor."

After referring to an English court decision to the same effect, the circuit court of appeals said in conclusion:

"If the mills company had said, 'We are willing to deliver the flour at the rate of 2,500 bbls per month until the balance is delivered,' we think it would have been entitled to thus distribute its performance. . . . Here the postponements were granted, some at the request of the mills company and some at the request of the bread company, but much more at the request of the former than the latter. So the enforcement of the present contract after the advance in price is not as great a hardship as it was in the English case. . . .

"When no time is fixed for performance of a contract for the sale of goods, the law by implication fixes a reasonable time. What that will be depends upon the nature of the transaction. The same principle ought to control when parties by mutual concessions have carried the time of performance beyond that fixed by the contract. The law would then allow to each party a reasonable time, depending upon the terms of the contract and the other circumstances of the case."

* *

A seller cannot be held to be in default in making delivery of the goods sold, merely because of failure to deliver within the contract time, where the buyer's conduct has led the seller to believe that delivery within that time has been waived by the buyer. Under such circumstances, the seller cannot be deemed to be in default until given reasonable opportunity in which to deliver.

This is the gist of the decision of the appellate term of the New York supreme court in the case of Barish vs. Brander, 180 N. Y. Supp. 447.

* *

In the case of C. E. Slauson Co. vs. L. Arena Bro. & Nobile, 130 Atl. 68, the Connecticut supreme court of errors decided that, even if after making of a contract of sale the parties agreed upon a suspension of weekly deliveries until such times as defendants should call for the same, the defendants' subsequent repudiation of the purchase, as to the undelivered flour, entitled plaintiff to tender delivery of all the remaining flour within a reasonable time. The court said that "The result was not necessarily to resuscitate the provision for weekly deliveries."

SECTION 161. TENDER AFTER NOTICE OF CANCELLATION

On failure to deliver flour within an agreed time and expiration of the buyer's notice to the seller of intention to purchase substitute goods in the market, it is too late for the seller to tender delivery, according to the holding of the appellate term of the New York supreme court in the case of Duhrenheimer vs. Wolf Bread Co., 165 N.Y. Supp. 437.

Plaintiff sued defendant for damages for failing to deliver a carload of flour, and the court found that there was established a valid claim to substantial damages on the following state of facts:

Defendant, instead of delivering the flour to plaintiff on its arrival as agreed, through mistake used it in its own baking business. On the failure to deliver, plaintiff gave defendant written notice that two days later plaintiff would go into the open market and purchase a substitute carload of flour. No reply having been made to the notice, plaintiff bought in the necessary flour. Later, defendant offered to furnish flour of the contract grade, but the court holds that this offer came too late to avoid liability for the excess of the market price at the time agreed upon for delivery above the agreed price.

* *

Suit to recover for nondelivery was not prematurely brought where the seller had refused to fix a time for delivery or make any positive agreement respecting it, after delivery was due and payment of the purchase price had been tendered. And where a buyer has justifiably sued for damages for refusal to deliver, the seller cannot avoid liability by tendering belated delivery. (Washington supreme court in Sussman vs. Gustav, 186 Pac. 882.)

* *

A buyer not being bound to accept delivery after the agreed time for delivery, it was held by the appellate term of the New York supreme court in the case of Charlop vs. Alt, 182 N.Y. Supp. 630, that plaintiff, in suing for damages for defendant's refusal to accept goods bargained for, could not rely upon a tender of delivery made after the date when delivery was due.

SECTION 162. GROWING CROPS

Question as to whether title to wheat passed to the buyer on execution of a contract for its purchase was the main point in controversy in the case of Sikes vs. Freeman, 204 S.W. 948, passed upon by the Springfield, Mo., court of appeals.

In January, 1917, defendant agreed to sell to plaintiff "his entire wheat crop" growing on certain land, at $1.30 per bu, "basis of No. 2 wheat," to be delivered in June or July at a specified warehouse. Defendant reserved the right to save out 400 bus of the wheat for seed. Plaintiff paid $1 down, and agreed to pay the balance of the price on delivery of the wheat.

Defendant failed to make actual delivery of the wheat when the crop matured, and was disposing of it elsewhere when plaintiff replevied the grain. Trial of the suit resulted in plaintiff's favor, subject to payment of the agreed price, and the court of appeals affirmed the judgment, holding that the terms of the contract indicated mutual intention that title to the wheat should pass to plaintiff at the execution of the contract. The fact that it was afterwards necessary to separate the reserved 400 bus did not, the court held, prevent a passing of title to the plaintiff to such wheat as was called for by the agreement.

Incidentally, it is decided, in response to a claim by defendant that another person had a half interest in the wheat when the contract was entered into, that defendant, having bargained the whole for sale, was in no position, as against plaintiff, to assert his right to break the contract.

* *

The Mark P. Miller Milling Co., Moscow, Idaho, was nonsuited in an action brought to establish title to a quantity of wheat. The decision of the Idaho supreme court overruled the mill's claim on the ground that the contract under which it claimed was so worded as to show intention for future delivery of the

grain to the mill, and not for a present passing of title. (181 Pac. 703.)

One Sutton, a wheat grower, signed a memorandum, June 22, 1914, reciting that he had sold to the mill for delivery on or before Nov. 1, 1914, 10,000 bus of No. 1 red Russian wheat at 66c bu "in the warehouse of Mark P. Miller at Moscow." It was further agreed that off grade wheat of the same variety would be received against the sale at customary discount. Only $1 was paid down on the contract by the mill.

The wheat was growing when Sutton made this contract, and was incumbered by chattel mortgages. In September, defendant, one of the mortgagees, sold the grain, presumably applying the proceeds to its mortgage. The mill then sued defendant for the value of the wheat, claiming title under the contract with Sutton.

The supreme court decided that the mill had no title, reaching a conclusion that the parties to the contract did not contemplate a present passing of title to the wheat, but merely bargained for future delivery.

"The price fixed in the agreement was for wheat delivered in the warehouse at Moscow," reads the opinion. "Had there been a loss of the crop before delivery, it could not be contended that the loss would have been that of the milling company. The company was not obliged to pay until delivery at the warehouse was accomplished, and in case of prior destruction delivery could not have been made."

CHAPTER XIV

PLACE FOR DELIVERY*

SECTION 163. IN GENERAL

IN the case of National Feed Co. vs. Sunny South Grain Co., 101 So. 542, before the Alabama court of appeals, it appeared that plaintiff booked defendant's order for alfalfa meal, to be shipped by June 15. Plaintiff seller's place of business was in St. Louis, and controversy arose concerning its right to ship meal from Garden City, Kansas, 700 miles farther away from Birmingham, the destination of the shipment, than St. Louis. Passing upon this point, the court of appeals said, in part:

"When the plaintiff, a jobber doing business at St. Louis, Mo., accepted the order of the defendant manufacturer of mixed stock feed in Birmingham for five carloads of No. 1 alfalfa meal, the contract being silent as to the place from which the commodity should move, the law will presume that the point of origin of the shipment was St. Louis, Mo., the place of business of the seller."

The court, however, recognized that, the contract being silent as to place of origin of the shipment, evidence was admissible by either party to show whence the meal might be shipped according to trade custom. The seller's evidence tended to show a custom in the grain and meal trade permitting shipment from any place in the country, while the buyer's evidence tended to show that shipment must be made from the place where the seller's place of business was located. The court of appeals refused to disturb a jury's implied finding in favor of the buyer's version.

* *

"Where a contract specifies that freight is allowed to destination, then that becomes the place of delivery," declared the Springfield, Mo., court of appeals in the case of Consolidated Flour Mills Co. vs. Miller, 238 S. W. 510.

* *

"The place where goods are to be delivered and where they are to be sent are two entirely different places. . . . In the absence of any provision for the place of delivery, it is presumed to be where the goods are at the time of sale, which is usually the seller's place of business or shipment. Both parties in this case were located in Kansas City, and the evidence seems to indicate that the cars were to be loaded, and the shipment, so far as plaintiff was concerned, was to originate, there." (Kansas City court of appeals in Pratt vs. Schreiber, 249 S. W. 449.)

* *

Goods are "shipped" when they are placed in the hands of a carrier for transportation, regardless of when they are actually moved by the carrier, decided the Indiana appellate court in the case of Daily vs. Horner, et al., 133 N. E. 585.

* *

A decision of the New York supreme court, handed down in the case of Seaver vs. Lindsay Light Co., 182 N.Y. Supp. 30, followed well-settled rules of law by holding as follows:

The place for delivery is to be ascertained according to the manifest intention of the parties.

Ordinarily, a contract to sell is completed when the seller has delivered the goods to a carrier to be transported to the buyer. That constitutes a delivery to the buyer, and this is true, although the goods have not been paid for. But this rule does not apply where the seller agrees to deliver the goods at the seller's place, or makes some other agreement showing a different intention of the parties.

Under the common provision, f.o.b. place of shipment, the seller's obligation is completed when he ships the goods, and the title to them passes then, and he is not obliged to pay the freight. If the agreement is f.o.b. place of destination, the seller must pay the freight, and may be deemed to have retained the title to the goods until their arrival at the point of destination. But if there is anything to show that the intention of

*Place for delivery, as governing risks of loss or injury in transportation and the assessment of damages for breach of contracts to buy or sell, is mainly considered in subsequent chapters.

the parties was different, that will control. Hence, the fact that freight is paid by the seller is not necessarily conclusive that the delivery was to be made at the place of destination.

The court adds these interesting observations concerning the meaning of "c.i.f.": "The provision c.i.f. seems to have been rarely used in commercial contracts in this country. Many textbooks contain no mention of the term, and but few cases have been found here which touch upon its meaning. The provision, however, is common in England, and has been used there frequently in shipping contracts.

"Its meaning is stated in 11 Corpus Juris, p. 765. It is an expression indicating that the price fixed covers the cost of the goods and insurance, and freight on them to the place of destination. Sometimes the initials are transposed, c.f.i.,—but the meaning is the same. Under a contract containing such a provision, the seller must ship the goods, arrange the contract of affreightment to place of destination, and pay its cost or allow it from the purchase price, and procure insurance for the buyer's benefit for the safe arrival of the goods and pay therefor. . . . When the seller has done this, and forwarded the papers to the buyer, he has fulfilled his contract, and delivery is complete. There is no obligation by the seller to deliver the goods at the place of destination. . . .

"The principle above referred to was stated and approved by the Supreme Court of the United States in Thames & Mersey Insurance Co. vs. United States, 237 U.S. 19, at page 26, 35 Sup. Ct. 496. . . . This is the meaning and effect of the letters c.i.f., in the absence of any agreement to the contrary, or any provisions showing a different intention. . . .

"That such is the meaning that must attach to this expression is emphasized by the requirement that the seller must procure insurance for the buyer's benefit. This is a manifest indication that the delivery was to be complete at the place of shipment, and that title to the goods was in the buyer from that time. If this were not so, why would the buyer require the seller to procure insurance for him?"

The decision in this case was upheld by the court of appeals (135 N. E. 329).

The timeworn legal principle that, where goods are shipped from seller to buyer without any contract stipulation manifesting contrary intention, it will be presumed that the parties intended that title should pass to the buyer on delivery of the goods to the carrying railway company, was reaffirmed by the Iowa supreme court.

In the litigation before the court it appeared that defendant sent a telegraphic order for goods to be shipped at once. Immediate shipment was made, but there was a delay in transit, on account of which defendant refused to accept the shipment on its arrival. But the plaintiff was upheld in its right to recover the agreed purchase price, on the ground that the ownership of the property became vested in defendant when the goods were promptly intrusted to the railway company.

The defendant buyer having been advised by telegraph of the shipment the day it was made, the court holds that the fact that the seller may have failed to transmit the bill of lading was not available to defendant as showing that title had not passed; it being possible for defendant to have traced and obtained the shipment notwithstanding plaintiff's omission to promptly forward the bill of lading.

Incidentally, the opinion of the Iowa court recognizes the point that the circumstance that a shipping seller may be called upon to select the carrier which is to carry the goods, because of omission of the buyer to give routing instructions, does not make the transportation company the agent of the seller.

See, also, Clement Grain Co. vs. Border Wholesale Commission Co., 237 S. W. 596, decided by the Texas court of civil appeals.

* *

A contract to sell "basis Chicago" has been held to fix the price of goods and not the place for delivery. (Clark vs. Pond Creek Mill & Elevator Co., 270 Fed. 482, decided by the United States circuit court of appeals, seventh circuit.)

SECTION 164. GOODS SOLD "DELIVERED"

A decision of the Springfield, Mo., court of appeals probably accords with common understanding in holding that a contract to sell goods "delivered" requires the seller to transport them to the town or city where the buyer lives, and not merely to put them on board cars at the place where the shipment originates. (Mayo vs. J. L. Price Brokerage Co., 218 S.W. 932.)

To the same effect see the decision of the Indiana appellate court in the case of Fort vs. Cummins, 128 N. E. 624.

SECTION 165. UNDER F.O.B. CONTRACTS

It is not to be supposed that the term "f.o.b." invariably is to be taken as in-

dicating the place where goods are to be delivered by a seller to the buyer, although that is generally the proper interpretation. The courts seem to agree that where the term is used in such context as to manifest a purpose to use it only in indicating the price basis, it will not control the question as to where delivery is to be understood as being made. A case illustrative of the point is that of Miller & Sons Co. vs. E. M. Sergeant Co., 182 N.Y. Supp. 382, decided by the appellate division of the New York supreme court.

Defendant contracted to sell plaintiff goods under a written agreement containing the following independent paragraph: "Price: $1.25 per 100 pounds basis of 48 per cent f.o.b. Solvay, N. Y." Plaintiff's place of business was Philadelphia, and the goods seem to have been at some third point when contracted for sale.

Reviewing an action for damages for nondelivery of certain installments under the contract, the court says:

"The learned justice of the city court was correct in the ruling that the words 'f.o.b. Solvay, N. Y.' did not have reference to the place of delivery, but erroneously held that the place of delivery was at the plaintiff's place of business in Philadelphia. The contract was silent as to the place of delivery. Where that is the case, the store or factory of the seller or the place where the goods are kept is the place of delivery."

The decision will serve to emphasize the importance of avoiding ambiguity in sales contracts on the point as to whether the "f.o.b." abbreviation is intended to fix place of delivery or merely a price basis.

See, also, the decision of the Texas court of civil appeals in Early-Foster Co. vs. A. P. Moore's Sons, Inc., 238 S. W. 299.

* *

The Nebraska supreme court has decided that a quotation of "prices f.o.b. Omaha," the destination, could not be construed as requiring the seller to deliver there, in the face of other circumstances showing that delivery to the buyer at the place of shipment was fairly contemplated. (74 N.W. 670.) And the Pennsylvania supreme court has held that an agreement to "bill f.o.b." a certain point did not bind the seller to make delivery there instead of at the place of shipment, which is ordinarily regarded as the place where title passes to the buyer, if the shipment is billed directly to him. (50 Atl. 928.)

Provision in a contract to sell goods, allowing the buyer freight to a designated point, did not control the place of delivery, nor did the buyer's implied right to inspect at the destination, held the Michigan supreme court in the case of Dow Chemical Co. vs. Detroit Chemical Works, 175 N.W. 269.

Defendant agreed to sell certain goods to plaintiff f.o.b., Detroit, the shipping point, "less freight to Midland, Mich.," and payment was to be made "net cash in 10 days."

To determine whether plaintiff was in default in payment, so as to sustain defendant's cancellation of the contract, it became important to determine the time from which the 10 days' credit period should be computed. The court sustained defendant's contention that the time ran from the date of delivery of the goods f.o.b. the shipping point, as against plaintiff's claim that the time ran from the date of inspection and acceptance by it at the destination.

Holding that the provision for deduction of freight to the destination did not constitute that point the place of delivery, the court said:

"While the plaintiff had the right to deduct the freight rate from Detroit to Midland, as counsel for the defendant pertinently suggest, plaintiff could have ordered this car sent to any point it designated and, no matter where sent, to deduct the Midland rate of freight. The provision is specific that delivery shall be on defendant's tank cars at Detroit, and this was in no way controlled by defendant's agreeing that plaintiff might deduct the freight cost of transportation to Midland. . . .

"This construction is accentuated by the provision in the contract that 'Any decline or advance in freight rates or other transportation charges which may be made subsequent to date of this contract shall be for the account of and borne by the buyers.' . . . We must therefore conclude that delivery was made and that the title to the acid passed to the plaintiff when placed in its car and consigned for transportation to plaintiff at Midland."

There is a general rule of law that title to goods sold and shipped passes to the buyer when the goods have been intrusted to the carrier, properly packed and billed, in the absence of agreement to the contrary. Plaintiff buyer in this case sought to avoid application of this general rule on the further ground that, as the goods bargained for were to be of a particular grade, plaintiff necessarily had the right to inspect before ac-

ceptance, and that title did not pass until such inspection and acceptance. But the supreme court overruled this contention, remarking:

"The argument loses sight of the fact that title may pass even though the right to reject after acceptance be reserved. . . . In 'Williston on Sales' . . . it is said: 'Where by the terms of the bargain the property was to pass before delivery to the buyer, the buyer has a reasonable time after delivery in which to examine the goods and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this does not prevent the title from passing, nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract.'"

* *

The importance of more explicit mutual understanding than may exist on use of the term "f.o.b." without qualifying words, especially as applied to export dealings, is shown by a communication from the National Foreign Trade Council appearing at page 277 of the Oct. 15, 1919, issue of The Northwestern Miller. The communication read:

"Correspondence from Australia has reached the National Foreign Trade Council complaining that American manufacturers and exporters who have quoted prices 'f.o.b. New York' have interpreted that quotation to mean merely delivery within the limits of the port of New York, and not necessarily actual delivery of the merchandise on board the over-sea vessel. The Australian contention is that the term 'f.o.b. port' has only one meaning—namely, 'free on board over-sea vessel,' and that a quotation 'f.o.b. port' means that the purchaser has no charges to meet except those of ocean freight and insurance.

"It appears that some American manufacturers and exporters who have quoted prices 'f.o.b. New York' or other port have contented themselves with the delivery of the goods within the limits of the port named, instead of delivering them on board the over-sea vessel, with the result that charges for cartage, lighterage, storage, and other items have been passed on to the Australian purchaser who had understood that the 'f.o.b. port' quotation covered delivery of the goods on board the over-sea vessel.

"The possibility of adverse effect upon American foreign trade in this situation is obvious, and leads the National Foreign Trade Council to urge upon American exporters generally the wisdom of following invariably a practice under which such complaints cannot possibly arise.

"There is no question that the original meaning of 'f.o.b. port' was 'free on board ship,' and that that is the general and usual interpretation of it among foreigners. The National Foreign Trade Council desires to point out that it is essential to the best practice for American exporters and manufacturers in making an 'f.o.b. port' quotation, to have it mean 'f.o.b. over-sea vessel'; but in any event the quotation, whatever it is, should be unmistakably clear and explicit.

"If in quoting prices 'f.o.b. port' American manufacturers or exporters have in mind any other delivery than on board over-sea vessel, they should make perfectly clear exactly what they have in mind—namely, that cartage, storage, or other services are for buyer's account.

"Any form of quotation that is susceptible of double interpretation lends itself to the possibility of abuse detrimental to American trade as a whole, and the National Foreign Trade Council urges upon American exporters and manufacturers that they adopt the unvarying practice of making their quotations so explicit as to preclude the possibility of misunderstanding."

See, also, section 85.

SECTION 166. BUYER MAY WAIVE PLACE

Where a contract is made for a sale of mill products to be delivered f.o.b. a distant point, is the buyer entitled to waive the benefits of the stipulation as to place of delivery and demand delivery at the place from which it was understood that the shipment would be made?

This question was answered in the affirmative in an opinion handed down by the appellate division of the New York supreme court in the case of Lekas & Drivas vs. Albert Schwill & Co., 175 N.Y. Supp. 707.

Apparently this suit was brought to recover damages for nondelivery of 150 tons of malt. The contract specified that delivery should be made "f.o.b. cars New York, lighterage free," and that the buyer would furnish export license and steamer permits for the malt in time to enable the seller to "make shipments from Chicago."

Before arrival of the time for shipment, as extended, the buyer notified the seller that it waived the provision for delivery f.o.b. New York, lighterage free, and would accept delivery at the seller's warehouse in Chicago. At the same time the buyer offered to pay the full purchase price; the contract having provided

for payment on presentation of bill of lading.

It seems that defendant, the seller, denied plaintiff's right to change the place of delivery without defendant's assent. But the court says:

"It is a fair intendment of the contract that shipment was to be made from Chicago, Ill., and the provision that delivery was to be made f.o.b. cars New York, lighterage free, was to the advantage of the purchaser. By reason thereof the expense of freight and lighterage charges and the risks of transportation were to be borne by the seller.

"Therefore, when the plaintiff agreed to waive those provisions of the contract, he waived provisions for his benefit. The contract was not changed so that the defendant was required to do something different, but something less than was required of it by the contract. It was competent for the plaintiff to waive these provisions and offer to accept delivery at Chicago."

And as to the necessity for the buyer furnishing export license and steamer permits, the court adds:

"The only purpose of requiring export license and steamer permits had to do with transportation of the malt, and when the plaintiff waived the delivery in New York and assumed the burdens of transportation, the requirement that these should be furnished in time to enable the defendant to make shipments from Chicago had no further potency."

The case was presented to the court on a question as to whether the plaintiff's complaint stated a cause of action on its face. The opinion makes the following intimation as to a possible defense that might be affirmatively pleaded to defeat the suit:

"The learned justice at special term suggested that it might be that the malt was not at Chicago, but at other points, where it would be more advantageous to the defendant to make deliveries, or it might be that a lower price was quoted with the understanding that these goods were to be exported and not resold in this country. But, if such was the fact, those matters should be pleaded as a defense."

CHAPTER XV

DUTY TO OBTAIN CARS*

SECTION 167. IN GENERAL

NO doubt it will surprise many persons to hear that the courts are not agreed that a seller under a contract for sale f.o.b. his mill is unqualifiedly bound to furnish any cars at all. It is held by some courts of high authority that the buyer must supply the cars, unless the seller has expressly or impliedly agreed to provide them.

The circumstances under which such an obligation has been found to have been impliedly assumed by the seller were that he had customarily furnished cars under similar contracts with the same buyer, or had treated the particular contract as requiring him to do so.

On the other hand, there are other states in which the view has been judicially adopted that the seller's duty to supply transportation equipment is so generally recognized in the business world that he will be presumed to have agreed to furnish them, in the absence of express or implied special agreement to the contrary. This view has been followed in the latest decisions on the subject.

Under a contract for sale f.o.b. the seller's western mill, shipment to be made in a specified month, is the buyer entitled to require the mill to obtain and load eastern line cars? This important question was raised by a sales manager in a letter to The Northwestern Miller. He wrote:

"Eastern line cars being practically unobtainable, the mill offered to make delivery, as per terms of the contract, f.o.b. Minneapolis, in Great Northern, Northern Pacific, or any possible available equipment. This the buyer refused to accept, stating that eastern line cars, or any cars that would go east of Chicago, were the only ones he could use.

"Is the buyer in default for not taking delivery or furnishing instructions calling for cars that could be obtained by the mills; and in the case of a sudden decline in prices, could a cancellation of the contract be effected for nondelivery, or would the contract be considered, if not so agreed, as continuing until such times as eastern cars become obtainable?"

On the judicial authorities mentioned below, I was of the opinion that the buyer was in default; that he had no right to require loading on the cars of a foreign railroad without supplying those cars himself at the mill. This opinion rests, however, on an assumption that there had been no customary dealings between the parties under which the buyer was justified in believing that the mill would procure eastern line cars on his request.

I do not believe that any judicial authority can be found to sustain a view that a mill is bound to furnish foreign cars, unless that obligation has been fixed by contract or customary dealings between the particular contracting parties. Even those courts which hold that there is an implied agreement by the seller to furnish cars based their conclusion on general custom, which we understand never has required a seller to provide foreign cars; the decisions appearing to require no more than that the seller load upon the cars of a domestic road, or other available cars, and bill the shipments through in proper form.

The following citation to the law reports shows some of the decisions holding that the shipper is bound to procure the necessary cars, where the buyer has not expressly or impliedly assumed that duty: Menz Lumber Co. vs. McNeeley & Co., 58 Wash. 223; Hurst vs. Altamont Mfg. Co., 73 Kansas, 422 (referred to in section 77); Vogt vs. Schienebeck, 122 Wis. 491, 100 N.W. 820; Elliott vs. Howison, 146 Ala. 568.

Decisions holding the contrary view—that the buyer must furnish the cars unless the seller has expressly or impliedly agreed to do so—are cited as follows: Consolidated Coal Co. vs. Schneider, 163 Ill. 393, 45 N.E. 126; Hocking vs. Hamilton, 158 Pa. St. 107, 27 Atl. 836; Baltimore & Lehigh Railway Co. vs. Steel Rail Supply Co., 123 Fed. 655, 658; Evanston Elevator & Coal Co. vs. Cast-

*Inability to secure cars or steamer, as excuse for nondelivery of goods, is treated in section 188.

ner, 133 Fed. 409; Neimeyer Lumber Co. vs. Burlington & Missouri River Railroad Co., 54 Neb. 321, 74 N.W. 670; Kunkle vs. Mitchell, 56 Pa. St. 100; Dwight vs. Eckert, 117 Pa. St. 490; Chicago Lumber Co. vs. Comstock, 71 Fed. 477; Davis vs. Alpha Portland Cement Co., 134 Fed. 274.

In the Baltimore & Lehigh Railway Co. case above cited, the United States circuit court of appeals, third district, held that the named railway contract to deliver rails f.o.b. Pennsylvania Railroad cars impliedly bound the buyer to procure such cars.

It must be manifest that, in the case presented to The Northwestern Miller, shipment of the goods in cars available in Minneapolis would facilitate arrival of the freight at its destination over awaiting availability of eastern cars.

Under this view, the decision of the Mississippi supreme court in the case of Malaga Packing Co. vs. Threefoot, 97 Miss. 21, seems to be pertinent. There it was decided that routing of freight over a line other than that specified in a contract of sale did not render the shipping seller liable for delay in arrival; it appearing that, on account of shortage of cars, shipment over the designated line would have caused at least an equally long delay.

There is a fundamental legal principle, applicable to all kinds of contracts, that contractual obligations of one party to an agreement cannot be enlarged by the act of the other subsequent to the making of the contract. Hence, if when a contract was made for a sale "f.o.b. Minneapolis, January shipment," there was no express or implied obligation on the mill's part to procure eastern cars, that obligation could not be created by the buyer's subsequent shipping instructions.

The parties should be presumed to have contemplated a probable shortage of eastern cars on western roads, and to have contracted with a view to equipment available at the shipping point. If a buyer could require a mill to furnish certain cars in a case of this kind, it would be possible for him to escape his promise to buy, by demanding shipment in cars known to him to be unobtainable, with the same grace that a restaurant patron salved his conscience in eating meat on Friday by first ordering whale.

I was of the opinion that the buyer broke his part of the contract by refusing to accept delivery as offered by the mill, thereby rendering himself liable in damages, the same as if he had unqualifiedly repudiated the contract, the recoverable damages being based upon the excess of the contract price above any lower market value at the time of such breach of the contract. His right to delivery could not be revived by subsequent availability of eastern cars, and it seems to me that delivery could now be made only upon such terms as may be agreed upon.

* *

The Kansas supreme court has said: "It is our understanding that the phrase or formula, 'f.o.b. cars,' has by long usage and custom acquired throughout the business circles of the country a definite and specific meaning generally understood by all business people.

"When such phrase or formula is used in a business contract between a buyer and a seller of ordinary commercial commodities, where the use of a common carrier is necessary, the parties intend thereby that the seller will at his own expense do all that may be necessary to accomplish the loading and consignment of the goods to the buyer, including the placing of cars upon which to load the commodities sold; and when nothing appears to modify or limit this meaning, courts should enforce the contract so as to effectuate this intent.

"This rule is reasonable, it harmonizes with existing business conditions, and is the universal practice among business people. It is conceded that by this phrase the seller is bound to deliver the goods to the buyer by placing them on board the cars. How can he do this unless he secures the cars?" (Hurst vs. Altamont Mfg. Co., 85 Pac. 551.)

Certain it is that this legal question is so clouded in doubt as to make it unsafe for a shipping mill to rely upon a mere provision for delivery f.o.b. mill or point of shipment as requiring the buyer to furnish transportation facilities, especially when all opportunity for controversy can be removed by using a simple phrase showing who undertakes to provide them. A word in time may avoid a lawsuit.

* *

The New Mexico supreme court follows the rule laid down by the highest courts of Kansas, Alabama, Washington and Wisconsin, by deciding that a contract to sell f.o.b. point of origin requires the seller to procure the necessary cars. The opinion shows that the decisions of the courts of Illinois leave it an undecided question in that state who has the duty of furnishing cars under such a contract, and that the rule in Pennsylvania, as fixed by the supreme court of that commonwealth, is that the buyer must supply the cars.

In states not named above, the question does not appear to have been settled by the highest courts, and is therefore an open one, but the trend of latest decisions on the point is in favor of the view that the seller must furnish the cars.

The New Mexico court intimates, however, that where a contract of sale does not fix the destination the seller may wait until the buyer indicates the destination, when under some rule or custom of the carrier it is necessary to know the destination before the seller can load. (Culp vs. Sandoval, 159 Pac. 956.)

* *

Nondelivery of barley under a contract of sale gave rise to the case of United States Trading Corporation vs. Newmark Grain Co., 205 Pac. 29, decided by the California district court of appeal.

The court reaffirms the now generally recognized rule of law that where a seller undertakes to deliver goods f.o.b. cars and, through being on the ground, more conveniently can arrange for securing cars than the buyer can, it will be inferred, in the absence of agreement to the contrary, that the parties intended the seller to procure the necessary cars. The opinion adds:

"It seems to have been the settled understanding that the plaintiff should make its payments on sight drafts attached to bills of lading procured from the carrier by the defendant. Obviously, these bills of lading could not be obtained from the railway company until the barley had been delivered to the carrier for shipment and its shipment to the point of destination contracted for by the carrier. This, of course, would necessitate the procurement of the cars by defendant, since it was the defendant who arranged with the carrier for the bills of lading.

"But all doubt as to the correct construction to be placed upon these contracts is set at rest by the interpretation which the parties themselves gave to them. Until the embargo created the difficulties which confronted plaintiff and defendant, the latter uniformly arranged for the necessary transportation facilities . . . without making any claim that it was plaintiff's duty to furnish the same. This course of dealing between the parties, whereby they put their own practical construction upon their contracts, convincingly shows that it was well understood by both when they entered into their agreements that the duty of obtaining the cars rested on the defendant [seller]."

The effect of a provision in a contract of sale for delivery of goods f.o.b. cars at place of shipping was considered by the Washington supreme court in the case of Sussman vs. Gustav, 186 Pac. 882.

It was ruled that such a clause does not require the buyer to furnish the necessary cars; and the court goes a step farther by holding that voluntary verbal agreement on the part of the purchaser to assist in procuring cars, after a written contract has been entered into, will not create an obligation on his part to furnish them.

* *

A decision of the Kansas supreme court shows that where a stipulation in a contract is for the obvious benefit of only one of the parties, he may waive compliance with the condition, and the other party cannot treat noncompliance as an excuse for failing to perform the contract on his part.

The decision was handed down in the case of Cardwell vs. Horning, 187 Pac. 878, a suit to recover damages for failure to deliver wheat contracted for sale. The agreement was that plaintiff, the buyer, would furnish cars at a certain station for loading. Defendant, the seller, relied on plaintiff's failure to provide the cars within the specified time as exonerating him from duty to deliver, although admitting that it was understood that the wheat might be piled on the ground, in the event that cars could not be obtained.

"The defendant was not interested," remarks the supreme court, "in the question whether cars could be obtained for carrying away the wheat. The cars were not for his benefit, but for that of the plaintiff, and if the latter saw fit to accept the wheat without cars, the defendant could not escape his liability for failure to deliver the wheat because of the inability of the plaintiff to obtain cars in which to place it.

"This becomes apparent if we turn the case the other way round and suppose that the price of wheat, instead of advancing 50c or 60c a bushel, had declined, and that the purchaser claimed to be unable to obtain cars, and for that reason would not take the wheat. In that case, undoubtedly, the seller would have the right to pile the wheat on the ground and recover the contract price, whether the purchaser was able to obtain cars or not. But in order to maintain such an action he would be required to make either an actual delivery of the wheat at the place provided in the contract, or to make a tender of delivery."

CHAPTER XVI

TENDER OF DELIVERY

SECTION 168. IN GENERAL

IN Daniel-Miller Co. vs. Roper, 270 S. W. 1087, the Texas court of civil appeals held that tender of delivery at the contract time and place was necessary in order to put the buyer in default. But the opinion is not necessarily inconsistent with the general rule stated in the next section.

* *

The Kansas City court of appeals ruled that the Gateway Milling Co. failed to make out a good defense against liability to the Central Flour Mills Co. for nondelivery of all the flour called for by two contracts. It was held that the first company was not relieved from liability to complete deliveries on a theory that the second company, as buyer, rejected a tender made by the selling mill. (213 S.W. 131.)

At a time when delivery was due under the contracts and while market values of flour were rising, defendant, the selling company, claimed to have gotten a 30-minute option on the flour required to fill its contracts with plaintiff, and gave plaintiff that time in which to say whether this flour would be accepted. Plaintiff did not accept, and when it sued for damages, defendant relied upon the rejection of the offer as such rejection of delivery of the flour as released defendant from liability. But, deciding the case in plaintiff's favor, the court said:

"The flour was to be delivered f.o.b. cars at Kansas City. The plaintiff had the right of inspection. Such right is implied, and this right concededly appears to have been exercised and always demanded. There is no evidence that the defendant had the flour in its possession or under its control. Indeed, the contrary is the case. All that it had was some company's promise over the phone to sell defendant 1,000 bbls at $7.20, if taken in 30 minutes. Where the flour was, does not appear, but presumably it was to be shipped to defendant if it were bought. . . .

"To make a tender of delivery means that the one making it shall have it at the time and place named in the contract, and tender it to the buyer without condition, except that he pay the purchase price. . . . There was no evidence that defendant was in possession of anything, or made an offer of anything, by which a symbolic delivery of a bulky article could be made. . . . Nor could the plaintiff be compelled to forego its right of inspection and accept in lieu thereof any one's guaranty that the flour would be as called for in the contract.

"Plaintiff could not be compelled to substitute its rights under a definite, certain, written contract, easily proved, for the precarious rights afforded by some guaranty. If defendant was satisfied with the guaranty of the company giving the 30-minute option, it could have bought and tendered the flour to plaintiff, and this would have been such an act as could have compelled plaintiff to accept the flour if up to the standard.

"Defendant was in no position to make its purchase of the flour for delivery on its contracts conditional on the plaintiff's acceptance thereof within 30 minutes. It was under contract to deliver the flour or tender delivery unconditionally, and could not impose conditions on plaintiff and then claim a release of liability on the contract because the conditional offer was not accepted."

Incidentally, question arose in this case as to the legal effect of a provision of one of the contracts for delivery of the flour in sacks, "returnable at 15c per bbl." The court interpreted the clause as meaning that the price of the flour included the sacks, but that plaintiff, as buyer, had an option to resell them to defendant at 15c bbl.

* *

The goods tendered must be of the contract kind and quality. (Bower-Venus Grain Co. vs. Norman Milling & Grain Co., 207 Pac. 297, decided by the Oklahoma supreme court.)

SECTION 169. EXCUSED BY BUYER'S REPUDIATION

"No tender is necessary when the contract has been definitely repudiated by

the buyer, as by a refusal to accept delivery if tendered, or notice to the seller that the buyer is unable to accept and pay for the goods. So, too, when the contract provides that the buyer shall from time to time specify the sizes and styles of the articles wanted, a refusal to specify dispenses with the necessity of a tender.

"And it has been held that where the contract of sale is to deliver a definite quantity of goods during a year's time, a certain number of carloads to be shipped each month on orders given by the purchaser, and the purchaser fails to give orders for a number of carloads, it is prima facie not necessary for the seller, in order to save himself from being in default, to tender such carloads at the purchaser's residence or place of business." 35 Cyc. 171.

See, also, Washburn-Crosby Co. vs. Antin, 188 N. W. 475, decided by the Wisconsin supreme court.

* *

In Jones-Scott Co. vs. Ellensburg Milling Co., 199 Pac. 238, an action to recover damages for defendant mill's breach of a contract to buy wheat, the mill objected that plaintiff could not treat the mill as being in default under the contract, because payment was not due until delivery and no delivery was tendered. But the Washington supreme court held that the mill's refusal to receive the wheat at the price fixed by the contract excused plaintiff from actually tendering delivery.

* *

From the decision of the appellate division of the New York supreme court in the case of Duryea vs. Bonnell, 18 App. Div. 151, it appears that plaintiffs sued for breach of a contract to buy flour. This agreement was made in the light of previous dealings under which plaintiffs, as flour dealers, had ordered flour shipped from a mill direct to defendant. Defendant knew that plaintiffs did not manufacture flour, and that they ordered it from mills as needed to fill contracts. The defense was that defendant was not put in default, because no delivery was tendered him, and because no flour was set apart for him. Overruling this contention, the court said:

"As he prevented the delivery in accordance with the terms of the contract, we think that it is a salutary rule which holds him estopped from asserting that the firm did not go through all the technical forms of law in order to put him in default. In order to permit the defendant now to assert that the firm was not ready to perform, when his own act prevented it, would permit his own breach of contract to constitute a defense, and he would profit by his own wrong."

* *

A contract to sell wheat was made with reference to a rule of the Wichita Board of Trade requiring a bill of lading to be proffered to a buyer before there could be said to be a valid tender of grain by a seller. The seller made two shipments covering about one half of the contract quantity, but the remainder of the wheat was not shipped because, on the seller's offer to ship, the buyer had given notice that the seller's draft and delivery would be rejected.

The seller then announced cancellation of the contract, and the buyer later sued for damages for nondelivery, asserting that there had been no valid tender under the rule mentioned. The seller counterclaimed for damages for the buyer's repudiation of the contract.

Affirming judgment in the seller's favor, the Kansas supreme court decided that, under the general rule of law that a formal tender of delivery is unnecessary when the buyer has announced in advance an intention to reject it, the seller in this case was not bound to go through the apparently useless formality of making shipment and of tendering bill of lading.

It was further held that the fact that the seller, after giving notice of cancellation, made a shipment to the buyer, which was accepted, did not reinstate the contract as to wheat not delivered. (Kemper Grain Co. vs. Farmers' Grain & Elevator Co., 163 Pac. 450.)

* *

Where one who has contracted to buy a bill of goods has since sold his business, and reasonably causes the seller to assume from his conduct that delivery of the goods will not be accepted, the seller is under no obligation to tender delivery as a prerequisite to suing for damages for breach of the contract, held the Delaware superior court in the case of W. F. Potts' Son & Co. vs. Myers, 109 Atl. 580. But the opinion makes it clear that the mere fact that the buyer may have sold his business will not excuse tender of delivery to him before he will be regarded as having broken his contract.

CHAPTER XVII

PRICE OF GOODS*

SECTION 170. WHEN DUE

UNDER a contract to sell goods to be paid for on delivery, a demand for delivery need not be accompanied by an offer of immediate payment, in order to put the contract seller in default, where the goods are not present and therefore not susceptible to immediate delivery; it is sufficient for the demand to be accompanied by an offer to pay when actual delivery shall be made. (Donlan vs. Meyer, 169 Pac. 447, decided by California district court of appeal.)

A contract to sell f.o.b. place of shipping does not obligate the buyer to tender payment of the price before loading is complete, although the sale be for cash, according to the holding of the Washington supreme court in Sussman vs. Gustav, 186 Pac. 882.

In a suit for breach of a contract to sell wheat to be delivered any time "after Jan. 10 and February, inclusive," the Washington supreme court held that this agreement entitled either party to comply with his obligation in the matter of delivery or payment concurrently with delivery of warehouse receipts up to the close of business hours on Feb. 28; that the seller could not shorten the time to banking hours on that day.

It was also decided that, although the buyer was bound to offer payment in legal tender, tender of a certified check, which the collecting bank, under authority from the seller, had agreed to take, was sufficient. (Oriental Trading Co. vs. Houser, 151 Pac. 242.)

* *

When a contract for a sale of flour is silent as to when the buyer should pay the price, it will be presumed that it was mutually understood that payment was to be made on delivery, although, as a matter of pure accommodation, he may have been previously allowed credit. This principle of law was recognized by the appellate term of the New York supreme court in the case of Bogert Flour Co. vs. Klein, 166 N. Y. Supp. 766.

Plaintiff's written contract for sale of 140 sacks of flour to defendant, to be delivered within 60 days, was silent as to when payment should be made. When plaintiff tendered delivery and asked for payment, defendant refused to pay on delivery, claiming that in previous transactions of the same kind with plaintiff she had always been given credit. Holding that payment was collectible on delivery, the court said:

"Nothing was said between the parties as to the time of payment, and it is well established that under such circumstances the law presumes that payment is to be made on delivery. . . . The question in this case is not what credit was accorded to defendant on previous purchases, but what did the parties agree to do in the present case. . . . Even if testimony were admissible to vary the terms of the written memorandum, the fact that plaintiff had voluntarily accorded the defendant credit in the past would not show that it had agreed to accord such credit upon the present sale.

"The defendant herself introduced in evidence the bills received for the previous purchases, and all of those bills bear on their face the words 'Terms cash,' so that, if any inference can be drawn from this testimony in regard to past sales, it would seem that even the credit given on such sales was a matter of favor, and not of agreement."

* *

In Ward vs. Wolfe City Milling Co., disposed of by the Texas court of civil appeals, the plaintiff was awarded judgment for damages for the mill's failure to deliver two carloads of flour contracted for sale to plaintiff. (194 S. W. 957.)

The controversy arose over a misunderstanding between the parties as to the terms of payment. One car was shipped to the mill's own order with bill of lading attached to draft for the price. The draft was presented before arrival of the car, and payment was refused. The draft was protested and the car arrived a day or

*Liability, as between buyer and seller, for transportation charges, etc., is considered in the next chapter. See, also, section 84.

two later, remaining at the destination until ordered away by the mill. The second car was never shipped. In the meantime the value of the flour advanced $300 a car, and plaintiff later sued to recover damages based on such advance.

A jury returned a verdict in favor of plaintiff, but the court of civil appeals set it aside on the ground that the trial court erroneously refused to submit to the jury vital questions of fact as to the agreed terms of payment. The higher court said:

"If payment was to be made by plaintiff as determined by defendant, and defendant determined payment should be made by demand protest draft and plaintiff refused to pay the draft on demand, defendant was not liable for damages. If payment for the flour was to be made on demand after arrival of the flour at Beeville, and plaintiff, as he testified, did not pay for the flour after it did arrive, defendant was not liable for damages unless plaintiff pleaded and proved a sufficient legal excuse. . . .

"Defendant was not bound to deliver the flour to plaintiff if he himself breached his agreement by refusing to pay for the flour on demand. The answer of the jury that defendant failed to deliver the flour to plaintiff does not determine whether or not plaintiff was obligated to pay for the flour on demand, nor whether plaintiff first breached the purchase contract by refusing to pay for the flour when demanded."

Accordingly, the appellate court ordered a new trial of the suit. (185 S. W. 663.) The retrial again resulted in a verdict for the plaintiff, and another appeal was taken by the mill. This appeal was decided against the mill, judgment of the lower court being affirmed.

The ground of the later decision is that the evidence at the second trial was conflicting as to the terms of payment, and that therefore the jury's finding in plaintiff's favor could not be disturbed.

"Appellant seems to labor under the belief," said the court of civil appeals, "that as appellee was to pay cash for the flour, that meant he should pay for the flour before he received it. The general acceptation of paying cash for a commodity is paying for it when delivered to the buyer, unless otherwise agreed. The jury found that it was agreed that the flour was to be paid for when it was delivered to appellee at Beeville."

* *

In Humphry vs. Farmers' Union & Milling Co., 190 Pac. 489, determined by the California district court of appeal, and involving a claim for damages for nondelivery of beans contracted to be shipped from Stockton, Cal., to Evansville, Ind., defendant unsuccessfully contended that it was entitled to be paid at Stockton on loading the beans. Defendant claimed that an expression in the contract, "f.o.b. Stockton," not only meant that the goods were to be placed on the car by the seller without any expense to the buyer, but also that it meant that upon their being loaded ready for shipment the purchase price was then due and payable, and at the place of shipment. On this question the court says:

"We deem it unnecessary to examine critically whether the expression 'f.o.b.' includes, not only loading, but the right to have payment at the place of loading because, even if the expression in general does mean both loading and payment, the parties can contract differently. . . . The telegram, . . . 'Have your bank wire guarantee payment draft with bill of lading,' was a clear expression by the defendant that payment was not expected until the goods were received in Indiana, together with the bill of lading, and the guaranty of the bank . . . could mean nothing else than that the bank guaranteed that when the bill of lading reached Evansville, together with the draft, the same would be paid at that place, and not at Stockton."

SECTION 171. EFFECT OF INVOICE

When the parties to a contract for a sale of flour or grain really misunderstand the price at which the sale is made, the same not being expressed in writing, and the buyer receives and uses the goods, after ascertaining from invoices that the seller claims a larger price than the buyer understood was fixed, the latter becomes liable for the invoice price, under the decision of the Kentucky court of appeals, announced in the case of Caldwell & Drake vs. Cunningham, 172 S.W. 498.

But where it appears that a certain price was mutually agreed upon, the buyer's acceptance of shipments under invoices calling for a higher price does not render the buyer liable for more than the contract amount.

* *

In denying the right of a seller of a car of feed to recover a balance claimed to be due on the price, the St. Louis court of appeals declared in the case of Toberman, Mackey & Co. vs. Gidley, 187 S.W. 593, that the trial judge properly instructed the jury that if plaintiff consigned the car to defendant, but failed to furnish him with an invoice of his individual order, and defendant did not

know and had no means of knowing the quantity in the car, and distributed its contents according to invoices received by him, taking the remainder of the feed in the car as his own, and delivered all of it, and paid for it as charged, the plaintiff had no ground for recovery of any balance claimed by him thereafter.

SECTION 171A. "SUBJECT TO GOVERNMENT REGULATION"

The St. Louis court of appeals has affirmed a decision by the local circuit court in favor of defendent in the case of Ismert-Hincke Milling Co. vs. Mercurio Bros. Spaghetti Mfg. Co., 243 S. W. 408.

In May, 1917, defendant contracted to buy a quantity of flour at a stated price. The agreement contained the clause, "Subject to government regulations." Before delivery was completed the price of the flour, through intervening governmental regulation, became fixed at a price lower than that specified in the contract. Defendant's demand for delivery at the lower price was refused. Plaintiff later sued for damages because defendant failed to order out and pay for the flour according to the specified price.

Defendant pleaded that plaintiff agreed at the time of the sale that "subject to government regulations" meant that the flour would be billed according to any regulation which might make the price higher or lower than fixed in the contract. It was also pleaded that it was generally understood in the flour trade in St. Louis that any price regulation should control the price stated in the contract. The trial judge excluded evidence offered by defendant in support of these pleas, but later granted a new trial to defendant on the ground that the exclusion was erroneous.

The supreme court holds that the new trial was properly granted on the ground stated, and intimates, if not deciding, that the government price controlled if, through specific understanding of both parties, or through local custom, the term "subject to government regulations" was intended to so control the price.

SECTION 172. DISCOUNT

That a seller of goods, under agreements to allow the buyer a discount on payment of the price being made within 30 days, on two or three occasions permitted the buyer to deduct the discount on payments made after the lapse of 30 days did not give the buyer a vested right to make such unauthorized deduction in subsequent transactions. This is the holding of the appellate terms of the New York supreme court in the case of Bombas vs. Fisher, 180 N.Y. Supp. 449.

SECTION 173. PAYMENT IN FOREIGN CURRENCY

In F. Marroquin & Co. vs. Wormser Bros., 249 Fed. 428, the United States circuit court of appeals, fifth circuit, decided that where a contract was made in Mexico for a shipment of corn from the United States, to be paid for through drafts attached to bills of lading payable in Mexico, where deposit to the seller's credit was required to be made by the buyer, this requirement was met by depositing $500 in Mexican currency, which was then worth only 44 cents on the United States dollar.

See, also, section 210A.

SECTION 174. BURDEN OF PROOF

In suits to recover the price of goods sold, it often becomes difficult for a judge or jury to resolve a dispute between the parties as to the existence of such facts as the delivery of the goods claimed by the seller to have been delivered, or payment by the buyer of an amount disputed by the seller.

To meet this situation, the courts have established a rule that the party to a suit who asserts an affirmative fact has the burden of proving it by the greater weight of the evidence; if he merely offers the same amount of proof as his adversary, leaving an equally balanced conflict in the evidence, he loses the suit.

Thus, in a suit to recover the price of goods, the burden is on plaintiff to show that he delivered goods of certain quantity and that the buyer agreed to pay a certain price for them, except so far as the facts are admitted by the latter; and then if the buyer claims that the account has been paid the buyer has the burden of proving that fact. (Kitchen, Whit & Co. vs. Powell & Co., 173 S.W. 324, decided by the Kentucky court of appeals.)

SECTION 175. OVERPAYMENT

A statute requiring common carriers of grain to issue bills of lading showing the exact quantity contained in a shipment, and making them liable to the consignee for any shortage, does not preclude the buyer of wheat, under a contract by the seller to deliver a stated quantity at a certain destination, from holding the seller for any overpayment made in honoring a draft by the latter on a supposition that the full quantity of grain covered by the draft would be actually delivered.

Speaking of a Kansas law to that effect,

in the case of Bennett vs. St. Mary's Grain Co. (164 Pac. 259), the Kansas supreme court said:

"Doubtless the buyer could have sued the railway company in this case, but no reason is apparent why he might not with equal propriety sue the seller, as he did. The statute in question adds to, but does not detract from, the rights of the buyer in respect to an action for shortage."

Accordingly, it is held that plaintiff was entitled to recover an overpayment arising from taking up a draft covering five carloads of wheat to be delivered and weighed at Kansas City, on discovering that there was a shortage in delivery.

CHAPTER XVIII

TRANSPORTATION CHARGES, ETC.*

SECTION 176. F.O.B. SALES

"WHERE goods are to be shipped, a sale f.o.b. at a certain point contemplates that they shall be delivered by the seller on board the cars or vessel without any expense to the buyer, and that after such delivery, subsequent expenses incident to the transportation and delivery shall be paid by the buyer." 35 Cyc. 107.

This statement of the law is supported by numerous decisions cited under the text.

The rule was followed by the Kansas supreme court in the case of Hunter Bros. Milling Co. vs. Kramer Bros., 80 Pac. 963, wherein it was held that an agreement to deliver property f.o.b. a distant place implies that the seller will place the property on the cars and ship to the designated point free of any expense to the buyer. And the Washington supreme court decided that, under a contract to deliver f.o.b. car or vessel, title does not pass from the seller until the goods are loaded. (Peacock Mill Co. vs. Honeycutt, 103 Pac. 1112.)

But that an agreement for a sale of goods for export requires the seller to deliver f.o.b. vessel at the port whence shipment is to be made imposes no obligation upon him so far as concerns the actual exportation, according to the decision of the appellate division of the New York supreme court in the case of Krauter vs. Menchacatorre et al., 195 N. Y. Supp. 361. It was held that such a contract did not charge the seller with liability for an export tax. The title to the goods passes when the seller puts the goods on board. The actual exportation is the concern of the buyer alone. The court added that, even if the tax be payable before the goods can be placed on board, nevertheless it is the buyer's duty to pay it.

SECTION 177. INCLUSION IN PRICE

The appellate term of the New York supreme court has interpreted a clause in a contract for sale of imported goods, reading: "Price at sh. 19/6 per cwt of 112 lbs, cost and freight at New York," as requiring the seller to pay the freight charges. This decision would, of course, be a precedent on the construction of a similar clause in an export sales contract. The court said: "In the absence of proof by experts in the business showing a contrary meaning, the construction of the contract must be that it includes the freight."

An additional ground for the decision is found in that fact that the contract expressly required the buyer to pay the insurance charges, it being inferred that if he were to pay the freight that, also, would have been explicitly provided for in the agreement.

The court cites a decision of the New York court of appeals wherein it was admitted by the parties to a similar controversy that "c. f. & i." meant "to include cost, freight and insurance." In that decision, it was said:

"The price is fixed at 59 shillings per cwt, and this is made up of the cost, freight, and the premium of insurance. Thus the purchaser deals with the matter in gross, and not in detail, transacts the various branches of the business with one person, instead of three, fixes his liability at a lump sum, and in the case of loss will recover the amount of his interest under the policy." (Martin vs. Sclafani, 159 N.Y. Supp. 41.)

SECTION 178. CHANGED DESTINATIONS

It seems to be settled law that where the place for delivering goods is changed at the instance of the buyer, he is liable for any additional freight charges due to such change, but that where the seller has agreed to deliver f.o.b. destination, he must bear any increase in freight rates involved in making such delivery, except as the contingency may have been guarded against by express agreement. (35 Cyc. 108, 109.)

SECTION 179. VARIATION IN CHARGES

Among numerous court decisions holding that the parties to a contract of sale will not be presumed to have intended that one should have the advantage, to the

*Liability to carriers for charges is treated in Chapter XXIX. See, also, section 83.

disadvantage of the other, of any variation from contemplated transportation charges, except as they may have contracted to that effect, or except as claimant of the benefit may have earned it by some special effort or diligence he was under no obligation to the other party to use, I find the case of Texas Lumber Co. vs. Prince, 154 S.W. 231, decided by the Texas court of civil appeals in 1913.

In that case it appeared that goods were sold at a fixed price, and the seller agreed to allow freight to the destination of the shipments "at 25 cents per 100 lbs." This was mutually believed to be the rate that would be actually chargeable. The buyer was held not to be entitled to the benefit of any lower rate actually paid.

* *

"If the contract provides for an increase in price in case of an increase in freight rates, the seller is entitled thereto if an increase occurs in the ordinary mode from causes not under his control" (Lovering vs. Buck Mountain Coal Co., 54 Pa. St. 291). Where freight at an agreed rate is made an element of the price, the buyer to have the burden or benefit of any variation or difference, the buyer is not liable for any increase in the cost of transportation due to demurrage (Ascherson vs. Bethlehem Iron Co., 28 Atl. 1011).

SECTION 180. REFUNDED FREIGHT OVERCHARGES

"As between the seller and the purchaser of commodities transported to destination by a common carrier, overcharges for such transportation refunded by the carrier belong to the one who had borne the expense of such transportation." This declaration was made by the Minnesota supreme court in the case of Jennison Bros. & Co. vs. Dixon, 158 N.W. 398.

Plaintiff, operating a mill at Janesville, Minn., sold flour and feed to defendant for delivery at St. Charles, Minn., at various times covering a period of several years. The invoices charged defendant with the agreed price and credited him with the amount of the freight charges, which were paid by him.

On discovery that the delivering railway company had collected excessive charges, defendant made claim for, and was awarded, a refund. Plaintiff then sued defendant to recover the amount refunded. The trial court denied the right of recovery, but the supreme court has reversed the judgment, holding that the mill was entitled to the benefit of the refund. The higher court said:

"If defendant had contracted for the flour and feed at an agreed price at Janesville [the shipping point] and had assumed the burden of paying for its transportation from Janesville to St. Charles in addition to such price, he would undoubtedly be entitled to the money refunded by the railway company; but he contracted to pay the agreed price for the flour when delivered at St. Charles, and plaintiff, as a part of its contract, assumed the trouble and expense of having it transported from Janesville to St. Charles.

"Whether the freight was much or little, the obligation rested upon the plaintiff to pay it. If the freight had been more than had been anticipated, plaintiff could not have collected the excess above the anticipated amount from defendant. Plaintiff had agreed to deliver the property at St. Charles for the stipulated price, and under its contract would have been required to stand any unexpected increase in the expense of making such delivery and was entitled to the benefit of any unexpected decrease in such expense."

* *

Question was raised in the case of Houck vs. Hubbard Milling Co., of Mankato, Minn., 167 N.W. 1038, as to whether plaintiff, an operator of elevators at Good Thunder and Rapidan, in the same state, was entitled to the benefit of refunds paid by the Milwaukee road to the milling company on it being determined that intrastate freight rates, which were fixed by the Minnesota legislature in 1907, but which were suspended for several years pending litigation, were valid. The trial court at Mankato decided that plaintiff was entitled to recover, but the supreme court has reversed the decision.

The suit was based on numerous quantities of wheat sold by plaintiff to defendant while the statutory rates were suspended and higher published rates were in effect. Finding that the sales were made on the basis of current Minneapolis prices, less published freight rates from the places of shipment to Minneapolis, the defendant itself paying the freight from the points of origin to Mankato, the supreme court said:

"The defendant was buying for its own consumption. It was not, so far as the record discloses, a seller of wheat on the market. . . . For all the six years of their dealings, from 1907 to 1913, the parties settled on the basis of the current Minneapolis prices less the published tariff of

nine cents a hundred. Nothing was said about a different rate. Upon the same basis the defendant was buying the identical wheat at his elevators. . . .

"As between the seller and the purchaser of a commodity transported by a common carrier, the one who bears the expense of transportation is entitled to the refund for overcharges. . . . Neither party has any apparent natural equities. The refunds amount to a find for the defendant. . . . There is no natural equity in defendant having the refunds, and none in taking them away and passing them to the plaintiff. If passed to him, they should go farther."

SECTION 181. DEMURRAGE CHARGES AND CREDITS, ETC.

Storage charges accruing before delivery by the seller must be paid by him, in the absence of clear proof of agreement or usage to the contrary. (Kugelman vs. Levy, 24 N.Y. Supp. 559.)

* *

A dealer in feed asked an opinion on the following stated case: On Dec. 26, X wired an order to Z for a car of bran prompt at $45, "Boston basis," furnishing shipping instructions the same day by mail.

The car was shipped from Minneapolis, and may have been a transit car, arriving in Chicago Jan. 3. The consignee was notified, but disposal orders were not received by the carrier until Jan. 23.

Jan. 10 Z advised X, "Car will undoubtedly be held at Chicago on demurrage," and on Jan. 15 asked new shipping directions by immediate wire. (Apparently the destination originally designated had been embargoed.) Z replied to the effect that if the original destination could not be reached the contract should be canceled. X replied by wire the same day that he would not cancel and was trying to get the car through.

Feb. 10 Z declined to stand demurrage, stating that the charge would not have occurred had X given instructions to a point not embargoed, and saying: "We sold you car delivered Boston rate, not delivered Q——, Pa. We could have shipped to Boston at that time."

X, on the other hand, took the position that the car was bought for prompt shipment from Minneapolis, without condition of unembargoed billing; that the contract fixed Boston as rate basis only, and not as a place for delivery; and that, in any event, Z was afforded opportunity to ship to Boston when X requested cancellation.

I did not believe that sufficient facts were presented to charge Z, the shipping seller, therewith, as against X, the buyer.

It seems clear enough that the demurrage charges should follow the question whether the bran was sold for delivery in Minneapolis, the shipping point, or at the destination to be designated by the buyer, excepting as responsibility might be placed on Z because of some fault in causing the demurrage to accrue.

It is well-settled law that, except as otherwise mutually understood, it will be presumed that the parties to a contract for the sale of goods to be shipped by the seller to the buyer intended that delivery to the carrier should operate as constructive delivery to the buyer; the carrier being regarded as his agent for transportation purposes. This rule of law rests on an inference that goods are to be delivered to the buyer at the place where they are at the time of the sale, or when they are ready for delivery, except as the seller may undertake to transport the goods.

Now, we fail to find in the statement of this case any agreement by Z to deliver the bran at any place other than the shipping point. His agreement to sell at $45 or $42.75, "Boston basis," merely fixed a price to include cost of transportation.

"The prepayment of freight by the seller does not conclusively show that the place of delivery is the buyer's place of business. Similarly, if the agreement is to sell goods 'f.o.b.' at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the 'f.o.b.' depends upon the connection in which it is used, and if used in connection with the words fixing the price only it will not be construed as fixing the place of delivery." (35 Cyc. 174.)

The term "Boston basis" comes much nearer a definite expression of intent that freight charges are to be taken into account merely for the purpose of fixing the price of the goods, and not that an undertaking is entered into by the seller to deliver at the destination, than did the contract in the case of Neimeyer Lumber Co. vs. Burlington, etc., Railroad Co., 74 N.W. 670. Yet the Nebraska supreme court in that case decided that a contract to sell goods at "prices f.o.b. Omaha" did not fix the place of delivery at Omaha.

The Pennsylvania supreme court has gone still further by holding, in the case of Dannemiller vs. Kirkpatrick, 201 Pa. St. 218, that an agreement "to bill f.o.b." a certain city does not import an obliga-

tion on the part of the seller to deliver in that city.

Therefore, assuming that there were no circumstances indicating an undertaking on Z's part to deliver elsewhere than at the shipping point, and taking the view that no such circumstances were presented in the case as stated, I was of the opinion that there was nothing to show such control of the car by the seller in transit as to render him liable for demurrage charges accruing without any fault on his part.

In view of the fact that several days intervened between the seller's receipt of the order and arrival of the car in Chicago, we cannot see how it can make any material difference whether this was a transit car or one specially shipped.

We do not believe that any activity on the seller's part in trying to get the car through can have any conclusive effect as indicating understanding that he was to deliver at the destination, although it is a circumstance to be weighed in considering what was the mutual intention of the parties as to where delivery should be made. It would be open to the seller to show that these offices were rendered as a mere customary accommodation.

But, if the fact is that there was mutual understanding that the seller would deliver at the destination to be designated by the buyer, then the seller would be chargeable with the demurrage, especially if the buyer did not know of the embargo when he designated the destination. By undertaking to deliver at a destination designated by the buyer, the seller would incur all transportation risks, including that of the accruing of demurrage on account of an embargo.

An interesting question not here involved would have been raised had the seller declined to undertake shipment of the goods to an embargoed destination. But he could not enter upon that undertaking, and afterwards escape responsibility for accrued demurrage on the mere ground that if the buyer had designated some other destination there would have been no demurrage.

The statement of the case says that the buyer gave the seller a "chance" to ship the bran to Boston. This expression is inapt. The contract reserved to the buyer the right to designate the destination. Apparently, the only destination ever directed was Q——, Pa. But if it is true that the buyer substituted an unembargoed destination after demurrage began to accrue, positively directing or authorizing shipment to a new point, the seller would be liable for demurrage thereafter accruing through failure or refusal to recognize the substitution.

Apart from the question whether the seller undertook to make delivery at the destination designated by the buyer, thereby assuming responsibility for the demurrage involved, that responsibility might rest upon neglect to discharge with reasonable promptness and diligence an undertaking to attend to the matter of getting the car through for the buyer.

So, if there was some neglect on the part of the seller for 20 days to give the railroads disposal orders, he should bear all demurrage accruing during the period of such neglect, regardless of whether delivery was to be made at the shipping point or the destination. Neither the law nor a spirit of fairness would permit the seller to cause accrual of demurrage and then repudiate responsibility for it.

And if the demurrage accrued through the circumstance that a transit car was applied by the seller to the order and his failure to give proper instructions for diversion, he should bear the consequential demurrage.

In the suit of Earnshaw vs. McHose, 56 Fed. 606, it appeared that ore was sold, to be delivered from abroad by the seller. The contract contained the clause: "The above prices are based on an ocean freight rate of 12 shillings per ton; all freight over 12 shillings to be added to the invoice as part of the price of the ore, and all freight under 12 shillings to be deducted from the invoice."

Because the full demurrage free time for loading and unloading was not used, the seller was permitted by the vessel owner to deduct from the freight charges a certain amount as "dispatch money"—a rebate for releasing the vessel before detention would give rise to demurrage. The United States circuit court of appeals, third circuit, decided that the benefit of this deduction belonged to the buyer of the ore, under the clause of the contract above quoted, saying, "It certainly could not have been the intention of the parties that the plaintiff was to make a profit on the freight as well as on the ore."

In a similar case the Pennsylvania supreme court decided that the buyer was not entitled to the benefit of dispatch money earned by a seller, holding that provision for a variation in "freight" should be limited strictly to the freight charges, unaffected by demurrage that might be incurred through the seller's fault or by dispatch money accruing through his diligence. (28 Atl. 1011.)

CHAPTER XIX

EXCUSES FOR NONDELIVERY*

SECTION 182. EXCUSES IN GENERAL

IT is a general rule that, where performance of a contract to sell and deliver goods is suspended by an official act of the government for a material length of time, execution of the contract is entirely excused, decided the United States district court for the eastern district of New York in the case of P. N. Gray & Co. vs. Cavalliotis, 276 Fed. 565. And it was added:

"A government embargo placed upon the exportation of a commodity would be a defense to an action upon the contract involving the commodity. . . . But this relates to embargo or governmental interference by the government of the country in which the contract was made and in which it was to be performed. Foreign embargoes are ordinarily not an excuse for nonperformance."

This decision was affirmed on appeal (293 Fed. 1018).

* *

Nondelivery of feed under a contract to manufacture and sell the same is excusable if the seller can show that the buyer intended to resell the feed in violation of laws relating to branding. It was so recognized by the St. Louis court of appeals in the case of Heffernan vs. Neumond et al., 201 S.W. 645, although the court in that case sustained a finding that no such unlawful intention existed.

"Where the real ground for failure to deliver is inability to furnish the goods, and there were constant demands by the buyer for delivery, nondelivery cannot be justified on the ground that the buyer failed to give the notice required by the contract. Default or delay is not excused because performance has become difficult, dangerous, or burdensome.

"Thus it is no excuse that delivery is dangerous because of the existence of war, or because pestilence prevails, or that it is difficult because of the inclemency of the weather. It will not excuse delivery that, because of new laws or regulations enacted after the making of the contract, additional burdens will be imposed on the seller." (35 Cyc. 244-245.)

* *

In the case of Traylor vs. Crucible Steel Co. of America, 183 N. Y. S. 181 (affirmed by court of appeals, 134 N. E. 581), it appeared that a clause inserted in contracts negotiated by plaintiff for defendant provided that defendant should not be liable for nondeliveries due to "strikes or fire or act of God or other causes beyond its reasonable control." It was decided by the appellate division of the New York supreme court that this clause was not broad enough to exempt liability for nondelivery due to any lack of knowledge of methods involved in performance of the contract, nor to delay in securing construction of the seller's plant, and in getting materials, etc. The court held that the clause must be read as referring only to extraordinary causes which could not be foreseen and anticipated when the contract was entered into.

* *

The Washington supreme court decided that plaintiff in the suit of Farmers' Grain & Supply Co. vs. Lemley was entitled to recover damages for breach of a contract for a sale of wheat to it. But this decision was reversed on a rehearing of the case, the court deciding that under a contract for delivery of bulk grain the buyer cannot require the seller to deliver in sacks because of lack of room in the elevator at which delivery was to have been made. And the fact that the buyer offers to receive delivery in sacks does not put the seller in default on failing to so deliver, where the buyer does not offer to furnish the sacks and labor required to sack the grain, and refuses to permit immediate grading. (178 Pac. 640.)

* *

The effect of the following quoted clause in contracts for sales of meal was considered by the appellate division

*The default of a buyer as an excuse for rescission of the contract is, also, treated in the chapter on Rescission by the Seller. See, also, the next chapter on Risks Pending Actual Delivery.

of the New York supreme court in the case of Kellogg et al. vs. Boutwell Milling & Grain Co., 196 N. Y. Supp. 747:

"Fires, differences with workmen, accidents to mill or power running to same, or any cause unavoidable or beyond the control of seller . . . shall excuse any delay in filling or shipping orders."

The main question raised was whether the sellers' differences with their workmen, resulting in a temporary plant shutdown, excused failure to make full delivery under the particular contracts. The buyer insisted that there was no excuse under this clause, because the sellers filled a later order for another customer. It was insisted that the sellers were bound to fill the orders according to priority of time of their receipt, but the court decided in favor of the sellers, saying:

"The rule is that, where measures are adopted in good faith solely with the view of the general business of a party and the reasonable necessities of his business, no fault may be found with the manner in which he conducts it. . . . Bearing this in mind and the propriety of a man conducting his business with reference to its maintenance and development, we are unable to say that the delivery to Thompson & Co. of Sept. 14 was a wrong against the defendant [the buyer]."

* *

Under the New York sales act, failure of a buyer of goods to pay for installments delivered within the time agreed upon for payment justified the seller in refusing to make further deliveries, without first giving notice to the buyer that such deliveries would be withheld in the absence of payment within a reasonable time for past deliveries. It was so decided by the appellate term of the New York supreme court in the case of E. Stuffer & Co. vs. Carbondale Mills, 196 N. Y. Supp. 266.

The opinion draws a distinction between a seller's right to rescind as to further deliveries and his right to justify a refusal to make further deliveries, because of nonpayment for delivered installments. It is held that, under the sales act, giving of notice and reasonable opportunity to pay what is due is essential to a rescission, but not to exercise of right to refuse to make further deliveries.

* *

One who refuses to perform a contract for the sale of goods on a specific ground will not be permitted, after suit has been brought and it appears that the ground is untenable, to assign a new reason. Following this general rule of law, the United States circuit court of appeals for the fourth circuit held in the case of Wall Grocer Co. vs. Jobbers' Overall Co., 264 Fed. 71, that where a seller unjustifiably refused to complete deliveries, on the mistaken ground that the parties had not consummated a binding contract, it could not afterwards defeat the buyer's suit for damages by claiming that timely specifications of goods to be shipped were not furnished. The court quotes this declaration of the United States Supreme Court:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

* *

Other decisions on some of the points mentioned in this section are referred to in the succeeding sections of this chapter.

SECTION 183. FAILURE OF SOURCE OF SUPPLY

". . . Where the sale is of specified goods which, without the seller's fault, are lost or destroyed before the day of delivery, the seller is excused from delivery and the buyer from obligation to pay. In such cases a condition is implied in the contract, the effect of which is to relieve the seller from the obligation to perform." (35 Cyc. 246.)

That an act of God, such as a storm or unusual rain, will excuse one from performance of a contract to deliver specific goods is a legal proposition reaffirmed in the decision of the Nebraska supreme court in Matousek vs. Galligan, 178 N.W. 510. But this holding is to be distinguished from the law of cases where no particular goods are in contemplation under the contract. For instance, a farmer who has agreed to deliver his crop of corn to a mill may be excused in failing to do so, by reason of some unavoidable calamity. But if a grain company has contracted to deliver a certain quantity of corn of certain grade, without the particular source of supply being in contemplation, the grain company could not excuse nondelivery through storm or other cause interfering with delivery, excepting as the contract may have reserved such excuse.

In the Nebraska case, it appeared that specific hay was bargained to be sold, but that defendant was prevented from baling and delivering it, by unusual storms and rainfall. Under these circumstances, the supreme court decided

that the trial judge properly instructed the jury that "an 'act of God' is a part of every contract, whether it is written therein or not, and if a party is prevented from performing his contract directly and exclusively by an act of God, the law excuses him, and he cannot be held for any injury or damage in the nonperformance of the contract.

"An act of God, such as will excuse the performance of a legal contract, must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it," etc.

* *

When a contract for a sale of grain contemplates delivery from a definite crop, as distinguished from the ordinary agreement for sale of grain without regard to the source of production, failure of the crop will excuse the seller's failure to deliver, according to a holding of the Kansas City court of appeals, in the case of St. Joseph Hay & Feed Co. vs. Brewster, 195 S.W. 71.

Defendant, a farmer, entered into a written contract to sell plaintiff 3,000 bus No. 2 red wheat at $1 bu, f.o.b., his station. It is to be inferred that he would have been liable for nondelivery had the contract contained no further provision. But the agreement provided: "If there should be 500 bus over or under, this is to be taken on the same basis."

This clause is held by the court to have so far indicated a mutual understanding that the wheat was to be furnished out of a definite crop then growing as to entitle defendant to prove a verbal understanding between the parties that the wheat was to be so furnished, and to show that through weather conditions there was no production of the minimum contract quantity and no wheat of the grade called for by the agreement.

The decision does not contravene the well-established rule that an unqualified contract to deliver staple commodities is not excused by destruction of the goods out of which the seller expected to make delivery, in the absence of a saving clause in his favor. It merely declares that where a contract of sale is made with a mutual view to supply from a particular source, destruction of the supply by an act of God exonerates the seller from liability for consequent inability to deliver.

* *

An opinion of the South Dakota supreme court, handed down in the case of McCaull-Webster Co. vs. Steele, 180 N.W. 782, shows how mutual understanding as to a special source of supply may affect the validity of a contract of sale.

Defendant contracted to sell plaintiff 5,000 bus of "good, sound, dry and merchantable S. corn to grade 3Y, . . . said grain being now in my possession." It was contemplated that delivery should be made on maturity of a then growing crop, which failed to produce corn of the contract grade. Market values rising above the contract price, plaintiff sued for damages for nondelivery. The supreme court, however, holds that the trial judge properly ruled that plaintiff could not recover. The reasoning on which the decision rests is as follows:

"In this case it is perfectly clear that both parties were so confident that the corn, then in the minds of the parties, would fulfill the conditions as to grade, that they made no provision whatsoever as to what should be done if this corn would not test No. 3. They contracted in the full belief that defendant had in its possession 5,000 bus of yellow corn that would, at the time of delivery, grade No. 3. No corn that would, by mere lapse of time, become No. 3 corn, was in possession of defendant. Both parties assumed, as the very basis of the contract, that corn that would fulfill this contract did exist in the possession of defendant. Being mistaken as to this essential fact, there was no binding contract. . . .

"Let us suppose that No. 3 corn had not been worth the contract price, and defendant had gone out and purchased No. 3 corn and tendered same to plaintiff; plaintiff, knowing such fact, would have had the right to and undoubtedly would have refused to accept such corn, for the very simple reason that it never agreed to buy any corn other than the corn in possession of defendant when the contract was entered into."

* *

One who unconditionally agrees to deliver goods cannot escape liability for damages for nondelivery on the ground that he was disappointed in an expected source of supply.

This was the main point involved in the decision reached by the California district court of appeal, third district, in the case of Neligan & Son vs. Knutsen, 175 Pac. 18, a suit in which judgment against defendant for nondelivery of 2,250 sacks of No. 1 white Egyptian corn was affirmed. The damages were assessed at $850, based on market values prevailing when delivery should have been made, early in 1917.

As an excuse for nondelivery of the 2,250 sacks remaining undelivered, the

entire contract quantity being 4,500 sacks, defendant asserted that when the contract was made plaintiffs understood that the corn which defendant agreed to sell was to be procured from certain growers, and that, without any fault on his part, defendant received only the 2,250 sacks actually delivered. Rejecting this excuse as being unrecognized by the law, the court quoted the following rule previously laid down by the California supreme court, and recognized as good law in all jurisdictions:

"Where one makes an unqualified agreement to sell goods to be delivered at a fixed time, or on demand of the buyer within a stated period, and it is inherently possible to obtain the goods, the fact that the seller may have expected to manufacture the goods himself, or to procure them from a certain source, and has not been able to complete or obtain them when delivery is due, does not excuse performance. In that event, his contract being unconditional and unqualified, he must go into the market, if necessary, and obtain the goods, and will be liable in damages for nondelivery."

This decision suggests the importance of imposing suitable conditions against liability for nondelivery, when the seller is relying upon a particular source of supply in undertaking to make a sale.

SECTION 184. IMPOSSIBILITY OF PERFORMANCE

"The general rule that no impossibility arising subsequent to the making of the contract will excuse the performance thereof is of course applicable to the contract of sale; and a seller who promises unconditionally to deliver takes the risk of being unable to perform, although his inability is caused by inevitable accident, or circumstances beyond his control.

"There is, however, a distinction between cases where the contract is to do something impossible of performance, and those where the contract is to do something possible in itself but performance of which is prevented by the occurrence of inevitable accident, although not foreseen by the party and not within his control." (35 Cyc. 244.)

* *

In the case of James vs. Morgan, decided in the fifteenth year of the reign of Charles II (1675), plaintiff sued defendant on a promise to pay for a horse "a barley-corn a nail, doubling it every nail." There being 32 nails in the shoes, the price aggregated 500 quarters, or 4,000 bus of barley. The judge at Hereford who tried the case decided what probably most judges of today would decide, that plaintiff was not entitled to recover 500 quarters of barley, or its value, but merely the fair value of the horse. Apparently this decision proceeded upon the ground that defendant, through failure to compute the grain called for by his contract, had no idea what he was binding himself to do.

This would seem to bring the case within the modern rule of law that a failure of the minds of contracting parties to meet in agreement as to the quantity of goods to be delivered invalidates the contract. Viewed in this light, there is no conflict with the equally well settled legal principle that nonperformance of a deliberate promise to do a thing is not excusable on the ground of improvidence of the bargain.

* *

In the later case of Thornborow vs. Whitacre, decided in the reign of Queen Anne (1705), the court, however, recognized the validity of a contract of this kind. In this case it appeared that defendant received a half crown under a contract whereby he was to receive £4 17s 6d more on delivering two grains of "rye corn" on Monday, March 29, four grains the next Monday, and, in arithmetical progression, doubling each preceding delivery, for one year.

As a computation of this contract evidently not made by defendant until after he entered into the agreement, showed that the first week's delivery of two grains doubled 30 times would aggregate 125 quarters (1,000 bus), and doubled 52 times would call for 524,288,000 quarters (more than 4,000,000,000 bus), defendant defended suit for nonperformance of his contract on the ground of impossibility. His counsel argued that "the rye to be delivered amounted to such a quantity, as all the rye in the world was not so much."

The chief justice who heard the case said: "Suppose A for money paid him by B will undertake to do an impossible thing, shall not an action lie against him for not performing it? . . . So where a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages."

But the same judge found that the contract was so worded that it should be interpreted as requiring delivery on alternate Mondays after the second week (and not every Monday, as the parties probably intended when they made their agreement); and noted that "that would bring the contract nearer to the defendant's ability of performance."

Although the ruling was clearly to the effect that the contract was valid,—another of the sitting judges saying that "though the contract was a foolish one, yet it would hold in law, and the defendant ought to pay something for his folly,"—the report of the case gives this happy ending:

"The counsel for the defendant, perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case."

SECTION 185. DESTRUCTION OF PLANT, ETC.

Has a mill a right to cancel flour contracts in case its plant burns? According to the weight of judicial authority this interesting question propounded by a flour salesman must be answered in the negative, except as the contracts may contain special provisions showing a mutual intention that the agreements might be annulled in such an event.

Said the United States Supreme Court, in holding that one who had contracted to furnish cloth to the government was not released from liability for failing to deliver the goods as he had agreed by reason of the fact that the mill producing the stuff was destroyed by fire pending deliveries:

"Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party nor was within his control." (96 U. S. 29.)

The principle was applied in the case of Hottellet vs. American Corn Milling Co., 160 Ill. App. Ct. Rep. 58, in which it was decided that destruction of defendant's mill by fire did not excuse failure to deliver hominy feed as contracted by defendant, there being no saving clause in the contract.

In this case the evidence tended to show that plaintiff buyer expected that the feed would be manufactured at defendant's mill, knowing that defendant dealt in its own product only. But the court decided that this circumstance should not be deemed to excuse defendant's nonperformance of the contract, considering the facts that the contract contained no qualifications upon the duty to deliver the stated quantity of "hominy feed," and that substitute feed was available to defendant in the market to fill its contract.

In another case, the Illinois supreme court applied the same rule to an instance where a manufacturer of iron unsuccessfully sought to evade liability in damages for failing to deliver, on the ground that its mill had burned. The court said:

"The general doctrine is that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages." (153 Ill. 110.)

In a similar controversy, the New York court of appeals declared:

"There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manufactured and delivered, and whether by that particular machinery or in that mill would not be deemed material. True, the contract specifies the mill as the place, but it necessarily has no importance, except as designating the place of delivery. For aught that appears, other machinery could have been substituted.

"The defendant agreed to furnish a certain manufactured article by a specified day, and it cannot be excused by accident, even if it prevented performance. If it sought protection against such a contingency it should have been provided for in the contract." (60 N.Y. 491, 492.)

* *

The St. Louis court of appeals affirmed judgment in favor of plaintiff in the case of Heffernan vs. Neumond et al., 201 S.W. 645, a suit brought to recover damages for nonfulfillment of a contract for the manufacture and delivery of mixed feed to be manufactured according to a prescribed formula. The contract was made with defendants' predecessors, but defendants assumed performance of the agreement. There was partial delivery under the contract, but defendants refused further performance after their mill burned. The court said:

"The contention that the destruction of the mill by fire excused further performance of the contract under the circumstances is obviously without merit. . . . 'If the party entering into a contract of this sort desires to protect himself against contingencies, it is incumbent on him to express the contingency in his contract.' . . . It is not a case where

the subject matter went out of existence, through the fault of the contracting party, rendering the contract incapable of performance. It cannot be said that these parties contracted upon condition that Goeke & Co.'s mill remain in existence."

"Where the contract of sale is unconditional, it is no excuse for nondelivery that the seller's factory or the one on which he relied to obtain the goods has been destroyed or forced to close through natural causes, or that the goods cannot be obtained in the market. The seller is regarded as an insurer to the extent of making good the loss." (35 Cyc. 244.)

* *

A southern mill sent a copy of its sales contract form containing the clause, "All contracts or agreements are contingent upon strikes, accidents, delays of carriers, or other delays, unavoidable or beyond seller's control." Stating that this was the clause "on which we would have to rely if our German friends were to get busy and burn us out, or if our plant were destroyed by either fire or cyclone," the mill inquired:

"Would this, in your opinion, excuse us from filling a contract, provided our plant were destroyed? If it is not sufficient, what verbiage do you think should be used in order to relieve the miller if his plant were destroyed?"

In my opinion, the quoted clause would, at most, excuse "delay" in delivery and not a complete failure to deliver. It also seems that the term "contingent upon" is used in an inaccurate sense, although plainly intended to mean "subject to," in which latter sense it would no doubt be judicially interpreted. I should substitute for this clause one reading something like this:

"The seller shall not be liable for delay in delivery or for nondelivery caused by fire, storm, explosion, strike, accident, delay of carrier, or other cause beyond the seller's fault or control, including any such cause or causes preventing or delaying manufacture or delivery by the seller of the goods herein agreed to be sold."

If conformable to the facts, it would be proper to add the following clause at the end of the paragraph: "it being understood that delivery of the seller's own products is contemplated." This would specifically avoid the effect of judicial decisions holding that where there is no such understanding, and substitute goods to fill a contract can be obtained in the open market, destruction of the seller's plant is no excuse for nonperformance.

But, if for any reason it should be desired to avoid giving the prominence involved in the clause just quoted, I am of the opinion that the same exemption from liability could be claimed with it omitted, for I believe that the last clause of the suggested paragraph, "including any such cause or causes preventing or delaying manufacture or delivery by the seller of the goods herein agreed to be sold," would, in a pinch, be held to accomplish the point.

The Millers' National Federation Uniform Sales Contract form (See The Miller's Almanack for 1925, pp. 88-90) seems to adequately guard the seller against liability for nondelivery in case of destruction of his plant through an uncontrollable cause.

* *

Delay and difficulty encountered by a manufacturer of goods from trouble with his machinery ordinarily is not to be regarded as a "circumstance beyond his control," within the meaning of a provision in a sales contract excusing nonperformance when due to such circumstance, held the United States district court, northern district of California, in the case of P. Pastene & Co. vs. Greco Canning Co., 268 Fed. 168.

But on review of this case the United States circuit court of appeals held that, under the circumstances, the seller was excused from making delivery (277 Fed. 877).

See, also, section 88.

SECTION 186. BURDENSOME CONTRACTS

The Maryland court of appeals has recognized the principle of law that a manufacturer who has agreed to deliver goods at a stated price cannot avoid his contract because of unexpected expense or difficulty in obtaining raw products, except as he may have specially guarded against such contingency in his contract.

The particular case before the court involved a contract for delivery of chemicals to be manufactured by the seller, but the following stated conclusions of the judges applies in principle to contracts involving the manufacture of any kind of commodity:

"The contract of the defendant was to deliver to the plaintiff the product of its plant, and the defendant was not required to purchase acid from other manufacturers in order to make deliveries to the plaintiff. It was bound to make every reasonable effort to secure the pyrites [the raw product], and to pay any reasonable sum necessary to enable it to do so. The fact that the price of pyrites

ore was greatly in excess of the amount that it had contracted to pay for it did not relieve the defendant of its duty to perform the contract." (Davison Chemical Co. vs. Baugh Chemical Co., 104 Atl. 404.)

* *

The following interesting query involving legal principles of much importance to the flour trade came from a dealer, through The Northwestern Miller:

"We sold a customer a 250-bbl car of flour, which at the time of the making of the contract constituted a full car. Later the different mills which we represent informed us of the new interstate commerce rules under which a minimum capacity of 60,000 lbs would have to be included in each car. Before shipment became due we explained to our customer about the increased tonnage demanded, but he took the view that he bought a 250-bbl car and that there was no rule or law in the world that could make him take more.

"We nursed this contract along for him until a couple of weeks ago, endeavoring all the while to get him to increase the tonnage so as to make it possible for us to fill his order. While the prices were high he even went so far as to secure legal advice in the matter, and his attorneys took the same stand as he. They claimed that we could have sold the remainder of the flour in the car to some other party, and cited also that another flour firm furnished him with this quantity of flour.

"Then, just about the time that we convinced his attorneys that we were right and their client was wrong, the market took a sudden drop and our customer overnight took the stand that he would not take the flour, and entered damage suit against us, on the ground that our failure to fill his order entailed a substitute purchase at increased price.

"We would like to learn from you if you know of any previous case such as this, and, if so, what would be the proper course to pursue?"

I knew of no authoritative adjudication in a case involving this precise state of facts. It was likely that there was no such decision, since the regulation involved was so recently promulgated by the Interstate Commerce Commission, but it seemed that, under fundamental legal principles, the customer was right in his contention that he could not be required to take more than the 250 bbls bargained for. It seems that it was undisputed that he bought 250 bbls, no more and no less, according to mutual understanding existing when the contract was made. If so, he could not become obliged to take more without his assent.

"Generally, a specification of quantity in a contract of sale will be regarded as material. The full quantity contracted for must be delivered at the time and place specified, to constitute a sufficient delivery, and the buyer is in general not obliged to accept or pay for a less quantity, the failure of the seller to deliver the quantity specified constituting a total breach of the contract. . . .

"So, too, a delivery in excess of the quantity contracted for is not a proper delivery, and, although the buyer may if he elects retain the amount designated by the contract and reject the excess, no obligation is imposed upon him to select the proper quantity out of the excessive quantity delivered, but he may reject the whole, especially when the selection of the proper quantity would be troublesome and laborious, or the buyer did not have the privilege of separating and receiving less than the whole quantity shipped." 35 Cyc. 202-205.

"The seller is excused from performance where it is rendered impossible by reason of some action taken by or under authority of law. It is, however, no excuse that, because of a change in the law, the performance has been rendered more expensive or burdensome." 35 Cyc. 247.

It seemed that the case presented to us fell within these general principles—that it is a case of performance by the seller having been rendered "more expensive or burdensome," rather than "impossible." If this is so, then any failure of the seller to insist upon a clause in his contract guarding against the situation that has arisen debars him from excusing nondelivery of a "carload" of flour, measured according to the understanding of the parties when the contract was made, on the ground that the Interstate Commerce Commission later fixed the minimum loading capacity at 60,000 lbs.

Since it appears to have been mutually understood that 250 bbls would be delivered, that understanding must be given legal effect the same as if the quantity had been designated specifically, instead of as a "car"; but, in passing, it may prove of general interest to note the following statement of the law applying where there is no understanding as to the specific quantity to be delivered by the seller:

"Where the goods are sold by the 'carload' the term may be construed by the custom of trade, but in the absence of any agreement or particular custom it will ordinarily be held to mean the ca-

pacity of a car used for transporting the particular kind of goods sold. So, too, a sale of a 'cargo' of goods means ordinarily the entire load of the vessel, and is limited only by the capacity of the vessel." 35 Cyc. 210.

Where the term "carload" is to be defined in the light of trade custom, I believe that there can be no doubt that the applicable custom is that prevailing when the contract is entered into, and not at some later date when shipment is due from the seller. This conclusion is necessitated to give effect to the mutual intention of the parties existing at the time of the making of the agreement.

Whether the buyer in this case had properly preserved his right to recover damages for nondelivery of the flour, or whether he had waived those rights, depended upon facts not disclosed. I was, therefore, of the opinion that, where the parties to a flour sales contract mutually understand that a car containing 250 bbls shall be shipped to the buyer, a subsequently adopted regulation of a railroad commission increasing the minimum loading capacity of a car cannot obligate the buyer to take more than 250 bbls, nor diminish the seller's obligation to deliver the contract quantity, except as the contingency has been guarded against by agreement.

The burden must be regarded in the same light as a change in freight rates between the time of making of a contract and delivery. If the seller agrees to deliver f.o.b. destination unqualifiedly, or to pay the freight, an unexpected rise in freight rates, not guarded against by agreement, must fall on the seller.

SECTION 187. INTERRUPTION OF TRANSPORTATION

"In accordance with the general rule it has usually been held that the seller is not excused from delivery by the obstruction of routes of transportation, whether due to the freezing of waterways, seizure of a railway by the government, freshets, or other causes, unless such contingencies are expressly provided for in the contract, and especially will the rule prevail where other routes of transportation were open to the seller. A failure to deliver under the terms of the contract is not excused by the inability of the seller to procure cars, or other means of transportation, unless there is a stipulation covering such contingency, and even in such case he must show that he made a reasonable effort to procure transportation." (35 Cyc. 245, 246.)

The second highest court in the land, the United States circuit court of appeals (second circuit), decided that, where mill products are bought for export under an understanding that the sales are made subject to embargoes, an embargo preventing delivery within the contract time definitely terminates the contract; the mill is not bound to deliver after raising of the embargo.

In the case before the court—Tanner vs. Ballard & Ballard Co., 273 Fed. 671—it appeared that plaintiff, a New York flour merchant, had made frequent purchases from defendant, a Kentucky milling company. The suit was brought to recover damages on a theory that the mill was in default in failing to deliver flour under certain contracts formed in 1916 by exchange of letters and telegrams, calling for delivery at the Atlantic seaboard for export.

Before any order from plaintiff was accepted, the mill advised him that "any order taken would be subject to an embargo on flour at the port of New York"; and asked him to let it be "understood that in any trading between us your orders are taken subject to embargoes on the part of the railroad companies entering the port of New York or any other Atlantic or Gulf port." Plaintiff acquiesced, writing that he had "adopted a policy of neither buying nor selling an ounce of flour until we have the freight room engaged."

Existence of an embargo prevented complete performance of the contracts within the times specified in them, and the suit followed. Disposing of the case, and affirming a judgment in favor of the defending mill, the circuit court of appeals said:

"By evidence uncontradicted it appeared at the trial that the word 'embargo' meant, and was known to mean by the parties to this action and by the commercial world, that in the spring and summer of 1916 the movement of freight toward Atlantic seaboard destined for export to a Europe occupied by war was so great that railway lines refused to transport all the goods offered them, and particularly refused to accept freight intended for export, unless assured beforehand that it would be promptly unloaded at the seaboard terminal. This practically meant that shippers were obliged to satisfy land carriers that their ocean freight space was ready and waiting.

"The court below held that the contracts in suit were made with this knowledge and on the underlying agreement between the parties: (1) that a railway embargo or refusal to accept was always good reason for not shipping; (2) that it

was Tanner's duty under this agreement to make the shipping arrangements and notify Ballard when and as any embargo on the flour was lifted; so that (3) unless Tanner succeeded in procuring the railway carriage before the expiration of the time limit agreed upon, he had committed a breach of the contracts in suit.

"In these rulings we think the trial court was right. The Ballard company proved its willingness to ship, and Tanner admitted that he could get no permit to ship that remainder of the contract quantity in respect of which this action is brought. The proposition of plaintiff in error is that the effect of the railway embargo was but to create an excusable delay in performance and did not work a discharge of obligation; in other words, that, assuming the contract to be subject to embargo, the contract was not terminated, and performance within a reasonable time should be deemed sufficient.

"But courts are bound by law to look first at the written language of the contract making parties, and we have no doubt that the contract between these parties is to be spelled out of the whole series of letters, beginning with those of January, which substantially read the embargo into all of the subsequent contracts, to the last written extension, which carried the time of performance to July 15.

"Throughout all this correspondence there is nothing to take this contract out of the settled rule that in an executory commercial agreement time is of the essence. . . . The time finally fixed was July 15. Defendant refused to extend the time. The agreement of January (underlying the contracts in suit) was that Tanner should procure the goods to be moved by rail before that date, and to that essential agreement the law holds him.

"It is quite true, as proven at the trial, that if there were nothing except the telegrams and letters of May, 1916, above referred to, it would have been the duty of the seller to move the goods and deliver them at the named shipping ports; but the January correspondence fixed the preliminary duty of 'lifting the embargoes' on Tanner. This he was unable to do in time, and therefore the defendant was relieved of its obligation on July 15."

SECTION 188. INABILITY TO SECURE CARS OR STEAMER

The duty, as between seller and buyer, to furnish shipping facilities is discussed in Chapter XV.

"A failure to deliver under the terms of the contract is not excused by the inability of the seller to procure cars, or other means of transportation, unless there is a stipulation covering such contingency, and even in such case he must show that he made a reasonable effort to procure transportation." (35 Cyc. 245.)

Where goods are to be sold f.o.b. mill, but the seller is unable to secure the necessary cars, he is exonerated from liability for nondelivery. So decided the Mississippi supreme court in the case of Griffin vs. Edward Eiler Lumber Co., 84 So. 225. The commodity involved in the specific litigation was lumber, but the court's decision plainly covers various commodities, including cereal products.

Defendant agreed to sell f.o.b. its mill, and earnestly endeavored to secure the necessary cars, but the railway company refused to furnish them. Several weeks later, it returned the buyer's (plaintiff's) orders and disposed of the lumber elsewhere. Plaintiff sued for damages, and recovered in the trial court, but the supreme court reversed the decision, saying:

"The plaintiff, by directing the defendant to ship the lumber to him by rail, and the Gulf, Mobile & Northern Railroad Co. being of necessity the initial carrier, thereby appointed that railroad company as his agent to receive the lumber for transportation to him. . . . And when the railroad company declined to furnish the cars for the transportation of the lumber, after being requested to do so by the defendant, it thereby declined to receive the lumber, so that the defendant's failure to deliver it was caused by no fault of it, but of the plaintiff's agent; consequently, the plaintiff, and not the defendant, must bear the loss occasioned thereby.

"The plaintiff's contention is that, because the defendant agreed to deliver the lumber f.o.b. its (the defendant's) mill, it thereby assumed the obligation of furnishing the cars in which to transport it. The abbreviation 'f.o.b.,' when used in contracts of sale, stands for the words 'free on board,' and when the goods sold are to be shipped to the buyer 'mean that the subject of the sale is to be loaded by the seller on the vehicle or conveyance for shipment without any expense on the part of the buyer' . . .. and does not of itself alone indicate whether the seller or buyer is to furnish the vehicle in which the subject of the sale is to be transported.

"The vehicle in which property is to be transported by rail must be, of neces-

sity, a railroad freight car, and it is not only the custom of railroads to furnish the cars in which they transport property, but they are under the duty to do so; consequently, the cars in which the seller is to load the subject of a sale for shipment to the buyer by rail, in the absence of agreement to the contrary, must be presumed to be cars to be furnished by the railroad company.

"So that the seller complies with his obligation to the buyer, in so far as this feature of the contract is concerned, when he calls upon the railroad company for the cars. The railroad, under such a contract as hereinbefore set forth, acts as the agent or bailee of the buyer, and not of the seller.

"The authorities are in conflict as to whether it is the duty of the seller or of the buyer to furnish the cars in which the subject of the sale, under a contract of this character, is to be transported; the cases holding that the duty is on the seller being of comparatively recent origin. . . . Among the cases holding that this duty is on the buyer is Graham vs. United States, 231 U.S. 474, 34 Sup. Ct. 148, 58 L. Fd. 319."

* *

But the seller's inability to secure cars in which to ship grain in satisfaction of a contract of sale was held by the Kansas City court of appeals to constitute no legal excuse for nonperformance of the agreement. (Peirson-Lathrop Grain Co. vs. Barker, 223 S.W. 941).

Answering a contention on plaintiff's part, to the effect that he was excused in failing to deliver corn and oats to defendant, the court said:

"The letters evidencing the contracts provided that defendant should load and bill the car of corn to plaintiff at Kansas City; the oats were to be delivered f.o.b. cars at Raymore, and likewise billed to Kansas City. The letters are silent as to who should furnish cars, but the construction the parties placed upon the contracts was that defendant was to furnish them. He ordered the cars . . . three days after the contracts were made, but was unable to get them. The contracts, as construed, were that defendant was to furnish the cars. (35 Cyc. 197, 198.) Defendant's inability to secure cars did not release him. There is no evidence of any understanding that the happening of such a contingency was to make an exception. . . .

"The contracts were not mutually altered by the parties by the effort made by plaintiff to get cars after defendant had tried to get them and failed to do so. It is true that plaintiff attempted to assist defendant in getting cars after defendant represented that he could not get any. But defendant did not ask plaintiff to get cars for the corn until after the contracts had expired through lapse of time for delivery, and he made no request that plaintiff get cars for the oats until after the expiration of that time, except that contained in his letter. What plaintiff did in the matter of assisting in an effort to get cars was only an act of courtesy to defendant, and the evidence does not show that plaintiff intended to change the contracts as construed by the parties so that plaintiff, and not defendant, was to get the cars."

* *

The importance of a sales contract clause specifically excusing the seller from delivery on inability to secure cars is illustrated by the decision of the Louisiana supreme court in the case of C. F. Bonsor & Co. vs. Simon Rice Milling Co., 92 So. 711. It was held that shortage of railroad cars did not release a contract to deliver f.o.b. cars on the theory of "commercial frustration" or interference of "inevitable accident" or irresistible force.

* *

Under a contract to sell goods f.o.b. steamer belonging to a particular steamship line, the seller is not entitled to cancel on it becoming impossible to secure such steamer. The buyer is entitled to insist on delivery on the wharf where the goods were to be loaded, or at some other convenient place imposing no additional burden on the seller. This is a summary of what the California district court of appeals decided in the case of Meyer et al. vs. Sullivan et al., 181 Pac. 847.

Just before war was declared, in 1914, defendants contracted to sell wheat to plaintiffs at a specified price "f.o.b. Kosmos steamer at Seattle," September shipment. On declaration of war the Kosmos Line canceled sailings, and plaintiffs designated no substitute vessel. The market value of wheat having advanced, defendants denied liability to make delivery, on the ground that the contracts involved called for delivery on board a Kosmos liner, and that, on such delivery becoming impossible, defendants were not bound to deliver elsewhere.

Suit for damages for nondelivery followed defendants' rejection of plaintiffs' offer to pay for the wheat in gold and to receive the grain on the dock where Kosmos steamers usually loaded, or at any other warehouse on the Seattle harbor.

Affirming judgment in plaintiffs' favor,

the district court of appeal approved the trial judge's findings that the f.o.b. clause was used in connection with the price of the wheat, and not the place of delivery; and that in view of a well-established and well-known custom in the Pacific Coast grain trade the place of delivery contemplated was the dock at which Kosmos steamers customarily loaded, and not the deck of the vessel itself.

It was further held that, if the f.o.b. clause could be construed as implying obligation on the part of the seller to transfer the wheat from the dock to the vessel, the buyer could waive that and insist on delivery on the dock.

The opinion of the court left some doubt as to the precise difference between the terms "f.a.s." (free alongside ship) and "f.o.b.," as applied to water shipments. On this point the opinion said: "In both f.a.s. and f.o.b. sales, the seller of the goods pays the cost of all handling on the dock, and the cost of stevedoring, or transferring the cargo from the dock to the ship, is paid and absorbed by the shipowner from the freight, which in turn is paid by the buyer.

"The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f.a.s. sales, it seems to end with delivery on the dock. In the case of f.o.b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all."

SECTION 189. MISDELIVERY BY CARRIER

"We sold a carload of feed to a party in Philadelphia," wrote a Minnesota mill. "Feed was shipped, draft made with bill of lading attached, and customer paid the draft, and has the bill of lading. The railroad company delivered the car of feed to other parties without surrender of the bill of lading, on the promise to produce the same later.

"Now our customer wants us to deliver to him another carload of feed. In your opinion, are we obliged to do so? Is not the matter entirely up to the railroad company?"

The buyer of the feed became vested with ownership of it by paying the draft and receiving the bill of lading. and when the carrier made unauthorized delivery of the freight to a third person, it was the buyer's, and not the mill's, property that was converted. Therefore the buyer has no claim against the mill, but has a valid claim against the carrier for the value of the feed at the time of the conversion.

As bearing upon this case, I was later asked by the buyer what effect would result from "the mistake in the delivery being caused by the fact that this shipment was billed by the mill to a third party, to whom the shipment was delivered by the railroad companies."

If, without authority from the buyer, the mill billed the feed to the third person, to whom delivery was actually made, it seems that the mill is just as much liable to the buyer as if there had been a complete default on the mill's part by failing to make any shipment at all under the contract.

The only escape from the liability would appear to be by showing that the buyer ratified the billing to the third person by taking up the bill of lading with knowledge of that fact. But if the buyer, innocently assuming that the bill of lading was drawn to his own order, overlooked the erroneous billing, I do not believe that he could be held to have ratified it.

If the buyer did not authorize or ratify billing to the third person, he should recover the amount he advanced and damages for the mill's failure to make proper delivery, measured by the excess of the market value of the bran at the contract time and place for delivery, above the contract price at that time and place. If he did authorize or ratify the billing he has no just claim against the mill.

If the mill is liable to the buyer, its only remedy is either a claim filed against the carrier for unauthorized delivery of the feed without production of the bill of lading, or against the third person for the reasonable value of the shipment appropriated by him. If the buyer authorized or ratified the billing, releasing the mill, the buyer has the same remedy against the railway or the third person.

The third person's act in obtaining possession of the shipment created an implied promise on his part to reimburse the owner of the feed, if he had not become otherwise entitled to delivery.

SECTION 190. WAR CONDITIONS

"There seems to be no legal doubt that a governmental prohibition of the export of goods is an excuse for nonperformance of a contract, upon the doctrine that performance would thereby be rendered illegal, and would subject a contracting party to prosecution, with attendant fine or imprisonment," declared the appellate division of the New York supreme court in the case of

Varagnolo vs. Partola Mfg. Co., 204 N. Y. Supp. 577.

"The acts of the federal authorities incident to the war being lawful, such an act within authority as prevents or renders impossible performance excuses the party restrained. If the defendant, as it contends, had until the end of October to perform, and provided it has shown that performance by it on that day was lawfully forbidden and would have been illegal, its defense would be sufficient, for it would not be held liable for a breach of its contract on the theory that it might lawfully have performed the contract before the time it had agreed to perform."

* *

A decision having an important bearing on lawsuits involving the validity of government interference during the war with the performance of contracts for the sale of goods as an excuse for nonperformance of such contracts was handed down by the United States circuit court of appeals, second circuit, in the case of Roxford Knitting Co. vs. Moore & Tierney, 265 Fed. 177.

The substance of the decision was that a manufacturer was released from obligation to perform a contract for the delivery of goods within a stated period, through virtually being compelled by the federal government to devote the entire product of the factory to the supplying of the army and navy on orders given through the advisory commission of the council of national defense.

The court noted that it was "not questioned that, if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless performance is rendered impossible by the act of God, the law, or the other party." But it was held that there was a prevention of performance in this case by the law, although the manufacturer entered into contracts with the government for the army and navy supplies "voluntarily"; it appearing that, if the contracts had not been entered into, the plant would probably have been commandeered by the government under the national defense act.

We quote the following language of the New York supreme court, appellate division, concerning the obligation of a buyer to accept deliveries and pay for them at current market prices as agreed:

"The contract was entered into after all the great powers except the United States had become involved in the war with Germany. It was to extend eight years. The parties must have contemplated that unusual and abnormal market conditions must be occasioned by the war, and that there was a possibility of the United States becoming involved, and that the performance of the contract might have been rendered difficult or burdensome. Parties cannot be relieved from the performance of their contracts merely for those reasons, but only where, by acts of law, the performance thereof has become impossible or illegal." (Boret vs. L. Vogelstein, 177 N. Y. Supp. 402; affirmed by court of appeals, 130 N. E. 898.)

* *

Nonperformance of a contract for sale of goods could not be excused on the ground of impossibility of performance by reason of war conditions abroad, so as to avoid liability for damages to the complaining party, the agreement having been made in this country and contemplating performance here. In so holding, the trial term of the New York supreme court, in the case of Richards & Co. vs. Wreschner, 156 N.Y. Supp. 1054, threw interesting light on legal phases affecting exporting millers.

Before the late war was declared, defendants, comprising a partnership with principal offices in Germany, entered into a contract in New York to sell stated quantities of Belgian antimony to plaintiffs, shipment to be made from Europe, and to be "delivered, c.i.f., New York or Boston, buyer's option. Terms: cash against documents on arrival of vessel. No arrival, no sale."

When sued for breach of this contract, defendants relied, as an excuse for nonperformance, on the facts that the war shut off the only source from which the antimony could be obtained, and that on declaration of hostilities it became unlawful for defendants, under the German law, to deal with Belgian industries, so that performance of the contract became impossible.

The New York court refused to adopt this view, saying: "The claim of the defendants that they are excused from performance because of the interference with the source of supply or with the opportunity for shipment by reason of the existence of a state of war between Germany and Belgium, and also because of the subsequent illegality of shipment by reason of the proclamation of the German government prohibiting the exportation of the merchandise contracted for, cannot be sustained.

"It is well settled that impossibility due to a foreign law is no excuse. . . . Under the provision in the contract of

'no arrival, no sale,' title remained in the seller until delivery. The contract was entered into in New York, and was to be performed in this country, and the nature, validity, obligation, and legal effect of the contract must be determined by the law of the place of contract, and effect will not be given to foreign laws in derogation of the contract or prejudicial to the rights of citizens."

Numerous American and English judicial precedents were cited by the court to sustain the decision. From one of them—a decision of a federal court—the following language is quoted: "Do the legal acts of the agents of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties?

"Contracting parties are subject to contingencies of changes in their law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse when the act which is contemplated by the contract was valid in view of the law of the place where it was made, . . . and for stronger reasons when it was also then valid at the place of performance."

One of the English decisions cited was handed down by Lord Ellenborough in the case of Barker vs. Hodgson, where the defendant was unable to send a cargo by reason of an embargo imposed by port authorities due to the breaking out of a pestilence at Gibraltar.

In that case it was said: "If the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused from nonperformance of it and not liable to damages.

"But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

The New York court also quotes the following general principles laid down by the court of appeals of the state on the question as to when performance of a contract is excused in law: "It is a well-settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve from an expressed agreement, and an act of God or the law or the interfering or preventive acts of the other party may free one from the performance of it; but if what is agreed to be done is possible and lawful the obligation of performance must be met.

"Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other. They will neither make nor modify contracts, nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications."

SECTION 191. INSOLVENCY OF BUYER

As announced in numerous court decisions, where a sale is made on credit, the seller is excused from delivery if the buyer has become insolvent. If, however, the buyer is ready to substitute cash for the credit, his insolvency does not excuse the seller.

The Minnesota supreme court appears to have stated the general rules governing this point in the case of Crummey vs. Raudenbush, 56 N.W. 1113. The gist of the decision is as follows:

A seller on credit waives his lien on the goods sold to cover the purchase money, on an implied condition that the buyer will keep his credit good. Hence if, while the goods remain under the seller's control, he discovers that the buyer is insolvent, he may retain them.

The insolvency does not rescind the contract, nor afford ground for rescission; it merely entitles the seller to demand cash payment. Nor does insolvency existing at the time of the making of the contract excuse refusal by the seller to deliver, if such insolvency was then known to him. The seller will, however, be presumed to have had no such knowledge, unless the buyer expressly proves the contrary. The seller's rights in this regard are not affected by any part payment which may have been made by the buyer.

"Insolvency," within the meaning of these rules, is a general inability to pay

one's debts; no formal adjudication of insolvency is required.

SECTION 192. FAILURE TO GIVE SHIPPING INSTRUCTIONS

"Nonperformance by the seller is excused if the buyer, when obligated so to do by the contract, fails to order deliveries; or to give instructions as to the size, quality, or quantity of the articles desired; or to give proper shipping directions." (25 Cyc. 250.)

Many persons will agree that this brief statement of an important rule of law is too clearly sound on its face to afford basis for argument. But the existence of numerous appellate court decisions attests the fact that controversy frequently arises on the point as to whether a buyer who has failed to give shipping instructions within an agreed time can require delivery by giving them tardily.

An illustrative case is afforded in bankruptcy proceedings had several years ago against the Millbourne Mills Co. (165 Fed. 109). Claim was made against the company's estate in bankruptcy on the ground that the mill had broken a contract to deliver flour and other mill products to claimants. Affirming an order of the referee which denied the claim, the United States district court for the eastern district of Pennsylvania said:

"We are unable to find any error either in the referee's ruling on the evidence offered, or his conclusion as to the right of the claimants to recover for the difference in price on goods subsequently purchased by them in the open market instead of similar merchandise for which they made no call on the Millbourne Mills Co., as required by their contracts, either before or after the time limit had expired.

"It is plain these contracts, as interpreted by the parties themselves, required the claimants to notify the bankrupt company when they desired the deliveries to be made, and in the absence of a receipt of such a notice the Millbourne Mills Co. had a right to assume that plaintiffs were not ready for delivery, and if, as in this case, the claimants failed to take the merchandise purchased, according to the contract, within the time specified, the seller had a right, after the expiration of the time, as it did in this case, to notify the claimants of its refusal to be further bound by the contract.

"In mercantile transactions time is of the essence of the contract, unless the contrary appears, as the purchase and delivery of goods is a matter of importance to both buyer and seller for the purpose of enabling them to successfully develop and execute their plans in connection with the goods bought or sold in the use to which they are to be put."

* *

An example of a class of cases in which duty of the buyer to give shipping directions will be inferred without express provision is to be found in the holding of the Mississippi supreme court that, in the absence of a demand for delivery, damages are not recoverable for breach of a contract to deliver goods in such quantities as shall be required by the buyer. (42 So. 284.)

* *

Under a contract for sale of grain, to be shipped promptly on shipping orders to be given by the buyer, the seller reserving the right at the end of the contract time to continue the contract, without notice, for 30 days, with a carrying charge, the Illinois appellate court held that the buyer broke the contract by refusing to give shipping instructions, although pressed by the seller to do so. (194 Ill. App. 543.) It was held that the buyer had no right to assume that the time of performance had been extended by the exercise of the seller's option.

* *

The Dowling-Martin Grocery Co., Ozark, Ala., was nonsuited in an attempt to recover damages against the J. C. Lysle Milling Co., Leavenworth, Kansas, on account of nondelivery of two cars of flour ordered Jan. 8, 1917. The Alabama supreme court found that the mill justifiably canceled the contract for failure of the plaintiff to give shipping instructions within a reasonable time. (83 So. 486.) The suit was founded upon a contract formed by correspondence as follows:

Responding to solicited quotations, plaintiff instructed the mill by wire to "book two cars." Two days later—Jan. 10—the mill confirmed the contract "on the basis of $10.80 for White Crest in cotton, delivered Ozark," stating that shipping instructions were awaited and that much higher prices were looked for. March 8, plaintiff gave general routing instructions to cover all shipments that should be made to plaintiff.

In response to request for quotation on the same brand of flour, the mill wired plaintiff March 28 a price of $11.05. Two days later, plaintiff telegraphed: "Ship at once on contract 240 sacks forty-eights, 1,200 sacks twenty-fours White Crest, same route. Rush shipment." The mill

replied: "Your contract expired March 8, 1917. Price today $11.50 Crest. Shall we ship?"

The mill's letter confirming this telegram stated that the flour was booked for 60 days' shipment, and that the mill regretted that it had not been ordered out within the contract period. Plaintiff telegraphed back that the mill should have advised that it was canceling, that confirmation did not specify a time limit on the contract, and that shipment at the contract price was insisted upon. The mill replied: "We never book for shipment over 60 days, and cannot accept directions now."

About one month later, plaintiff again requested quotations on same flour, but the mill declined to make any. May 8, 1917, plaintiff wired: "Ship at once on contract 140 bbls White Crest in forty-eight sacks; 300 bbls in twenty-four sacks. Ship at once, or we will buy for your account, charging you with any difference." Reiterating its refusal to deliver, the mill closed the correspondence with the statement: "For you to come in, four months after you made this purchase, with specifications, and expect us to reinstate the order, is something that we cannot see our way clear to do."

The trial judge ruled, as a matter of contract interpretation, that plaintiff had no right to recover. Affirming this decision, the supreme court says in part:

"Defendant says that, no time limit for compliance being fixed, payment or direction and demand for shipment must be made by plaintiff within a reasonable time after making the contract; that defendant was only bound to deliver within a reasonable time after compliance and request for shipment. The correspondence confirming acceptance of the order contained defendant's specific statement that it awaited plaintiff's shipping directions.

"The contract relation of the parties, when the nature of the property dealt with is considered, was that the law implied: (1) a reasonable time within which direction for delivery should be given, or payment of contract price made was of the essence of the contract; (2) that seller was under no obligation to ship until buyer had given shipping directions or until payment was made and accepted; (3) that the failure or refusal of buyer to direct shipment or indicate its willingness to accept the flour within a reasonable time after the booking of its order relieved the seller of any obligation to deliver the same.

"What is a reasonable time for performance of a contract is determined by the circumstances of the case, and is a question of fact or of law. . . . If dependent upon disputed facts, extrinsic to the contract, the reasonable time becomes a question of fact, and when it depends upon the construction or a contract and undisputed extrinsic facts, it is a matter of law. . . .

"The argument of plaintiff is that, although no time for performance is mentioned in the contract, and a reasonable time for performance had elapsed from the making of the contract to the date when plaintiff ordered shipment of the flour, the contract was of binding effect for the reason that defendant mill company had not notified the buyer that it had the specific quantity of flour to the credit of the plaintiff, and that, unless the same was ordered shipped within a reasonable time, defendant would rescind the contract or treat it as terminated.

"We do not agree with this statement of the contract relation or obligation arising therefrom. [It is to be specially noted that no formal contract was entered into in this case and that there was no such stipulation for notice of cancellation as is provided in the uniform sales contract forms now in general use.]

"It may be that the foregoing would be the correct rule to be applied if the facts had been that the grocery company had ordered the flour shipped, or stipulated the date of shipping on making the contract, and defendant mill company had shipped a portion of the flour of a grade different from that contracted, and had notified the purchaser that it had other flour of like grade to ship on its contract.

"Under such circumstances it would become the duty of the grocery company, desiring to terminate the contract within a reasonable time, to give the mill company notice of such intent, and the latter would have a reasonable time to procure and deliver flour of the quantity and quality sold, and, failing for such reasonable time so to do, the contract would be terminated. . . .

"Construing the terms of the instant contract, . . . it must be said that it became plaintiff's obligation to make payment for the flour, or make arrangement satisfactory to defendant for the contract price, and order its shipment within a reasonable time after Jan. 8, 1917. The contract disclosed fails to show that plaintiff directed or requested shipment of the flour or any part thereof

within a reasonable time after the meeting of the minds of the parties."

* *

By appealing to the North Carolina supreme court, defendant in the case of Sterne et al vs. Bay State Milling Co. won a decision exonerating it from liability for refusal to ship flour under canceled contracts of sale. (101 S.E. 21.)

These agreements contained the following clause:

"Unless otherwise specified herein, goods are to be ordered out within 30 days from this date. Buyer to pay carrying charges of 5c a barrel on flour, and 25c a ton on feed for each period of 30 days, or fraction thereof, on goods not ordered out within contract time, payable at the beginning of each period; also all advances in freight after contract shipment time. At the end of contract time, or of any succeeding 30-day period, or other agreed time, unless goods are ordered out, or on failure of buyer on demand to pay carrying charges, seller may terminate contract and resell goods for buyer's account."

After lapse of the times within which plaintiffs should have given defendant mill shipping instructions, the mill, by letters of May 15, May 27, and July 19, asked for them, suggesting certain dates and asking if they would be satisfactory. The plaintiffs did not reply. On July 29, the mill wired:

"Unless you authorize by wire today permission to ship by Aug. 15 remaining three cars of flour on books for you, with full carrying charges added, we will understand you prefer order canceled. Impossible carry beyond Aug. 15."

Plaintiffs did not answer this telegram, and the mill resold the flour within the ensuing 10 days. Plaintiffs then sued for damages on a theory of wrongful refusal by the mill to deliver the three cars of flour, necessitating a purchase by plaintiffs of substitute flour elsewhere at increased cost.

On the points involved on the appeal, the supreme court says:

"The plaintiffs allege an extension of time by agreement to certain dates specified in the complaint. The burden was upon the plaintiffs to prove such agreement. . . . Upon the whole correspondence there was no evidence that the time of shipment was extended by agreement. The offers of May 27 and July 19 before acceptance were withdrawn by telegram of July 29. Besides, the failure to meet the demand in that telegram, for payment of 'full carrying charges,' authorized defendant by the terms of the contract to cancel.

"Even if the time for shipment had been extended by agreement, the plaintiffs' failure to give shipping instructions was fatal. We agree with the defendant's contention that it 'could not be required to take the risk of shipping without instructions, because the plaintiffs might have required that the point of destination be other than Greensboro. The plaintiffs might have resold the flour or have desired it shipped to other points.'

"If the plaintiffs' failure to answer the defendant's letters of May 15 and 27 and July 19 was an acceptance of the dates of shipment therein proposed [it was so claimed by plaintiffs], their failure to answer the telegram of July 29, with remittance of 'full carrying charges added,' was equally an acceptance of the condition that the contracts would be canceled unless reply was made that day with remittance demanded.

"The motion for nonsuit should have been allowed."

* *

In another case (147 Fed. 411) the United States circuit court of appeals, eighth circuit, declared that "buyers could no more neglect to give shipping instructions without violating their obligation than the seller could neglect to make shipments after receiving the instructions without violating his obligation."

* *

One of the latest appellate court decisions on this subject, and arising in the milling industry, was handed down by the Wyoming supreme court in the case of Malin vs. J. W. Denio Milling Co., 165 Pac. 1113. In this case the court reversed a judgment in plaintiff's favor for damages for nondelivery by defendant milling company of flour contracted for; the court holding that plaintiff was in default under the contract in failing to give shipping specifications.

The decision is specially noteworthy in that the written contract was silent on the matter of shipping instructions; the court's conclusion resting on the fact that the circumstances indicated an understanding that such instructions would be given.

The contract called for shipment of five cars of flour from the defendant's mill at Sheridan, Wyo., to plaintiff at Billings, Mont., at which latter point delivery was to be made f.o.b., "one car at time—last car to be shipped on or before Feb. 1, 1915." The contract was made July 31, 1914. Two cars were delivered in the

fall, and plaintiff sued for nondelivery of the remaining three.

The defense interposed was that, when the contract was entered into, it was understood that before any shipment could be made plaintiff would give the mill specifications as to the sizes of sacks desired, and the number of each; and that such specifications were furnished as to the two cars delivered, but not as to those undelivered.

The supreme court held that the trial judge committed error in refusing to receive evidence offered by the mill proving that, prior to the shipment of each of the two lots delivered, the plaintiff informed the defendant that a carload of flour was desired, made up of specified numbers of sacks of specified weights, but that no specifications were given as to the remaining three cars, although requested by the mill before expiration of the time limit for delivery.

This evidence was excluded by the trial judge on the ground that it tended to contradict the terms of the written contract, which purported to state the full agreement between the parties. Reversing this ruling, the higher court says:

"It is a settled rule of construction of written contracts that if the language employed is susceptible of two constructions the court will take into consideration the situation of the parties and surrounding circumstances at the time the contract was entered into, in order to arrive at the true intent of the parties. . . .

"Here plaintiff was a retail grocer and wanted the flour to supply his customers, and covering a period of five months, which fact was known to defendant. It is unreasonable, under such circumstances, to conclude that plaintiff intended that defendant had the option of shipping to him the entire five cars, one car each week immediately after the contract was entered into, and thus require plaintiff to pay for all within 35 days; or that defendant could decline to deliver any of the flour until the last five days in January, 1915, and deliver one car a day during those five days.

"There is also a still stronger reason supporting the contention of defendant. It offered to prove facts showing the construction placed upon the contract by the parties before any controversy arose between them.

"Plaintiff's conduct in ordering the two cars and specifying the weight of sacks and the number of each, if that was the fact, would clearly indicate that he regarded that as his right under the contract; and defendant offered to prove its acquiescence in that construction of the contract and its understanding of the rights and duties of the respective parties thereunder.

" 'It is to be assumed that the parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions.' . . .

"The evidence sought to be introduced by defendant would not have varied the terms of the writing. It would not have changed the terms of the contract that the flour was to be delivered 'one car at a time,' or that it was to be contained in sacks of specified weight, and all to be delivered on or before Feb. 1, 1915.

"We think the evidence was competent and should have been admitted; and if defendant had been permitted to introduce the evidence offered, and the same had been found sufficient to establish the facts which defendant offered and sought to prove, then the fault was that of plaintiff in his failure to give shipping directions, and he would not be entitled to recover."

From the reasoning of the court in the Wyoming case it is clear that where, at the time a contract of sale is made, there is a mutual understanding that the buyer is to give shipping instructions, compliance with that understanding within the time fixed for delivery is a prerequisite to the buyer's right to delivery, although the understanding may not be expressed in definite terms in the contract proper, unless there happen to be in the contract express terms at variance with any such understanding.

For example, let it be supposed that the buyer or the seller has mentioned in his letter confirming a sale consummated by an exchange of telegrams that the buyer is to furnish shipping instructions. Plainly, this would make the giving of such instructions one of the conditions of the contract, and especially if the statement of that understanding be made by the

buyer, for whose benefit a stipulation of this kind is usually made.

* *

In a Georgia case (Caddick Milling Co. vs. Moultrie Grocery Co., 96 S.E. 583), a suit brought by the Moultrie (Ga.) Grocery Co. to recover damages for an asserted breach of contract to deliver flour, the specific question involved in the controversy was whether the grocery company was itself in default in having failed to order the flour out within the time called for by the agreement, and the Georgia court of appeals decided this issue in favor of the milling company.

The contract was dated Nov. 10, 1914, and was written on a printed form. It called for 500 bbls, and a blank providing for "date of shipment" was followed by the words, "Nov. and Dec." The form also specified that the sale was made subject to the terms and conditions printed on the back. The second of these printed conditions provided that "unless otherwise specified, purchases must be ordered out within 30 days from date of contract, with a maximum possible limit of 90 days from date of contract," etc.

The grocery company, by orders given Dec. 4 and 29, obtained shipment from the mill of 300 bbls, but called for no part of the remaining 200 bbls of flour until Jan. 30, 1915. The milling company declined to deliver on this belated order, and the suit followed.

Trial of the action resulted in a verdict in favor of the plaintiff, but the court of appeals has ordered a new trial, on the ground that the trial judge misinterpreted the agreement on the vital point as to whether the grocery company ordered shipment of the 200 bbls in proper time. The salient portions of the opinion of the higher court read as follows:

"The main question in the instant case arises upon the construction of the contract between the parties. Was the time of shipment limited to the months of November and December, or was it limited to 90 days from the date of the contract, to wit, Nov. 10, 1914. If limited to the months of November and December, the plaintiff should have ordered out the flour during those months, and, having failed to do so, no right of action would lie in its favor.

"The cardinal rule of construction of a contract is, of course, to give effect to the intention of the parties, if that can be arrived at. . . . If there are apparently inconsistent clauses in the contract, one written upon the face of the contract in a blank prepared for that purpose, and the other printed upon the back of the contract, that which is written by the parties in the face of the contract will generally be accepted, rather than the inconsistent clause printed upon the back thereof. . . .

"From the correspondence which took place between the parties in connection with the signing of the contract, immediately before and immediately thereafter, it was the evident intention of the parties that the time of shipment should be limited to November and December. . . . It is proper, of course, to take into consideration this correspondence between the parties, in the construction of this contract and in arriving at the intention of the parties. . . .

"Moreover, upon a careful reading of the contract, we do not think that the clause in the face of the contract, limiting the shipment to the months of November and December, is really inconsistent with the provisions of the contract printed on the back thereof. These conditions printed on the back are evidently general rules governing the sale of flour and feed adopted by the Southeastern Millers' Association, and are intended to apply where the time or period of shipment is not otherwise specified in the contract. The second paragraph of these printed conditions begins with the clause:

" 'Unless otherwise specified, purchases must be ordered out within 30 days from date of contract, with a maximum possible limit of 90 days from date of contract.'

"So that this printed condition, as set out in paragraph 2, fixing a maximum possible limit of 90 days from date of contract, applies unless it is otherwise specified in the contract. A reasonable construction to be placed upon this clause of the contract is that this maximum possible limit of 90 days from date of contract will not apply where the parties fix in the face of the contract a time or period of shipment. It is intended, by this paragraph 2, to provide for a limit within which purchases must be ordered out where the contract itself does not provide for such limitation.

"The remainder of this paragraph provides for carrying charges to be paid by the buyer under certain conditions, and for certain credits to be given the buyer, under certain conditions therein specified. We think, therefore, that there is really no inconsistency in the contract, since it is otherwise specified and fixed by the terms of the contract that the time of

the shipment should be the months of November and December.

"A contract of the precise form of the one before this court was construed by the supreme court of Alabama, in the case of Hopkinsville Milling Co. vs. Gwin, 179 Ala. 472, . . . except that in the Alabama case it was provided, in the face of the written contract for the sale of the flour, that the date of the shipment was at 'buyer's option.' On the back of the order appeared the same printed conditions as in the contract now under consideration, viz:

" 'Unless otherwise specified, purchases must be ordered out within 30 days from date of contract,' etc.

"The suit in that case was by the seller against the buyer, for a breach of the contract in declining to order out the flour according to the terms of the contract and to accept the shipment. The judgment was for the defendants, and the plaintiff appealed.

"It was contended by the plaintiff, the milling company, that the phrase 'buyer's option,' written on the face of the order, was substituted for and took the place of the printed provisions on the back, referring to the dates of shipment and of delivery, or, in other words, that this order was one within the protection of the printed provision, 'Unless otherwise specified,' and that the terms and dates of delivery were otherwise specified in this contract.

"The construction contended for by the vendees, and the one which seems to have been adopted by the trial court, was that the printed condition on the back of the order controlled. The supreme court of Alabama reversed the judgment of the court below, and held that the stipulations on the face of the contract governed. . . .

"The time of delivery in the instant case is of the essence of the contract, and it was obligatory upon the buyer to order out the flour within the limit provided by the terms of the contract, i.e., during the months of November and December, and, having failed to do so, he would have no right of action against the defendant."

* *

Adhering to the rule laid down in the case of Caddick Milling Co. vs. Moultrie Grocery Co., the Georgia court of appeals held in Lee Bros. vs. Bewley-Darst Coal Co., 97 S.E. 99, that, where a contract for a sale of goods provides that the buyer shall order delivery within a certain time, failure to do so terminates his right to delivery. It will be presumed that the parties mutually intended that the stipulation for ordering the goods out within the specified period should operate as a vital condition of the contract.

* *

Defendant in the case of Fortson Grocery Co. vs. Pritchard Rice Milling Co., 220 S.W. 1116, defeated plaintiff's claim for damages demanded on account of nondelivery of a carload of rice, under circumstances and legal principles of special interest to the flour and feed trade.

The car in question was contracted for in November, to be delivered on furnishing of shipping instructions. Local custom required these instructions to be furnished within 10 days, but this was not done.

Nov. 10 and Dec. 7 the mill requested shipping instructions, and, receiving no response, on Dec. 18 asked whether plaintiff buyer repudiated the purchase. Whereupon the latter replied that it did not, but was crowded for storage room, and would like "a little more time" in which to move the rice. The mill replied, on Dec. 20, "We are also crowded for room ourselves, and will be glad if you will furnish us shipping instructions at the earliest opportunity."

No further communication passed until March 30, following, when the market value of the rice had doubled and when plaintiff gave shipping instructions. The mill replied: "It is true that we sold you a car of rice last October, but you refused to accept it and sale was canceled long ago."

The buyer's suit proceeded upon the theory that the mill could not cancel without notice to plaintiff, but the point did not stick.

The trial judge found that, when the mill acquiesced in the grocery company's request for "a little more time" in which to move the rice, it was "the intention of the parties that the grocery company should still furnish the milling company with shipping instructions within a reasonable time," and that, "taking into consideration the character of the commodity, the fluctuation of its market price, and the intention of the parties, both buyer and seller, as reflected by their letters, telegrams, and conduct, from December, 1916, to April, 1917, or more than three months, was an unreasonable time for the grocery company to wait to furnish the milling company shipping instructions." Affirming the ruling of the lower court, the Texas court of civil appeals said:

"If, as the grocery company assumes to be true, the milling company was in the attitude of having waived the default of the grocery company in failing to furnish the shipping instructions within the time, to wit, 10 days fixed by the usage and custom the court found to exist, we are inclined to agree with its contention, if it is that the milling company did not have a right to treat the contract as at an end until after it had demanded performance by the grocery company, and that company had failed to comply with the demand within a reasonable time.

"As, however, we are of the opinion it appeared that the milling company in its letter of Dec. 20 demanded performance by the grocery company of its undertaking to furnish shipping instructions, it is not necessary that we should decide the question. If the letter should be construed, as it was by the parties and the trial court, as a grant to the grocery company of a reasonable time after its date in which to furnish the shipping instructions, we think it should be construed as a demand that the grocery company furnish the shipping instructions within that time. . . .

"Construed in the light of the circumstances of the case and the rule of law the grocery company invokes, we think the fair meaning of the last clause in the letter, to wit, 'will be glad if you will furnish us shipping instructions at the earliest opportunity,' was, and that the grocery company should be held to have understood it to be, a demand on it to furnish the shipping instructions within a reasonable time after it received the letter.

"Before that time the milling company had repeatedly demanded of the grocery company that it comply with its undertaking to furnish the shipping instructions, and clearly the grocery company was in default because of its failure to do so. The milling company would have been within its rights had it then refused to recognize the contract as any longer binding on it. The effect of the letter in question was, we think, to advise the grocery company that it would, instead, treat the contract as binding on it, but would expect the grocery company to furnish shipping instructions within a reasonable time thereafter."

* *

A decision of the New York supreme court, appellate division (177 N.Y.S. 309) shows that specification of a place in a contract for the sale of goods may be treated, not as specifying the place for delivery, but as fixing the price with reference to transportation charges.

In the case before the court a seller had agreed to ship from its plant to such place as the buyer might name, and it was provided that the latter would give shipping instructions by a certain date. The contract fixed the price at a certain figure "ex-dock New York." Considering this contract as a whole, it is held that the quoted phrase bore no relationship to the place of delivery, merely fixing a price basis, and that, therefore, the buyer broke its contract by failing to give timely shipping instructions.

* *

A rule that where a contract of sale provides for delivery f.o.b. shipping point, but does not indicate the destination or the carrier which is to transport the goods, the buyer cannot put the seller in default until shipping directions have been given, is vouched for by the North Carolina supreme court (138 N.C. 105), which quoted the following language from an English decision:

"When circumstances, left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars."

* *

The following is the gist of a decision of the Pennsylvania supreme court (117 Pa. 490) bearing on contracts to sell for water transportation:

Under agreement to deliver f.o.b. an unnamed vessel, the seller is not bound to act until the buyer names the ship to which delivery is to be made. But where, by the nature of the express provisions of the contract, either the time or the place of delivery is at the seller's option, he becomes the actor, and it is his duty to give notice of the time or place of delivery before there is any obligation upon the buyer to name the vessel.

* *

According to a decision of the Alabama supreme court, failure of a buyer to give shipping specifications within an agreed time not only exonerates the seller from obligation to deliver but gives the latter an option to sue for any damages resulting from being prevented from making delivery, the same as if the buyer had definitely repudiated his contract to buy. (144 Ala. 598.)

Other holdings of appellate courts on points germane to the subject of this article are as follows:

When a buyer has failed to order out

deliveries in the full monthly quantities required by his contract, his subsequent insistence that further deliveries be made in excess of the monthly requirements of the contract, to make up the deficiency on previous orders, coupled with a threat to claim damages for failure to comply with such insistence, justifies the seller in refusing to make further deliveries, as for want of proper order. This is a decision of the United States circuit court of appeals, seventh circuit. (234 Fed. 20.)

"The exact bearing point of the controversy can be best found by presenting three suppositious cases:

"(1) A broker, or other middleman, who buys to sell again, buys for delivery to an unknown consignee at an unknown place. To get a price basis, East St. Louis is named as the place of delivery. It is not in the contemplation of either party that the goods shall be there shipped or received, but they are to go to any place named by the vendee. (2) A vendor has a manufactory in East St. Louis from which he ships. A rate is made for delivery f.o.b. cars East St. Louis, with the expectation of being shipped elsewhere. (3) A vendee buys goods for delivery to himself at East St. Louis, to be there used. The goods are to be shipped in cars to East St. Louis, where the consignee is to receive them.

"The common sense as well as legal meaning of these respective contracts is that, in the first and second cases, the vendee is bound to give shipping instructions. In the third case the vendor has them." United States district court, eastern district of Pennsylvania. (236 Fed. 596.)

Occasionally, no doubt, a buyer is disappointed in his expectations in matters related to the disposition to be made of the goods on their delivery to him—e.g., where an embargo is laid on rail shipments, or where he is unable to secure ocean space for export shipments.

However, it is too clear to require argument that such conditions do not affect the seller's right to cancel on the buyer failing to give shipping instructions, any more than would be the case had the buyer been disappointed in an expectation of being able to resell the goods to advantage at the destination to which they were to be shipped by the seller. Such contingencies must be specially provided for in the contract before they are available to the buyer. (13 Corpus Juris, 635-637.)

* *

The New York supreme court has decided that, where a contract of sale is entered into under such circumstances as to negative any understanding that the buyer is to give shipping instructions, the seller cannot subsequently impose giving of them as a condition upon delivery, unless the buyer assents to that condition.

In this case the contract specially provided for delivery f.o.b. factory, and for shipment "promptly, as soon as possible." After the terms had been closed, the seller's representative wrote the buyer that shipping instructions would be awaited. Holding that the seller could not impose this condition on the buyer, the court said:

"The contract did not provide for further shipping instructions, and the defendant could have shipped the goods to the address of the purchaser as given in the contract 'as soon as possible' and thus made a complete delivery."

Another decision of the New York supreme court (117 App. Div. 21) is worthy of note. In that case the contract of sale specifically provided in typewriting for shipment of 400 bbls of wire at the rate of six to eight bbls per week. The contract was written on a form containing the following quoted language in printing:

"The purchaser shall give to the seller specifications for goods covering shipments, not less than 10 days before time of shipment."

The court disregarded this clause as not having been intended to be incorporated into the particular contract, holding that it "would only refer to a case where the provisions of the contract contained no specific obligation as to the shipment, for where the contract expressly provided when the defendant was to ship the wire sold, no further directions were required."

But the same opinion recognizes the point that, where shipments are suspended by the seller at the buyer's request, the seller cannot be deemed to be in default as to delivery until the buyer again gives directions.

And the New York court of appeals has adhered to the general rule that, where it has been agreed that shipments were to be made on the buyer's directions, the buyer's refusal to give such directions constitutes a definite breach of the contract of purchase. (206 N.Y. 544.)

* *

In Valdosta Grocery Co. vs. Caddick Milling Co., 126 N.E. 240, an action for damages for nondelivery of flour, one contention made by the mill related to the

interpretation to be placed on the contract with reference to when the 1,000 bbls of flour in question were to be ordered out. The mill made a twofold contention in this regard:

(1) The contract expressly limited the time of ordering out the flour to the months of November and December, 1914; (2) the contract as to the time for ordering out the flour covered thereby was controlled by a general custom which required that the flour be ordered out with shipping specifications and directions within the months of November and December.

"We cannot adopt either of these views," said the Indiana appellate court. "Both the order and confirmation specify a shipment period. Such period is designated by the words 'November and December' written on the face of each. In the subsequent portions of both the order and confirmation, which are identical, it is provided that, 'Unless otherwise specified, purchases must be ordered out within 30 days from the date of contract.'

"It is obvious that this provision was inserted in the printed form to fix a limitation on the time when flour sold should be ordered out where the contract was silent in that regard, but, where the contract fixed the shipment period, such provision was to be disregarded. The contract under consideration fixed a shipment period, and hence the provision quoted above is not applicable.

"We must, however, give effect to every other provision thereof which is not wholly dependent thereon. Passing to the sentence following the one from which the above quotation is taken, we find it provides that, if the flour sold is not ordered out 'within contract shipment period,' it is to be subject to a carrying charge of five cents per barrel per month or fraction thereof.

"As the shipment period in this case terminated on Dec. 31, 1914, it follows by the express terms of the contract that carrying charges would begin to accrue from that date, which would be wholly inconsistent with the theory that the contract terminated on that date and that appellant was thereafter under no obligation to make shipment of such flour.

"The fact that the clause under consideration expressly provides for carrying charges after the expiration of the contract shipment period shows conclusively that its application is not limited to cases where there has been a failure to fix a shipment period, but applies in all cases, whether a shipment period has or has not been fixed.

"To adopt appellant's contention would require that we refuse to attach any significance to the phrase 'within contract shipment period,' as found in both the order and confirmation in connection with the provisions relating to carrying charges, which we are not permitted to do, under the well-established rules relating to the construction of contracts. . . .

"On the other hand, to give it the effect we have indicated leads us to a reasonable construction of that part of the contract under consideration, and removes a difficulty which would otherwise exist in arriving at the intention of the parties. The conclusion we have reached in this regard finds support in the case of Hopkinsville Milling Co. vs. Gwin, 179 Ala. 472, 60 So. 270, but is in conflict with the later case of Caddick Milling Co. vs. Moultrie Grocery Co., 22 Ga. App. 524, 96 S.E. 583, cited by appellant. However, we find ourselves unable to follow the latter case, as the better reason leads us to a contrary conclusion."

The appellate court finds that a letter written by the mill in the middle of January, 1915, two weeks after time for shipment specified in the contract had expired, warranted an inference that the mill recognized that the contract was still in force, contrary to the position taken at the trial, that the contract expired Dec. 31.

"It is obvious from reading the contract," proceeds the court, "that it was incumbent upon appellee to order out the flour covered thereby, with shipping specifications and instructions, within the life of the contract, but until the contract had expired by limitation, or had been terminated according to its provisions, it was optional with appellee when this should be done. This was true, not because of any custom, but by a fair implication arising from the provisions of the contract itself.

"It follows that the general custom alleged by appellant could not be accepted as controlling in that regard. We do not believe appellant is in a position to insist that it failed to ship the flour because no shipping instructions had been given, in view of the letter written by it, . . . a portion of which is quoted above. Moreover, appellant did not base its refusal to ship the flour on the ground that shipping specifications and instructions had not been given, but solely on the ground that the contract in suit had expired by limitation.

"In view of this fact appellant may not, after suit is brought for a breach of

the contract, change from its former position, and base its refusal to ship such flour on another and different ground. . . . It follows, as a matter of course, that, after appellant had repudiated the contract by declaring that it had expired by limitation, it was not incumbent on appellee thereafter to furnish further shipping specifications and instructions."

* *

"We do not agree," declared the Oklahoma supreme court, in the case of Westbrook Brothers vs. Kingfisher Mill & Elevator Co., 192 Pac. 209, "that defendant was excused from complying with its contract on the ground that plaintiffs had not furnished it with specifications as to the other products to be shipped with the two cars of flour to the plaintiffs. Long before the time of delivery of the two cars the defendant had absolutely refused to ship the two cars of flour, contending that it had not contracted so to do.

"It certainly would have been a useless thing for plaintiffs to have furnished defendant specifications, after they had been informed that in no event would the defendant comply with the alleged contract. By its refusal defendant waived its right to have plaintiffs furnish specifications, and is not in a position to urge such failure as a defense to this action."

* *

Error committed by a buyer in giving shipping instructions will not excuse nondelivery of goods where, in the exercise of reasonable diligence, the seller would readily discover and correct the mistake. This rule was applied by the Louisiana supreme court in the case of National Wholesale Grocery Co. vs. Simon Rice Milling Co., 92 So. 713, wherein it was decided that defendant was not justified in failing to deliver because in giving shipping instructions the buyer ordered shipment to Matuppa, Massachusetts, instead of Watuppa. The court observed that "the least diligence" on the seller's part "would have corrected and cleared this error within a few days."

SECTION 193. TIME FOR GIVING INSTRUCTIONS

The buyer must not only give shipping instructions when called for by his contract, but he must give them seasonably. The purchaser of a quantity of goods to be manufactured and delivered on his orders in assorted sizes by a specified date was held by the Tennessee supreme court to have broken his contract by failing to give orders a sufficient time before the date fixed for delivery to reasonably enable the seller to manufacture and deliver the goods. (45 S.W. 981.)

* *

A decision of the Illinois supreme court (126 Ill. 294) intimates that when a buyer has given shipping instructions they may not be withdrawn without the seller's assent. But it is held that, if the seller does acquiesce in the withdrawal, the buyer cannot complain if the seller disregards later and unseasonable directions to ship. In this case it appeared that, after authorizing shipment, the buyer wired the seller: "Pending new arrangements, desire nothing shipped." The court finds that the buyer did not have money to pay for the goods, and "was trying to gain time and yet not lose the benefit of the contract."

Where a contract of sale required a buyer to order out goods "in July or August" the Maine supreme judicial court held that the seller was not bound to deliver "after the last day of August." (49 Atl. 1062.)

* *

Under a contract for a sale of flour to be shipped within a stated time on the buyer's shipping instructions, the selling miller is entitled to a reasonable time in which to make shipment after receiving such instructions, not including any time allowance for the purpose of manufacture, except where there may be mutual understanding to the contrary.

This was decided by the Virginia supreme court of appeals in the case of C. C. Hindman, Greenville, S. C., against J. D. Manor and others, operating a partnership mill as the Harrisonburg (Va.) Milling Co. (Manor vs. Hindman, 97 S.E. 332.) The decision is of particular importance because there have been few, if any, other appellate court declarations on this precise subject.

The court found that the mill understood that the buyer intended to solicit buyers at a profit to himself in the territory tributary to his place of business in South Carolina, and that orders to ship directly to these buyers would be sent to the mill, together with proper specifications as to the size of the packages in which the flour was to be shipped.

Pursuant to this understanding, 902 of the 1,800 bbls were shipped on orders received by the defendants up to and including Dec. 28. Dec. 30 and 31 plaintiff placed orders for the remaining 898 bbls. but defendants declined to ship, asserting that they had the right under the contracts to insist that the specifications should be received in sufficient time to

permit manufacture and shipment of the flour on or before the last day of the month. Hence, when litigation resulted, the principal issue was whether the purchaser had the right to take the entire month of December in which to place his orders and specifications.

At the trial there were only two witnesses, plaintiff and one of the defendants. Both testified as to the proper meaning to be attached to the words "ordering out" flour, according to the custom and usage of the flour trade. The purchaser testified that "ordering out" meant sending in specifications for the flour, and that he had until Dec. 31 under his contracts to send in such specifications. On the other hand, defendants' witness testified that the quoted phrase meant that the mill was entitled to have the specifications in time to enable shipment before the close of the month. Disposing of this point, the supreme court of appeals says:

"One of the accepted rules is that the construction put upon such contracts by the parties themselves is accepted by the courts, where it does no violence to the language used. In this case, by letters dated Nov. 6, 13, and 24, the sellers emphasize the fact that all of the flour is to be ordered out by Dec. 31, 1914, and that all not so ordered out would be canceled. It was not, however, until the letter dated Dec. 31, 1914, that the sellers claimed specifically that it was the duty of the purchaser to get specifications as to the size of the packages to them, in time for them to manufacture and ship during the months of November and December. . . .

"One test to be applied to this contract is to inquire what would have been the obligation of the purchaser in case he had not sent in any specifications on or before Dec. 31. As to this there can be no doubt whatever that he could not have taken advantage of his own failure to send in the specifications, and, had the market price for flour depreciated so as to make it profitable to the sellers to require him to take all of the flour, he could have been held responsible to the sellers for the entire purchase price, and his failure to send in specifications would not have relieved him from the obligations of his contracts. . . .

"So here it is doubtless true that, if the sellers had claimed that their facilities were so limited that it was impossible to deliver 898 bbls of flour on Dec. 30 and 31, they should have been allowed a reasonable time in which to make such delivery. Their claim that they had a right to time to manufacture the flour is untenable. They had sold the flour under the circumstances mentioned, and it was their duty to have it ready for delivery whenever it was called for during the months of November and December.

"We may, we think, assume that there are standard packages of flour, and that, in accordance with the custom of the business, manufacturers of flour in large quantities have these packages on hand ready to fill orders which they are under contract to fill, and that reasonable time in which to assort and ship these packages after the specifications are sent in is all the time to which the seller is fairly entitled."

* *

Under a contract requiring goods to be shipped by a certain time on specifications given by the buyer, but being silent as to when the specifications shall be given, they must be given within such reasonable time as will enable the seller to make delivery by the time fixed for delivery. This is the gist of the decision of the California district court of appeal in the case of Charles Boldt Co. vs. Julius Levin, 183 Pac. 200.

In other words, a buyer of flour from a mill under a contract specifying delivery by tomorrow cannot require delivery on first giving necessary specifications as to bag sizes, marking, etc., today.

Plaintiff had contracted to deliver goods to defendant by Sept. 1, 1917, on specification by the latter of sizes, marking desired, etc. Partial delivery had been made by Aug. 27, when defendant made a telegraphic request for an extension of time for delivery. The request was immediately refused.

The next day defendant buyer telegraphed specifications as to sizes, saying that marking specifications would be given in a day or so. The following day plaintiff seller replied by wire that there would be no delivery, because of tardy specifications. By night letter, dated Aug. 31, defendant furnished remaining specifications.

The court decided that, in the absence of any statement in a contract as to when orders shall be given by the buyer, the law will infer a mutual intention that they shall be given within a reasonable time before delivery is required, considering the usual time required for filling orders.

* *

A case relating to the validity of a sales contract was heard in one of the

courts of Chicago in 1919. J. Levinson, a Chicago baker, brought suit against the New Century Co., wholesale flour merchants, alleging damages by reason of breach of three contracts entered into in January, 1918. The trial court held for the defendant on two of the contracts and adversely on the third, after which the case was taken to the Illinois appellate court.

At the time the contracts were made the United States Food Administration had ruled that all such contracts for the sale of flour in lots in excess of 25 bbls should be made on a form known as the "Universal Sales Contract of the United States Food Administration." The defendant, in this instance, not having received its supply of such contracts from the printers, used its regular form of contract, bearing on the face, stamped with a rubber stamp, "This contract subject to terms and provisions of Universal Sales Contract of the United States Food Administration."

The Universal Sales Contract contained a provision that the buyer must file his instructions within 15 days from the date of the contract. In this instance the contract was dated Jan. 11, and confirmed in writing by the seller under date of Jan. 14. On Jan. 28 the seller canceled the contract, which called for the delivery within a period of 30 days, claiming that the buyer had refused to furnish shipping instructions, although requested so to do.

The plaintiff took the position that this cancellation was premature; that the defendant could not cancel until the 30-day period had expired; furthermore that, because the defendant's letter of confirmation was dated Jan. 14, the contract did not become effective until that date, and that, therefore, the 15-day period within which plaintiff must file shipping instructions would run from that date to Jan. 11, the date of the contract; furthermore, that the stamped notice on the face of the regular form of contract was not sufficient to bring it within the terms of the Universal Sales Contract.

The court held that the contract was made subject to the rules and provisions of the Universal Sales Contract of the United States Food Administration, which was made a part thereof. It further held that the contract became effective, so far as the 15-day notice requirement was concerned, on Jan. 11, the date of the order, and that a letter confirmed it as of date, and did not change or affect the terms and provisions thereof, expressly relating to the date of the instrument; that it was incumbent upon the buyer to file shipping instructions within 15 days from the date of the order, and that, failing so to do, the seller could cancel the contract, even though the time for delivery had not expired.

CHAPTER XX

RISKS PENDING ACTUAL DELIVERY*

SECTION 194. IN GENERAL

QUESTION as to whether delivery is made to the buyer at the shipping point, with concurrent termination of the seller's responsibility, or at the destination, carrying responsibility to that point, is, of course, controlled by any express agreement existing between the parties.

When no place for delivery has been specified, and there is no established custom or special circumstances plainly indicating mutual understanding to the contrary, delivery of flour to the carrier under straight bill of lading naming the buyer as consignee is delivery to the buyer, the carrier becoming his agent for the purpose of transportation, and any claim for loss or damage in transit is a matter for adjustment between the buyer and the railway company.

As decided by the Kentucky court of appeals, intention of the parties, if clearly expressed, is the primary controlling factor in determining when title passes. Delivery to the buyer raises a presumption that title has passed to him, but this presumption is overthrown by showing that, under the terms of the contract, he has an unexercised right of inspection after delivery.

"When delivery is a part of the contract of sale, title is presumed to remain in the vendor until there is delivery," declared the Alabama court of appeals in a case involving a shipment of chops. (Veitch vs. Illinois Central Railroad Co., 68 So. 575.)

* *

In one case (126 S. E. 681) the Virginia supreme court of appeals had occasion to refer to a decision made years ago by that court on the point as to when goods are constructively delivered to the buyer. In the cited case—Pleasants vs. Pendleton, 6 Rand. 473—it was held that a constructive delivery is sufficient to pass title to the buyer. The gist of the decision is as follows:

"One merchant sells to another 119 bbls fine flour, lying in a certain warehouse; the barrels having on them the brands of eight different mills; the price is agreed upon; the vendee gives a check on the bank for the agreed price for the whole quantity; the vendor gives at the same time to the vendee a bill of parcels, specifying the number of barrels of each particular brand, and an order on the warehouseman for the flour, and a receipt in full for the price of the flour. This is a complete and executed contract, and the property in the flour was passed to the vendee. The warehouse, and all its contents, including the flour and the check, with other papers of the vendor, being burned the next morning, before the actual delivery of the flour, the loss is the vendee's, and the vendor may recover the price."

* *

In the case of Robbins vs. Brazil Syndicate R. & B. Co., 114 N.E. 707, the appellate court of Indiana applied the following rules of law bearing on the right of a seller to recover the price of goods shipped to the buyer but not actually received by him at the destination:

In the absence of any arrangement or agreement to the contrary, delivery of the goods by the seller to a carrier, properly consigned to the buyer, passes title to the latter, rendering him liable for the purchase price.

This rule does not apply where the seller has expressly agreed to deliver at the destination, or where that agreement is implied from the surrounding facts or circumstances or an established course of dealing, but the rule is not changed by a mere right of inspection to ascertain whether the goods delivered are, in fact, such as were purchased. If on inspection the goods are not found to be such as were purchased, that fact may authorize a rescission of the contract of sale.

* *

The Arkansas supreme court has summed up the rights of the parties to a

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*For related matter see chapters on Time and Place for Delivery, Excuses for Nondelivery, Actions for Nondelivery, etc.

Liability of carriers is treated in Part II of this book.

contract for sale and shipment of goods, concerning delay of the carrying railway company, as follows:

As soon as a seller delivers the shipment to the carrier, consigned to the buyer, title passed to the latter, exonerating the seller from any legal liability for delay in arrival of the shipment at its destination. But if the contract calls for delivery to the buyer by a stated time, and the goods are shipped to the seller's order, subject to the buyer's right to examine the goods, title remains vested in the seller throughout the course of transportation, and the buyer may legally reject delivery after an unreasonable delay, leaving the seller to reimburse himself under a claim against the carrier for failure to make prompt delivery. (Isbel-Brown Co. vs. Stevens Grocer Co., 175 S.W. 1158.)

* *

A decision of the Massachusetts supreme judicial court sanctioned the general rule of law that shipment of goods to a buyer under a straight bill of lading naming him as consignee placed the risk of loss in transit on him, but it was held that where a buyer placed an order for goods to be delivered by one steamship line and the seller shipped by another, the risk remained with the seller. In the same case it is decided that the buyer did not waive the misrouting by accepting and retaining the bill of lading nor by bringing suit to hold one of the carriers liable for loss of the goods in transit, such suit having been dismissed. (St. John Bros. Co. vs. Falkson, 130 N.E. 51.)

The Millers' National Federation Uniform Sales Contract form (The Miller's Almanack, 1925, pp. 88-90) contains specific provision that delivery to the carrier at the initial shipping point shall constitute delivery to the buyer.

See section 210 for the case of Potash vs. Herman Reach & Co., 272 Fed. 658, wherein the United States circuit court of appeals, third circuit, decided that a special contract clause excluded a buyer's right to reject goods damaged and delayed in transit.

SECTION 195. EFFECT OF CERTAIN TERMS

An eastern bakery asked advice on the following stated transaction: The bakery bought a carload of flour at a specified price "delivered track Washington," payment to be made on arrival draft for the value of the flour, less freight. The car was wrecked in transit. Part of the flour was destroyed, and the remainder taken to another city.

The carrier asked the bakery to pay the draft, to secure delivery of the uninjured portion of the shipment, and invited a claim for actual loss based on the invoice price of the flour.

The mill claimed fulfillment of its contract by shipping the car. The bakery insisted that the mill still owed it a car of flour at the agreed price, although the market price was higher then.

The law leaves no doubt that the mill was in default for want of delivery of the flour on track in Washington, and that the bakery was entitled to look directly to the mill for damages, leaving the mill to make claim against the carrier. Under the court decisions, the language of the contract made the carrier the mill's agent to transport the shipment to Washington (35 Cyc. 195), even though the bakery did agree to reimburse the mill for freight charges paid by the latter.

Had the flour been sold f.o.b. Washington, there would have been presumptive, but not conclusive, evidence of a mutual understanding for transfer of title in Washington, but the phrase "delivered track Washington" concludes any controversion of the point that there could be no delivery to the bakery short of placing the car on track in Washington.

The mill having failed to perform its contract, what was the extent of its liability?

Under the judicial authorities, I was of the opinion that the bakery was not entitled to insist on delivery of another car of flour at the price agreed upon for the other; and that the mill's liability was limited to the excess, if any, of the market value of flour of the grade ordered in Washington, when delivery should have been made under the contract, above the price agreed upon.

The theory of this principle is that, when a seller of staple goods fails to deliver according to his contract, the buyer is not actually damaged beyond the increased cost of obtaining substitute goods at the time and place when and where the default occurred.

This opinion proceeded under an assumption that the contract did not contain any clause expressly relieving the mill from responsibility for failure to deliver in such contingency as prevented delivery in this case. Such a clause would, of course, be decisive against any claim on the part of the bakery.

* *

Letters and telegrams evidencing a sale of corn to be shipped from Cairo, Ill., to a point in Texas did not specify delivery at any particular point, merely providing

that a certain price should be paid "delivered," "inspection allowed," and that payment should be made on arrival draft.

When the corn arrived in Texas it was found to have rotted through rain leakage and flood waters, and the buyer refused to receive or pay for the shipment.

In a suit brought by the seller to recover the agreed price, the buyer asserted that the terms of the contract called for delivery at destination, furnishing the testimony of several grain dealers to the effect that a contract like that involved is generally understood in the grain trade as calling for delivery at destination. The testimony of the seller's traffic manager controverted this point, he stating that "delivered" merely signified that the seller was to bear the freight charges.

In reversing a judgment of the trial judge awarding recovery of the price, the Texas court of civil appeals decided that the contract was so ambiguous on its face as to raise a jury question, under the conflicting evidence as to the grain trade usage, whether delivery to the carrier or at the destination was required; and that the buyer was entitled to show by letters written by the seller after shipment was made that the seller construed the contract as requiring delivery at destination, in which event the buyer was justified in rejecting delivery. (Samuel Hastings Co. vs. Marlin Lumber Co., 198 S.W. 1076.)

Moral: One word after the word "delivered," indicating whether delivery was to be made at the point of shipment or at the destination, probably would have avoided this lawsuit.

* *

In the case of Oklahoma City Mill & Elevator Co. vs. Pampa Grain Co., 248 Fed. 477, considered by the United States circuit court of appeals, fifth circuit, on an appeal taken from the United States district court for the northern district of Texas, the question involved was as to who owned wheat destroyed in transit by the Galveston flood of August, 1915, as between buyer and seller.

The wheat was contracted for sale by the grain company to the mill and elevator company for delivery at Galveston or substituted destination under order bills of lading. Upon shipment being made, the grain company sent the bills of lading through banks, with drafts for the price. After the bills were delivered to the mill and elevator company, and after payment of the drafts, the grain was destroyed.

It was not disputed that there was a completed sale and delivery to the buyer, except as this result was avoided by the following clause in the confirmation of the sale: "Delivery of grain not perfected until grain reaches destination specified, and has been inspected and weighed."

The trial court upheld the contention of the buyer that this clause prevented a passing of title until inspection and weighing, notwithstanding payment of the drafts and delivery of the bills of lading. (237 Fed. 715.) But the circuit court of appeals reversed the decision, holding in favor of the grain company, and saying:

"There may be a sale without completed or perfected delivery. By delivery of the bills of lading, and by the express terms of the confirmation letter, the Oklahoma company acquired complete dominion over the property, with the right to change its destination in transit, to sell at this changed destination, or to sell in transit. The Oklahoma company acquired with reference to it all the rights of ownership. It must be held to have the corresponding obligations and liabilities. As the owner of the property it must stand the loss of its destruction.

"The contract contemplated that there might be readjustments in weight, and this was what was in the minds of the parties as required for perfecting the delivery at the point of destination. The contract as written leaves the destination uncertain. The phrase 'wheat at $1.18½, basis delivered Galveston,' has reference to the price, and was not, within itself, sufficient to name the place of delivery.

"The order in the letter was to ship to Galveston for export, but the right to change the destination of shipment in transit was reserved, and, in any event, Galveston was not the point of ultimate destination. However that may be, it is quite certain that the incidents of ownership passed to the elevator company by the payment for the property and the receipt of the bills of lading, and the loss must necessarily fall upon it."

The decision of the circuit court of appeals was not reached by a unanimous vote of the three judges. Judge Walker dissented, adopting the view that the contract provisions: "basis delivered Galveston. . . . Delivery of grain not perfected until grain reaches destination specified, and has been inspected and weighed," manifested, not merely a price basis, but also mutual intention that title should not pass until arrival of the grain at Galveston or a substituted destination.

"When the contract expressly calls for an actual delivery at destination, there is no room for saying that a constructive delivery by furnishing a bill of lading

was all that was required to put the subject of sale at the buyer's risk."

* *

But provision in a contract to sell and ship goods "subject to inspection arrival draft" places on the seller the risk of deterioration in transit, held the Texas court of civil appeals in the case of Clement Grain Co. vs. Border Wholesale Commission Co., 237 S.W. 596. The quoted phrase is held to take the case outside the general rule that delivery to a buyer is complete when made to the carrier at the place where the goods are received. The court, however, recognized the point that attachment of draft to the bill of lading did not conclusively show mutual intention to withhold passing of title until payment of the draft.

It was determined that failure of sacked corn to be in merchantable condition on its arrival at destination entitled the buyer to reject it, whatever may have been its condition at the shipping point.

* *

When a customer places an order for goods to be shipped by the seller from a distant point, and nothing is said as to the place where ownership of the goods is to pass to him, it passes when the seller has placed the goods in transit. And, according to a decision of the Minnesota supreme court, this rule of law is not affected by the fact that the buyer has the right to inspect the goods on their arrival to ascertain whether they are of the quality bargained for. (Lieb Packing Co. vs. Trocke, 162 N.W. 499.)

"The right of inspection is only a right to examine the goods to see whether they conform to the contract," said the court. "If they do so conform, the title is held to have passed as of the date of the shipment. . . . The purchaser has, by making of the contract, committed himself in advance to the acceptance of the goods. The fact that the carrier does not carry the goods through so as to give the buyer an opportunity to inspect is no fault of the seller.

"The carrier may be liable for his failure. The carrier is the buyer's agent. As between seller and buyer, the goods while in transit are at the risk of the buyer. The fact that they are lost in transit does not affect the passage of title."

We do not, however, interpret the decision in this case as meaning that the buyer might not avoid liability for the agreed price of goods lost in transit by showing that by reason of failure of the goods shipped to conform to the contract he would have been entitled to reject the shipment, if that fact can be established.

* *

A seller's contract to ship goods, "freight paid" to destination, is equivalent, in legal effect, to a contract for delivery f.o.b. destination, where there is nothing to show agreement that, notwithstanding prepayment of freight, transportation losses and delays should be at the buyer's risk on shipments of the goods.

This point of law was laid down by the St. Louis court of appeals in the case of Street & Co. vs. Werthan Bag & Burlap Co., in which the court affirmed judgment in plaintiffs' favor for nondelivery of bagging defendant had agreed to deliver from St. Louis to Houston, Texas. (200 S.W. 739.)

Attorneys for defendant attempted to draw a clean-cut distinction between the terms "f.o.b. Houston" and "freight paid to Houston," but the court said: "We have searched the adjudicated cases and textbooks to find a precedent for such a distinction between these terms as is argued exists, but without avail. We are of the opinion that the terms, . . . for the purposes and under the facts in this case, are synonymous."

The decision was influenced by the fact that surrounding circumstances pointed toward a mutual understanding that the parties to the suit had treated the two terms as synonyms. But the holding is not to be misunderstood as making "freight paid" equivalent to "f.o.b." destination, when it clearly appears that the term was used for the sole purpose of fixing liability for transportation charges.

The decision suggests that where a mill is willing to pay freight charges, but unwilling to bear transportation risks, on a shipment under a straight bill of lading, some such terms as these should be used: "delivered on cars at mill, freight paid to ———." This should leave no doubt as to the seller's intent.

One car of bagging was delivered under the contract to plaintiffs, and because this had been done over a railroad line designated by the plaintiffs in ordering the goods out, defendant argued that the case fell within the rule that selection of a particular carrier by a buyer implies that the carrier is to be treated as his agent, and not the shipping seller's.

The court, however, regarded the granting of the buyers' request for shipment over a certain road as a mere accommodation, and held that the seller, having

undertaken to pay the freight charges to the destination under a contract not specifying any particular carrier, could select any one of two or more carriers operating to the destination, and that compliance with the buyers' request as to one installment would not preclude the seller from refusing to comply as to another installment.

See, also, section 210.

F.O.B. CONTRACTS

SECTION 196. IN GENERAL

The term "f.o.b." is one that "has such a common signification that the courts take notice of its meaning, generally, without proof. . . . The meaning of these letters is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped." And where the sale is f.o.b. place of shipping, "the goods are at the risk of the buyer from the time they are put on board." (California district court of appeal, Whitaker vs. Dunlop-Morgan Co., 186 Pac. 181.)

Under a sale f.o.b. place of shipment, and timely loading by the seller, a delay in transportation affords the buyer no defense to an action brought to recover the agreed price. (195 Ill. App. 233.)

But that the term "f.o.b." does not necessarily indicate the place at which title to goods is to pass from seller to buyer, as affecting transportation risks or the buyer's obligation to pay the price, is shown by the decision of the Texas court of civil appeals in the case of A. P. Moore's Sons vs. Early-Foster Co. (238 S.W. 299.)

Plaintiff sold sugar to defendant at a specified price, "net cash, f.o.b., Chicago," the price to be paid immediately on presentment of draft. On instructions from defendant, plaintiff diverted a transit car to defendant's customer in Detroit, drawing draft on such customer. Delivery at Detroit was delayed by the carriers, and payment of the draft was refused by the consignees. Plaintiff thereupon sued defendant on the contract, and the court of civil appeals upholds the right to recover. It is decided that diversion of the car on defendant's order constituted a constructive delivery of the goods to defendant, despite the f.o.b. clause. The court observed:

"The circumstances revealed in the evidence show, in point of fact, that the term 'f.o.b., Chicago' was used and intended only to fix the price of the sugar, and no circumstances appear during the negotiations indicating a contrary intention. . . . The stipulation 'twenty-four and one half cents net cash, f.o.b., Chicago' does not necessarily, as a matter of law, fix the place of delivery at Chicago."

* *

The following case was presented to me as a basis for an opinion:

"A contract between two parties states that the price was f.o.b. mill, with freight allowed destination. The flour was shipped within contract time on a bill of lading which consigned the shipment to the shipper, notify the buyer. The buyer refused the shipment on the ground that it was delayed in transit. He has taken the position that, since the flour did not belong to him, he could not hold the carrier for the delay—that inasmuch as the flour was consigned to the shipper, notify the buyer, it did not become the buyer's flour until such time as he should take up the draft."

I was and am of the opinion that, both under common sense reasoning and judicial authority, the buyer's position is unsound.

The f.o.b. provision, read in connection with the agreement that freight should be allowed to destination, manifests intention that delivery should be made to the carrier for the buyer at the mill, but that the seller would stand the transportation charges. And both clauses, read in connection with the fact that shipment was made to the seller's own order, indicate that the seller merely retained control over the flour as a means of securing collection of the purchase price.

It seemed to me that this is the only interpretation that can be placed upon the contract without rendering some part of the agreement meaningless, if not repugnant to the other parts. To say that title was intended to be reserved in the seller for any purpose other than to secure payment of the price is to flatly contradict the term "f.o.b. mill." Except for the fact that the liability for freight charges is expressly fixed in the contract, it might be argued with some plausibility that the term was intended merely to indicate who was to pay the freight charges.

But since the contract provides specially for allowance of freight charges to destination, the term "f.o.b. mill" means that delivery to the carrier there should be delivery to the buyer, so far as concerned risks of transportation; or

it is to be taken as flatly contradicting any inference of intention that delivery should not be complete until taking up of the draft by the buyer, deducible from the shipment to the seller's order; or the term must be regarded as meaningless.

Under fundamental rules governing the interpretation of contracts, the first construction should be adopted, because it gives harmonious effect to all the terms of the contract.

"A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect." (13 Corpus Juris, 525-527.)

"Apparently conflicting provisions must be reconciled if possible by any reasonable interpretation." (13 Corpus Juris, 535, 536.)

This opinion is supported by the decision of the Connecticut supreme court of errors in the case of Alderman Brothers Co. vs. Westinghouse Air Brake Co., 103 Atl. 267. In that case, which was decided March 12, 1918, the question was whether partial loss of goods in transit should fall on the buyer, or defendant, the seller. And this question turned upon interpretation of provisions in the contract for sale at a certain price "f.o.b. cars Wilmerding, Pa. [the place of shipment]. Terms, sight draft on arrival at destination."

The trial judge instructed the jury that if the loss occurred in transit, without fault of either party, the title at the time of the loss was in the defendant, and that it must therefore bear the loss. Reversing this ruling, and referring to provisions of the uniform sale of goods act, which codifies well-established legal principles applicable to sales, the Connecticut court said:

"Section 20 deals with the reservation of the right of possession of, or the property in, goods shipped to the buyer. It makes the distinction that if the bill of lading is drawn to the order of the buyer or his agent, and is retained by the seller or his agent to secure payment of the price, the seller reserves only the right of possession of the goods; but if the bill of lading is drawn to the order of the seller or his agent, 'the seller . . . reserves the property in the goods.'

"This last statement is, however, qualified by the next succeeding words: 'But if, except for the form of the bill of lading, the property would have passed to the buyer on the shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.'

"Manifestly, the intention is to make some kind of a distinction between a reservation of title with intent to remain the owner of the goods for all purposes, and a reservation of title for the sole purpose of securing payment of the price. The legal effect of this distinction is pointed out in section 22:

" 'Unless otherwise agreed, the goods remain at the sellers' risk until the property therein is transferred to the buyer, . . . except that (a) where delivery of the goods has been made to the buyer, or to a bailee [carrier or other custodian] for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.'

"In this case the delivery of the goods to the carrier f.o.b. at Wilmerding was authorized by the buyer, and section 46 provides that 'where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, rule 5 (where the seller contracts to deliver the goods to the buyer or at a certain place, etc.), or unless a contrary intent appears.'

"A delivery to a carrier in accordance with section 46 is a delivery to the buyer within the meaning of section 22, notwithstanding the fact that the buyer cannot have possession of the goods until the seller is paid, because the sales act contemplates that the seller may at his option reserve the jus disponendi.

"It makes no difference to a buyer who has agreed to pay the freight, whether a sight draft is presented to him attached to a bill of lading drawn to his order, or to a bill of lading drawn to the order of the seller and indorsed in blank. In either case he must pay his draft in order to get possession of the

goods, and in either case his rights, on paying the draft, are the same.

"The risk of loss unquestionably passes to the buyer, in the former case, as soon as the goods are delivered to the carrier, and section 22 of the sales act provides that it shall pass to the buyer at the same time in the latter case, provided the seller's purpose in drawing the bill of lading to his own order was merely to secure payment of the draft.

"This resolves for us any conflict of opinion on the point, and gives . . . an interpretation which makes the risk follow the beneficial interest according to the intent of the parties, and not the legal title held merely as security for the payment of the price. The court erred in charging the jury that, because of the form of the bills of lading, the risk of loss in transit rested on the defendant."

Another authority supporting the position is the decision of the Rhode Island supreme court in the case of Hobart vs. Littlefield, 13 R.I. 341. There plaintiff sued to recover the price of cotton destroyed while in possession of a common carrier and sold to defendant under a contract for sale f.o.b. Galveston, point of origin. Shipment was made under a bill of lading drawn to the seller's own order, notify the buyer. The court said:

"It would not at all follow, even if the goods were in the plaintiff's control, that the title and the risk were not in and on the defendant. It was perfectly competent for the parties to have provided that neither the title, risk, nor possession should pass, or that, the title and risk passing, the possession should not pass until the goods reached the destination and were paid for. The reserving this latter right . . . has been the subject of many decisions not always consistent.

"But all the cases on the subject hold that this is a question of intention, to be gathered from the facts. If a bill of lading is taken to the order of the buyer, it would undoubtedly be regarded as evidence of passing both title and possession. If it is taken to the shipper, and his order, it would be taken as prima facie evidence that, although the title may have passed, he intended to keep the goods in his possession and control, and not to actually deliver them until they were paid for or until some condition was complied with. . . .

"In any sale of goods, without any stipulation for credit, the title may pass, if the facts show that such is the intention of the parties, although they remain in the vendor's possession; and in such case he has a lien on them for the price, and may retain them until paid. . . .

"So in the present case the title might pass on the completion of the bargain, and the selection and appropriation of the cotton to that purpose, in such manner that the goods would be at the buyer's risk and yet the seller retain possession of them by himself or by the master [of the vessel on which the cotton was carried] as his bailee and agent, until paid. If the retention of the bill of lading was merely to retain the possession of the cotton for this purpose, then the title and the risk belonged to the defendant [the buyer]."

There are, it is true, appellate court decisions to the effect that particular transactions under which goods were shipped to the seller's own order placed the risks of transportation on him. But, so far as I have been able to discover, there is no decision to this effect where, as in the case presented by our correspondent, there has been an express provision for a sale f.o.b. place of shipment.

In the case of Hunter Brothers Milling Co. vs. Stanley, 132 Mo. App. 308, plaintiff sued for breach of a contract to buy meal, but was defeated on the ground that it had wrongfully deprived defendant of a right of inspection by shipping to its own order and requiring payment of bill of lading drafts before defendant could get possession. The Kansas City court of appeals said:

"On a shipment directly to the consignee a delivery to the carrier is a delivery to the consignee; but that is not so when the shipment is to the consignor's own order. In the latter instance, he does not part with his property. In the former, he does, subject to his right of stoppage in transitu. By plaintiffs' act in this case it was necessary to a delivery to defendant that he should have possession of the bills of lading indorsed by plaintiff, and this he could not get without first paying the drafts attached."

These abstract statements by the Missouri court are not entitled to weight as against the carefully considered and expressed opinion of the Connecticut and Rhode Island courts, so far as they may be regarded as in conflict with that opinion. The question here considered was not raised in the Missouri case, because there the court expressly provided for delivery f.o.b. destination.

The decision of the Illinois appellate court in Kitchin vs. Clark, 120 Ill. App. 105, illustrates some court holdings in

cases where a contract for sale is wholly silent as to place of delivery. There the court said:

"The mere loading of the corn upon the cars at Fordyce did not, however, constitute a delivery of the same to Kitchin, for the reason that the corn was consigned, and the bills of lading issued, not to Kitchin, but to Clark himself. Such act did not divest Clark of his title to the corn. It was, in legal effect, but a delivery to the carrier as bailee for Clark, and a valid transfer of the bills of lading by Clark, before the corn actually reached the possession of Kitchin, would have passed the title to the property. . . .

"To constitute a delivery of the corn to Kitchin it was therefore necessary that he should not only have indorsed the bills of lading to Kitchin, but have also delivered the same to him."

This decision will find support in other judicial authorities, so far as it means that where there is no other light cast on the mutual intention of the parties as to where delivery should be made than the circumstance that the seller has shipped to his own order, it will be inferred that they intended that the risks of transportation should be with the seller until taking up of the bill of lading.

But, read as meaning that shipping to the seller's own order precludes a finding that delivery was intended to be made at the place of shipment where a f.o.b. provision or some other pertinent circumstance indicates that there was an understanding that the seller was merely reserving control of the goods for the sole purpose of securing himself in collection of the price, I am of the opinion that the decision is against the great weight of judicial opinion.

See, also, the other sections of this chapter.

SECTION 197. LOADING NOT COMPLETED

On the ground that loading of a car of oats had not been completed, the California district court of appeals held, in the case of Lewis vs. Farmers' Grain & Milling Co., 198 Pac. 426, that title had not passed to defendant, as buyer under a contract to purchase f.o.b. the shipping point. Therefore, it was held that loss by fire of the oats that had been loaded was the seller's loss. After referring to the fact that no bill of lading had been issued and that no notice had been given the railway company that the car was ready to be moved, the court says:

"Where shipment is made by common carrier it is held that delivery is not completed until the vendor has relinquished his control over the car and given notice to the carrier that it is ready for shipment. . . . If delivery to the railway company were to be regarded as constituting delivery to the defendant, it must be upon the theory that the railway company became the agent of the consignee. Therefore, if no delivery was made to the railway company, none was made to the defendant. . . .

"It is true that in the great majority of cases where litigation has arisen concerning the contracts providing for f.o.b. delivery of goods, no question has existed as to risks. Such cases usually involve a dispute concerning expenses of delivery, and in cases of that character it is held that the term f.o.b. means 'free on board.' The question is frequently raised as to whether, under a provision for delivery of goods 'f.o.b.,' such a delivery is one sufficient to pass the title and risk of transportation to the vendee.

"If the point specified for delivery f.o.b. is the initial point of shipment, title is passed to the vendee, and he assumes the risks of transportation by delivery at that point. If the provision is for delivery f.o.b. the final point of destination, the vendor retains the title and also the risk of transportation to the point named in the contract (note to Lawder & Sons vs. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L.R.A. 798, and cases there cited), and title passes upon such delivery to the vendee, who thereupon assumes risks of loss or destruction. . . .

"But in no case of which we are aware has it been held that, under a contract for delivery of goods free on board cars, title passed to the vendee before delivery at some point."

* *

When goods are injured or destroyed before passing from the actual custody of the seller to that of the buyer, question frequently springs up as to whose loss it is. This was true in the case of Gianelli vs. Globe Grain & Milling Co., 191 Pac. 721.

Plaintiffs contracted to sell defendant company a quantity of hay f.o.b. cars or warehouse, the agreement containing the words, "I hereby sell," etc. Three fourths of the price was to be paid by a certain time, and was paid then. The balance was payable "on completion of hauling and delivering." Plaintiffs assigned to defendant insurance covering the hay, about the time three fourths of the price was paid.

While the hay remained on the sellers' premises it was damaged by rainfall, and the buyer refused to accept or pay for the portion damaged. But the California district court of appeal decided that title had passed to defendant buyer, and that the loss was therefore defendant's. This holding was made on a consideration of the whole transaction, including evidence of all the circumstances, as well as the language of the contract, "I hereby sell," etc.

In what is probably the most interesting part of the court's opinion it is said concerning the conclusiveness of the term "f.o.b.":

"The specific contention [on the part of the mill] is that the characters 'f.o.b.,' as used in contracts for the sale of personal property, are in commercial circles always understood to mean that title to the thing which is the subject of such a contract does not pass until the thing or property is delivered by the seller to or on board the cars, or, as in this case, until so delivered either at a warehouse or on board the cars.

"In other words, it is the contention that those letters or characters as used in commercial contracts for the sale of goods or commodities have a definite, fixed, and well-understood meaning, that their signification as so used is as above given, and that, therefore, there cannot properly be admitted to prove the meaning of those characters or to show that, as used in a particular contract, they do not mean what they are in the law merchant commonly understood to mean when so employed, any testimony other than the agreement itself, but that the courts may and must take notice of their meaning or signification when so used. . . .

"We affirm only an obvious proposition when we observe that words or characters having a definite and well-understood meaning when used in certain contracts may nevertheless be used in a contract in such manner or in such connection with other words or language therein employed as expressing the terms of the agreement of the parties thereto as to make such contract itself ambiguous or uncertain as to its meaning or scope, and effect, or, in other words, render the intent of the parties vague and uncertain; and, where the intention of the parties to a written contract is not made clear by the written instrument itself, or is so obscured by the language of the writing, even though phrased in words which themselves, or taken alone, bear a fixed, definite, certain, and a common and well-understood meaning, it is proper to receive evidence for the purpose of explaining what the parties meant by the language employed in such contract to express their agreement.

"In this case, the parties appear from the face of the writing itself to have 'struck a bargain' by agreeing upon a sale of the hay and the terms of the payment therefor, but they, notwithstanding, inserted in their written agreement the characters 'f.o.b.,' in a connection which might possibly have the effect of throwing a little—we think very little, if any—doubt upon what they really intended to effect by their agreement.

"It was proper, therefore, to allow parol [oral] evidence for the purpose of bringing before the court all of the facts and circumstances characterizing the transaction, . . . not for the purpose of altering or modifying the terms thereof, but only to show what the characters 'f.o.b.,' as therein used, were intended by the parties to mean. . . .

"It has repeatedly been held in this state that the fact that the seller of goods or commodities of any character agrees to deliver the same to the purchaser at some point is not necessarily controlling in determining upon a construction of the contract for their sale, whether the parties intended by their agreement that an immediate transfer of title should or should not then be effected."

After citing several other court decisions, the California court added:

"It is held in all of the above cases that, whatever may be the general trade meaning of the phrase 'payable f.o.b.,' or other trade phrases peculiar to commercial contracts or the characters 'f.o.b.,' the fact remains that such trade or commercial meaning is always controlled by the express contract of the parties, and that parol evidence may be received to show what effect such phrases have on such contracts in fixing the nature, scope, or effect thereof, or in disclosing the intention of the parties as to such scope and effect."

ORDER SHIPMENTS

SECTION 198. IN GENERAL

Under a shipment to the seller's order with the bill of lading attached to draft on the buyer, the latter is not concerned with loss of the goods before he has taken title by taking up the bill of lad-

ing, according to the decision of the Georgia supreme court in Cartersville Grocery Co. vs. Rowland, 86 S.E. 402.

But that freight is shipped under an order bill of lading does not necessarily show that title remains in the seller in such sense that he cannot hold the buyer liable for the purchase price, held the Texas court of civil appeals in the case of Hamilton Mill & Elevator Co. vs. Rayford, 255 S. W. 1017. The controversy in this case centered about the seller's right to recover the agreed price of a corn shipment, which was rejected by the buyer on account of its having deteriorated in transit.

* *

Question as to who bore the risk of wheat deteriorating in transit, as between buyer and seller, was raised in the case of Consolidated Flour Mills Co. vs. Farmers' Elevator Co., 247 S. W. 480, decided by the Kansas City court of appeals.

The mill telegraphed for a price on wheat. The elevator quoted a price "track Hume," the shipping point. The mill replied with direction to book two cars "track Hume, 10 days shipment Fort Smith." The elevator wrote: "Give us shipping instructions where you wish draft drawn—bank."

The elevator shipped the wheat within contract time and the mill paid drafts the day after such shipment was made. The cars arrived at Fort Smith several days after the drafts were paid, and it was found that the wheat was heated. No agreement for disposing of the grain being made, the mill resold it and sued for resulting loss, increased cost of securing substitute wheat, etc. The elevator counterclaimed for the excess of the contract price of the two cars above the amount paid through the drafts.

Trial of the action resulted in judgment in favor of the elevator on its counterclaim, and this judgment was affirmed on appeal. The court of appeals said:

"We hold that title to the wheat in controversy passed on its delivery by defendant to the railroad designated by plaintiff, excepting in so far as defendant might assert its right, under the terms of the bill of lading and the usages of the trade, to protect itself for the purchase money. It is in evidence that the wheat was loaded on the 24th and 25th of August, and bill of lading with draft attached was sent to plaintiff at Hutchinson, Kansas, as per plaintiff's directions. The drafts were paid, and the bill of lading taken up on Aug. 27, 1921. This completed the acceptance and constituted a waiver of the right of inspection. These acts were in pursuance of the terms contained in the telegrams to which we have heretofore referred.

"It is urged by plaintiff that, as a rule in a contract of sale upon approval or test, title does not pass until approval is given or the test made; and from this hypothesis it is argued that plaintiff had the right, under the contract of sale, to examine the wheat before the purchase was completed; that this was an executory contract, and the right of inspection existed.

"We cannot accept this argument as applicable to the situation presented in this case. The question of transfer of title always is to be determined by the intention of the contracting parties."

* *

Specially worthy of being remarked are the observations of the North Carolina supreme court in the case of Penniman vs. Winder, 103 S.E. 908. The court said:

"The general rule in mercantile law is that the risk follows the title. If the title had passed to the defendant, then the loss would have fallen upon him, and he would be liable to pay for the lime, although he had never received it. If, on the contrary, the title had not passed to the defendant, but was retained by the plaintiff, then the risk in transitu was on the plaintiff, and he cannot recover the price of the lime. . . .

"We think the undisputed evidence shows that the title to the lime was retained by the plaintiff for his own protection, and that it was only to be delivered to the defendant upon payment of the draft attached to the bill of lading.

"When the seller ships goods 'to order notify,' and draws for the purchase money, the title and right of possession to the property is reserved by the seller until the draft is paid. No title passes to the buyer, and any loss in transitu must be borne by the seller."

This last paragraph of the court's opinion must be qualified, according to the weight of judicial authority, including authorities cited by the court. It seems that the generally recognized rule, and it is certainly supported by fairness, is that the seller's shipment to his own order does not leave the transportation risks with him, if there are circumstances from which it can be inferred that the parties mutually understood that the reservation of title was for the

sole purpose of securing payment of the price.

True, it seems that, standing alone, the usual order bill of lading is held to leave the transportation risks with the seller until the buyer takes up the draft and bill of lading. But there is nothing in this method of shipping goods to prevent an implied or an express understanding that transportation risks are to lie with the buyer. So, we see no bar to making this point plain by merely stating in a contract of sale some such clause as this: "Transportation at buyer's risk."

The true rule of law appears to be stated as follows: "If, where there is a consignment to the seller, his agent, or order, the bill of lading is forwarded to the seller's agent with draft attached to be delivered to the buyer on payment, the seller thereby manifests an intention to reserve the property in the goods, and the property does not pass until the draft is paid. . . . A different intention may, however, be indicated by the circumstances of the transaction, and will of course control." 35 Cyc. 333-334.

So, even where there are no circumstances to disclose a different intention, and thereby it must be inferred that shipment to the seller's order was intended to reserve title "until the draft is paid," it will not do to say without qualification, as the North Carolina court does, that "no title passes to the buyer, and any loss in transitu must be borne by the seller." Rather, it is to be said that the risks of transit are with the seller until the draft is paid. If loss occurs after payment of the draft, it is the buyer's. And, as a court of high authority has decided, it seems that the buyer would have the burden of proving that loss or injury to goods in transit occurred before he paid the draft covering them and took up the bill of lading.

* *

A seller of wheat shipped to defendant mill under an order bill of lading attached to draft was held to bear the loss resulting from rain leaking into the car and wheat leaking out, as against the mill, in the case of Early & Daniels Co. vs. Aulander Flour Mills, 121 S. E. 539, decided by the North Carolina supreme court. Apparently the bill of lading was never taken up.

Defendant agreed to buy 1,000 bus of wheat to be shipped by plaintiff from Cincinnati, Ohio, and delivered to the defendant at Aulander, N. C. Following exchange of telegrams by which the contract of sale and purchase was consummated, with nothing said as to how the wheat should be shipped, plaintiff consigned to itself at Aulander, N. C., a quantity of wheat, loose in a car, with instructions to the railroad company to notify the mill upon its arrival, and attached the bill of lading to a sight draft drawn on the defendant for the purchase price of the wheat.

When the wheat arrived, at least one fourth of it was missing from the car, such loss apparently having been caused by a hole or crack in the bottom of the car, through which the wheat had "leaked" in transit. There was also evidence tending to show damage from rain.

Defendant declined to receive the shipment, on the ground that the wheat was materially deficient in quantity and quality from that called for in the contract. Plaintiff thereupon shipped the wheat to Durham, N. C., and sold it at a sum less than the contract price. The suit was to recover the difference. It was the position of the plaintiff that when it delivered the wheat in good condition to the transportation company in Cincinnati its duty ceased, and that the defendant must look to the carrier for any loss or damage occasioned to the wheat while in transit.

Affirming judgment in favor of defendant, the supreme court said: "It is the general rule in mercantile law that the risk of loss follows the title to the property. . . . It is also the general holding that when a seller ships goods 'order notify,' and draws draft for purchase price with bill of lading attached, the title and right of possession to the property are reserved by the seller until the draft is paid. No title passes to the purchaser, and any loss in transit, as between the buyer and the seller, must be borne by the latter. . . .

"Upon sufficient evidence, the jury has found, in answer to an issue submitted to it, that the defendant was justified in refusing to accept the wheat when it reached Aulander. . . . The plaintiff, therefore, must look to the carrier, and not to the defendant, for any loss or injury to the wheat while in transit."

This statement is misleading. The prevailing rule, as expressed in the uniform sales act now in force in many states, as well as being expressed in opinions of courts of high authority, is that "Where delivery of the goods has been made to the buyer, or to a bailee [transportation agency] for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the

buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

It was decided by the Connecticut supreme court of errors (103 Atl. 267) that the fact that a bill of lading is drawn to the seller's order and forwarded with directions to deliver to the buyer only on payment of the draft attached is not determinative of the question of risk of loss. If the bill is drawn in such manner solely to secure performance of the buyer's obligation to pay, the title and risk of loss may pass to the buyer prior to the payment of the draft. Likewise, the Illinois supreme court has declared (132 N. E. 518) that, under the clause of the sales act above quoted, the property is at the buyer's risk after shipment, although the bill of lading is not to be delivered until payment of the price.

* *

"Notwithstanding shipped to seller's order, goods are at risk of buyer from and after delivery to carrier, and buyer hereby assumes responsibility as to shortage, loss, delay, or damage in transit upon issuance by carrier of clean bill of lading or shipping receipt."

Incorporation of this provision in a contract for sale of a quantity of beans shipped from the West to New York proved to be a valuable safeguard, for, as shown by a decision of the appellate term of the New York supreme court in the case of Glanzer vs. J. K. Armsby, 165 N.Y. Supp. 1006, it defeated plaintiff's claim for recovery of an amount paid to take up the seller's draft, on confiscation and destruction of the goods in transit by federal inspectors as being "buggy."

Plaintiff did not assert that the goods were not in proper condition when shipped, but relied on the fact that the contract provided for net cash payment on arrival of the goods and for examination by him at the destination as showing that title had not passed to him at the time of the loss.

Giving effect to the clause above quoted, the court declared that there is nothing in the form of shipping goods to the seller's order to prevent general title to the goods passing to the buyer on delivery to the carrier by the seller, subject to the seller's retention of special title to secure payment of the agreed price, when such intention is manifested by the agreement of the parties.

But the decision is not inconsistent with the general rule that, where no such intention appears, loss in transit while the order of bill of lading remains undelivered to the buyer is the seller's loss, and that the seller must bear the loss where he has failed to ship goods of the kind bargained for.

* *

The appellate court of Indiana was called upon to decide a legal point of great importance to sellers and buyers of goods shipped under the usual form of an order bill of lading attached to draft drawn on the buyer for the purchase price.

The conclusion reached in the case—F. W. McNeely & Co. vs. Lake Shore & Michigan Southern Railway Co., 115 N.E. 954—was that where the buyer has not become invested with ownership of the goods, by taking up the bill of lading, before arrival of the shipment at its destination, the seller, and not the buyer, is the proper person to make claim against the carrying railway companies for any unreasonable delay in transit. The court said:

"Title to the property described in the bill of lading does not pass to the person to be so notified until the draft is paid. . . . A direction of the bill of lading to notify some one other than the consignee does not qualify the duty of the carrier to deliver the property shipped to the consignee or in accordance with its order, nor does it give the person to be so notified any right to or control over such property until he has obtained and produced the bill of lading, or its equivalent."

Showing that controversies as to who is the proper party to sue the carrier under a bill of lading of the kind here considered turn distinctly upon the question of ownership at the time of the occurrence on which the claim is based, and that the same rule applies in the instance of a claim for loss or injury to freight in transit as in the case of delayed transportation, the Indiana court referred to a decision of the Iowa supreme court wherein it was held that, where a buyer of goods became the owner of them, by taking up the bill of lading covering them while they were in transit, he was the proper party to sue the carrier for injury to the shipment by the elements while in the hands of the carrier.

The Iowa court decided that the buyer's status as owner of the goods was not affected by the facts that he had not yet been afforded opportunity to inspect the goods, and that he was not bound to honor the seller's draft and take up the attached bill of lading until arrival of the shipment. If, for reasons satisfactory to himself, the buyer prefers to pay

in advance of arrival, he takes upon himself, not only the advantages of being able to deal with the goods as his own, but also, as against the seller, all subsequent risks incident to completion of the transportation.

These decisions are in line with a conclusion reached by the Washington supreme court in a case where wheat was sold for water shipment to a Mexican port and was damaged in transit. It was there held that the buyer had no valid claim against the seller on that account, in the absence of proof that the injury occurred before title passed to the buyer from the seller through transfer of the bill of lading.

In F. Marroquin & Co. vs. Wormser Bros., 249 Fed. 428, the United States circuit court of appeals, fifth circuit, decided that corn lost on board of cars by fire after loading but before issue of bills of lading represented loss to the seller and not to the buyer, under a contract for shipment into Mexico against drafts attached to bills of lading.

* *

The Arkansas supreme court has decided in effect that, while delivery of a shipment consigned directly to the buyer transfers title to him, thereby placing transportation and deterioration risks on him, "the converse of the rule is that, where the seller consigns the shipment to his own order, thus manifesting his intention to reserve his dominion and right of disposition over the property, nothing else appearing to manifest an intention to pass title, such consignment does not constitute a delivery to the purchaser." The court added:

"In the present case there is nothing in the record tending to show that the parties agreed that the corn should be consigned to shipper's order when the contract for its purchase was executed. The defendant purchased from the plaintiff a car of corn of a certain grade for a stipulated price. The plaintiff on his own motion consigned the corn to himself at the place where the defendant lived, with directions on the bill of lading to notify the defendant. Thus it will be seen that the plaintiff reserved his dominion over the corn until the purchase price was paid by the defendant. There was no agreement between the parties or anything else in the record tending to show that the plaintiff intended to pass the title to the corn to the defendant when it was delivered to the carrier.

"There being nothing in the record from which it could be legally inferred that the sale was complete when the plaintiff delivered the corn to the carrier, the court erred in finding for the plaintiff. A delivery, either actual or constructive, is essential to complete a sale of chattels, and the title does not pass until there has been such a delivery." (Richardson vs. Fowler, 241 S. W. 887.)

* *

In the case of Liberty Mills vs. Evans-Terry Co., 89 So. 809, the mill lost a suit to recover on a flour sales contract, because the Evans-Terry Co. is found to have been justified in rejecting the flour on its being damaged in transit from the mill in Nashville to the buyer at Laurel, Miss. The decision of the Mississippi supreme court turns on the facts that the flour was sold "delivered Laurel" and that it was shipped to the mill's order under bill of lading attached to draft drawn on the defendant buyer.

See, also, preceding sections of this chapter.

SECTION 199. WHEN DRAFT IS REJECTED

That a shipper of flour or other commodity to his own order must bear loss of the shipment, as between the buyer and himself, even though it would not have occurred had the buyer complied with his contract to take up the bill of lading and pay draft attached to it, has been decided by the supreme court of Georgia. Referring to an earlier case on the same subject, the court says:

"It was there ruled that 'the breach, by a purchaser, of a contract to pay a draft for the price of goods and remove the same from a railroad depot, the title to the goods remaining until such draft should be paid, did not involve the purchaser in liability to the seller for loss occasioned by the destruction by fire of the goods in the depot.' This ruling was not changed by the addition of the words, 'and more especially is this so when the seller's agent for the collection of the draft extended the time of payment thereof until the day upon which the fire occurred."

"An examination of the entire opinion in the case will show that the ruling was not made to depend upon the words last quoted, but that they furnished an additional reason to support the judgment." (Commander Mill Co. vs. Schafer, 85 S.E. 1036.)

* *

Goods were shipped to the seller's order, with bill of lading attached to draft for the purchase price. On presentation of the draft, the buyer refused to pay it unless allowed a deduction on account of

a claim growing out of a previous transaction under which the seller had shipped goods not of the kind ordered. The shipper refusing to grant the deduction, the goods were stored by dock authorities in a warehouse after the buyer refused to accept delivery, and they were there destroyed by accidental fire.

In denying the seller's right to recover the contract price of the goods, on the theory that the loss would not have occurred except for the buyer's wrongful refusal to accept delivery, the Maryland court of appeals decided that, title having remained in the seller because of nonpayment of the draft, the risk of loss remained with him; and that defendant, having a valid claim against the plaintiff on account of the previous transaction between the parties, was entitled to deduct the amount from the draft drawn to cover the second shipment, and hence was not in default by insisting on such settlement. (99 Atl. 597.)

* *

But where a contract buyer of grain, which had been shipped to the seller's order, omitted to take up the bill of lading and unload, and the grain was lost in a flood, in consequence, he became liable to the seller in damages, according to the decision of the West Virginia supreme court of appeals in the case of Allen & Wheeler Co. vs. Farr, 93 S.E. 1030.

Plaintiff milling company shipped a split car of corn and oats from Troy, Ohio, to Huntington, W. Va., under a bill of lading to its own order, attached to draft on defendant, who had contracted to buy the grain "on usual terms, delivered." The car arrived March 25, 1913, and the next day was spotted on a spur track used by defendant in unloading.

Defendant was notified by the bank by telephone of the receipt of the documents on the 25th and asked that they be held until arrival of the car. By the 26th the near-by Ohio River rose three feet, 22 feet more by the 27th, and 15 feet more by the 28th, when the spur track became submerged and the grain became so damaged by water as to become worthless. Defendant then refused to accept delivery of the corn and oats or to pay the draft.

Plaintiff sued to recover in the alternative the agreed price of the grain, or damages for defendant's breach of the contract to buy. Verdict was returned in plaintiff's favor, but was set aside by the trial judge. On appeal the verdict was reinstated by the supreme court of appeals, which held that, although plaintiff was not entitled to recover the price on the theory of delivery, it was entitled to recover on the theory of wrongful breach of the contract, saying:

"The evidence does not prove that delivery had been made to defendant, or that title had passed. Plaintiff was both consignor and consignee, and had mailed the bill of lading with draft attached to the Huntington National Bank, thereby constituting the bank its agent for the purpose of collecting the draft and delivering the bill of lading, the indicia of ownership and right to the possession, to defendant.

"The purpose of plaintiff, thus shown, to retain title to the grain and control of the shipment until it was paid for, is obvious. True, title may pass without actual or constructive delivery, where such was the intention of the contracting parties. But that was clearly not their intention in this case.

"But the evidence is sufficient to sustain the verdict on the other theory of the case. . . . According to the evidence, defendant made no effort to unload the car until the rise of the river made it impossible and destroyed the grain. . . . The grain was of the kind and quality ordered, and was shipped in good condition. It was incumbent upon defendant to be diligent in performing his part of the contract. In view of the condition of high water, of which he evidently knew, greater diligence was required of him to get possession of the car and unload the grain than would be necessary under ordinary conditions."

At first blush, this decision may appear to be in conflict with the other decisions cited in this section, but the West Virginia decision is to be reconciled on the ground that in this case it was found that defendant must have foreseen the danger of loss of the grain by flood water, whereas in the other cases loss by fire does not appear to have been in the contemplation of the defaulting buyers.

SECTION 200. C.I.F. CONTRACTS

Rights under a c.i.f. contract were involved in the case of Smith Co., Ltd., vs. Moscahlades, 183 N.Y. Supp. 500. The transaction arose in the fish industry, but the observations are pertinent to export flour sales agreements.

The plaintiff sold defendant Labrador codfish for water shipment from St. Johns, N. F., c.i.f., New York. The boat carrying the cargo was torpedoed by a German submarine, and the cargo lost. Plaintiff sued for an unpaid balance on the purchase price. Defendant

counterclaimed for the amount paid on the price and for damages for nondelivery, incidentally claiming that plaintiff should have procured war risk insurance on the shipment. Deciding an appeal in plaintiff seller's favor, the appellate division of the New York supreme court says, in part:

"The contract became what is known as a 'c.i.f.' contract, which is a well-known form of shipping contract, and means that the purchaser pays a fixed price, for which the seller furnishes the goods and pays the freight and insurance to the point of delivery, and that all risks, while the goods are in transit, are for the account of the buyer.

"Under such contracts the seller fulfills all of his obligations by putting the cargo on board and forwarding to the purchaser a bill of lading and a policy of insurance of the kind then current and customarily issued in the trade, and if the goods had not been paid for in advance it was customary to present a draft for the purchase price, accompanied by the bill of lading and policy of insurance and a credit slip for the insurance and freight, if not actually paid by the shipper, which documents were to be delivered to the purchaser on his paying the draft, and the insurance is for the protection of the purchaser, who assumes all risks after the goods have been placed on board; and this constitutes a delivery by the seller under such a contract, and title thereupon passes to the buyer, even though it be stated in the contract that delivery was to be made at the point of destination."

At the trial there was controversy as to whether the contract was a Newfoundland agreement or a New York contract. This arose on plaintiff's assertion of a custom in Newfoundland under which it was generally understood that a c.i.f. contract merely required the seller to procure ordinary marine insurance.

The court decided that it was a Newfoundland contract, but added that this was really immaterial, because it was "quite plain that the custom and usage in the light of which the contract is to be construed in determining the nature of the insurance which it was the duty of the shipper to procure were the custom and usage on the part of shippers on whom the duty of procuring the insurance devolved in this particular coastwise trade; and it would seem, therefore, that it was the general custom and usage then current and followed by shippers of such freight from St. Johns to New York, which necessarily would imply the same custom and usage on the part of purchasers in New York in accepting such insurance."

The court adds this reasoning: "The rates for marine insurance, which covers the ordinary perils of the sea only, do not fluctuate rapidly, and a shipper may, with some degree of accuracy concerning his profits, quote a price for the sale of goods which includes the freight and marine insurance to be paid or credited by him, but not so with respect to war risk insurance, which undergoes sudden material fluctuations."

* *

One of the latest decisions on this subject was handed down by the Washington supreme court in the case of Northern Grain Warehouse Co. vs. Northwest Trading Co., 201 Pac. 903.

In 1917 plaintiff bought 100,000 wheat bags from defendant to be shipped from Calcutta to Seattle. "Price: $0.17 each, c.i.f., Seattle." Defendant, having previously bought the bags from a British firm, caused that firm to make shipment to the "Textile Alliance," "account Northwest Trading Co."

After the goods had arrived and had been paid for, plaintiff discovered that they had been partly damaged on the voyage, and afterwards sued to secure reimbursement against the loss. The trial court decided the case in favor of defendant seller, on the theory that the transportation risk was with plaintiff buyer. Affirming this judgment on plaintiff's appeal, the supreme court said:

"The respondent's [seller's] contention is that this is a 'c.i.f.' contract, and that, in accordance with the established rule, under such a contract a delivery is complete when the goods have been actually delivered to the carrier for transportation, while the appellant claims that the use of the letters 'c.i.f.' in the contract refer only to the matter of price, and that title did not pass until delivery in Seattle, under the same restrictions as would be applied had those three letters not been used in the contract, and that in this case no title passed until either actual constructive delivery of the goods by presenting the bill of lading, with draft attached, or the purchaser had accepted the draft and thereby obtained the bill of lading.

"It is appellant's argument that this case is governed by what this court said in the case of Collignon & Co. vs. Hammond Milling Co., 68 Wash. 626, 123 Pac. 1083, and it quotes that part of the opinion which follows:

" 'There is nothing in a "c.i.f." sale differentiating it from other sales, so far as the question under consideration is concerned. The distinguishing feature of such a sale is that the contract price includes the costs of insurance and the freight to destination in addition to the invoice cost of the goods. An offer and acceptance on that basis, therefore, does not, more than in other sales, determine as between buyer and seller when or where the title to the goods passes from buyer or seller. That depends upon the intention of the parties, to be determined as in other cases.'

"The expression of this court in that case is, if read literally, not supported by the authorities and has, in fact, been overruled by our decision in Andersen-Meyer Co. vs. Northwest Trading Co., 196 Pac. 630, where we had under consideration a 'c.i.f.' contract.

"In the Collignon case, supra, a 'c.i.f.' contract was considered without any reference to the English and American authorities which have passed upon this form of contract under the law merchant, and which have established, with scarcely a dissenting opinion anywhere, that a 'c.i.f.' contract, although the term may be used in connection with the price of the commodities, yet affects the title on delivery.

"These contracts, being so generally used, have received a uniform interpretation, and it will not do to introduce confusion into commercial activities by establishing a rule which is inharmonious with the general custom of merchants throughout the trading world.

"In addition to the cases cited in the Andersen-Meyer case, supra, reference may be made to the very recent case of Smith Co., Ltd., vs. Marano, 267 Pa. 107, 110 Atl. 94, 10 A.L.R. 697; Law & Bonner vs. British-American Tobacco Co. (1916), 2 K.B. 605; C. Sharp & Co. vs. Nosawa & Co. (1917), 2 K.B. 814; Mambre Saccharine Co. vs. Corn Products Co. (1919), 1 K.B. 198; Stroms, Brucks, Aktie & Bolag vs. Hutchinson (1905), A.C. 515.

"The use of the expression in the Collignon case, supra, that the determination of when title should pass 'depends upon the intention of the parties' in a sale 'c.i.f.,' is not supported by the authorities, and is misleading, unless by it is understood that an intention contrary to that established by the use of 'c.i.f.' must be unmistakably shown in the contract itself, as the courts hold that the use of the term 'c.i.f.' establishes that the transfer is at the time of delivery to the carrier, even though the contract may call for delivery at some other time.

"In the Law & Bonner case, supra, the English court held that a provision in the contract that for a period after shipment the goods were to be at the risk of the seller was repugnant to the 'c.i.f.' terms, and that, although that clause appeared in the contract, it could have no application to a transaction which was also 'c.i.f.' . . .

"In the case of Mambre Saccharine Co. vs. Corn Products Co., supra, it was held that the seller could effectively tender the proper documents to the purchaser and claim delivery, although he knows at the time of the tender the goods have been lost in transit. Delivery of the shipping documents and the insurance policies in order to complete the transaction need not be made until a reasonable time has elapsed.

"In this case documents which entitled the appellant to physical possession of the property, though other than the bill of lading, were delivered to the appellant, which entitled it to physical possession of the property, and it is in no position to complain that the bill of lading was not delivered.

"Some point is made of the fact that shipment from Calcutta was not made to the appellant as consignee, and that the respondent was not the owner of the goods sold to the appellant.

"We see no merit in this position, for it is a common commercial transaction for mercahnts to make purchases and resell the goods to their customers without first getting actual physical possession of the goods themselves, and that is what was done in this case; the goods were distinctively marked and set aside to the appellant, and, although they may have been consigned to the account of the respondent, nevertheless were so segregated and distinguished as to have been appropriated to the appellant's contract.

"The bill of lading which was made out to the respondent was, immediately upon its receipt, indorsed and attached to the draft, and as was said in the Marano case, supra, this merely indicated 'appellee's intention to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of the sales act, relieve him from the risk that was upon him from the time the goods were delivered to the carrier.'

"The title was transferred from Becker, Gray & Co. to respondent, and from respondent to appellant at the time the goods were placed on board the Fuca Maru for transportation, although the

appellant was not entitled to the physical possession of the property until it had received the documents and complied with the terms of the contract.

"As the trial court said, in a memorandum opinion: 'There was no hint or reservation that the title would pass upon payment of the draft or subsequent approval of the plaintiff.'"

* *

In the case of Smith Co., Ltd., vs. Marano, 110 Atl. 94, it was conceded that the rule is generally recognized in England and in the United States that a contract for sale of goods at a price "c.i.f." calls for delivery to the buyer at the place of shipment, and not at the destination, in the absence of special agreement to the contrary. The litigants also agreed that the ordinary significance of the term "c.i.f." is that goods are sold at a price including "the cost of the goods, the cost of obtaining the customary insurance thereon, and freight charges" to destination.

In this case, the Pennsylvania supreme court quoted this statement by an English court: "The risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy."

Quotation was also made from a decision of the United States Supreme Court as follows: "The shipper fulfills his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and a policy of insurance, with a credit note for the freight."

The specific point in controversy in the Pennsylvania case was whether the rule above mentioned had been changed by the provisions of the uniform sales act, and the court decided that there had been no such change. It was unsuccessfully argued by defendant, who was compelled to pay for a cargo sunk by a German submarine, that sales of the goods on "c.i.f." terms indicated an intention that title should not pass until arrival of the goods at their destination, under the provisions of the sales act in force in Pennsylvania that a contract requiring a seller to pay the cost of transportation does not pass title to the buyer until the goods reach the destination, unless a different intention appears.

The court held that the mere fact that "c.i.f." terms bind the seller to effect insurance shows an intention that the goods are to belong to the buyer in transit, since if the seller were to bear the risk of transportation the buyer would not be concerned whether insurance were effected or not.

The Pennsylvania supreme court made the further holding, applicable to domestic, as well as foreign, shipments, that shipment of goods to the seller's own order does not relieve the buyer from the risks of transportation, when by reason of immediate indorsement of the bill of lading and attaching it to draft on the buyer it becomes manifest that the buyer has merely "intended to retain property in the goods to secure performance by the buyer of his promise to pay for them."

* *

The legal effect of the letters "c.i.f." in export sales contracts is thus concisely stated by the appellate division of the New York supreme court in Seaver vs. Lindsay Light Co., 187 N.Y.S. 622:

"The letters 'c.i.f.,' used in executory contracts of sale, have for many years been used in commercial contracts in this country, and their meaning is well established. They mean that the goods are to be shipped to an agreed point of destination, and that the price which the buyer is to pay includes the cost of the merchandise and the insurance and freight to such point of destination.

"When the seller has arranged for the freight, has shipped the goods, and has effected insurance for the benefit of the buyer to the point of destination, he has performed his contract, and the buyer is bound to accept and pay the seller's draft, with a bill of lading and the insurance certificate attached. If the goods are lost in transit, he must look to the insurance company for indemnity, or, in certain circumstances, to the carrier."

An opinion of the court of appeals (135 N. E. 329) reversing the decision in this case does not militate against the lower court's definition of "c.i.f."

* *

The United States circuit court of appeals, second circuit, has added this definition of c.i.f. contracts to those heretofore given by other tribunals:

"The c.i.f. contract is an expression which indicates that the price fixed covers the cost of goods and insurance and freight on them to the place of destination. Under such a contract, the seller must ship the goods, arrange the contract of affreightment to the place of destination, pay its cost and allow it

from the purchase price, and procure insurance for the buyer's benefit for the safe arrival of the goods and pay therefor. When the seller has done this, and forwarded the papers to the buyer, he has fulfilled his contract, and delivery is complete. There is no obligation by the seller to deliver the goods at the place of destination." (A. Klipstein & Co. vs. Dilsizian, 273 Fed. 473.)

* *

Long ago the New York court of appeals placed an interpretation on the term "C. F. & I.," which, meaning "cost, freight and insurance," is to be treated as the same thing as "c.i.f." In that case —Mee et al. vs. McNider, 17 N. E. 424— plaintiffs sold defendant 500 bags of coco "at 59s per cwt, C. F. & I., by steamer to New York"; the plaintiffs' address being London.

Defendant declined to receive the coco because part of it had become wet and damaged on the voyage. Plaintiffs sued for loss on the contract price based on a resale made for defendant's account, and the court upheld the right of recovery, saying:

"The answer admits that the letters 'C. F. & I.' mean 'to include cost, freight and insurance,' and the question is, who, under the contract, took the risk of the voyage? The relation between the parties was that of vendor and vendee. The former, residing in London, undertook to sell, and the latter, residing in New York, undertook to buy, the article named. The price is fixed at 59s per cwt, and this is made up of the cost, the freight and the premium of insurance. Thus the purchaser deals with the matter in gross, and not in detail, transacts the various branches of the business with one person instead of three, fixing his liability at a lump sum, and in case of loss will recover the amount of his interest under the policy.

"On the other hand, the vendor is to be reimbursed for his advances at the same time and in the same manner that he receives payment for the goods. Only one condition is to be performed, that of shipment by steamer. . . .

"In the case before us there seems no ambiguity. On the part of the vendor the shipment by steamer was an effectual appropriation of the coco to the buyer, and at that moment the agreement on the vendor's part was executed. The plain obligation of the purchaser was defined by the written contract then attached, and he was bound to accept and pay for the cargo at the price named and in the manner specified. It necessarily follows that injury to the coco during the voyage was no excuse for nonperformance, and as the amount due, if any thing, was conceded, there was no evidence which required submission of the case to the jury."

* *

The New York decision is in line with the following language used by Justice Hamilton in the English case of Biddell vs. E. Clemens Horst Co:

"The contract is to pay 'for the said hops at the rate of 90s sterling per 112 lbs, c.i.f. to London, Liverpool, or Hull,' and the meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject.

"A seller under a contract containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice . . ., and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods if they arrive, or recover for their loss if they are lost on the voyage."

The fact that insurance is effected for the benefit of the buyer of course necessarily implies that the goods are to be at his risk in transit, so far as the seller is concerned, and therefore that there is to be constructive delivery to him through placing the goods in transit under the terms of the contract.

But, on an appeal being taken in the English case, the court of appeal decided a matter of collateral interest, by holding that where goods are shipped under a c.i.f. contract, "terms net cash," the buyer, in the absence of any inconsistent terms—such as "against" or "in exchange for" shipping documents—is not bound to pay for the goods on tender of the usual shipping documents or before arrival of the goods, being entitled to an opportunity to examine the goods and to reject them if they are not in accordance with the terms of the contract.

This case involved a shipment of hops from the Pacific Coast, at a fixed price "c.i.f. to London, Liverpool, or Hull. Terms net cash."

The following is an excerpt from the opinion of the court of appeal:

"It is said that in the case of a c.i.f.

contract an implication ought to be made that payment must be made against tender of shipping documents, and this whether the ship and goods have arrived or not. It is suggested as one of the reasons why this implication should be made that the goods under a c.i.f. contract are carried at the risk of the buyer, and must be paid for whether the goods are lost at sea or not, because the policy is taken out on behalf and in the interest of the buyer.

"I do not think that any such implication ought to be made, seeing that cash against documents is a term which is frequently included in a c.i.f. contract by express words, and, moreover, because I do not think that the admitted fact that an object of the c.i.f. policy is to enable goods at sea to be commercially dealt with before the ship arrives compels the buyer to take advantage of this opportunity, if for any reason he is not disposed to do so.

"There is no evidence in the present case of any law merchant or custom which reads such words as 'payment to be made against shipping documents,' or words to that effect, into the contract."

It follows from this decision of the court of appeal that the seller under an export c.i.f. contract, if desirous to entitle himself to collect the contract price while the goods remain in transit, should specify that payment is to be made against the shipping documents.

Lord Justice Farwell, in concurring in the decision of the court of appeals, said:

"When goods are shipped from across seas, the contract becomes complicated by the fact that the delivery, although not complete until acceptance, commences on a c.i.f. contract of shipment, and the property passes, subject to certain qualifications not necessary now to consider, when the goods are shipped; if the seller fails to ship, or ships goods not according to contract, the breach is committed there and then. . . .

"The c.i.f. contract usually provides for payment against documents, a practice convenient for both parties, as the bill of lading enables financial dealings on the credit of the goods to be carried out before the arrival of the goods; but no one has ever suggested that on a c.i.f. contract, silent as to time of payment, the buyer is bound to pay on shipment of the goods."

* *

In the case of Groom vs. Barber, decided in 1915 by the King's Bench, it was held that the fact that goods sold had been lost on the voyage through sinking of the steamer by an enemy's cruiser did not absolve the buyer from the duty of accepting a tender of the shipping documents as a performance of the contract on the seller's part.

After quoting Justice Hamilton's definition of c.i.f. terms, the court said, in part:

"In my opinion, the result is that the contract of the seller is performed by delivery to the buyer in reasonable time from the agreed date of shipment of documents, ordinarily bill of lading, invoice, and policy of insurance, which will entitle the buyer to obtain, on the arrival of the ship, the delivery of the goods shipped in accordance with the contract, or, in case of loss, will entitle him to recover on the policy the value of the goods, if lost by a peril agreed in the contract to be covered, and in any case will give him a rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. . . .

"The seller's obligation cannot depend upon whether the goods are lost or not; and if there is no loss the property has to pass to the buyer before delivery of the documents. At what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing any other time than on delivery of the documents [the court is dealing with cases where no time for passing of title has been specified]; and if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed. . . .

"The object of the courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties, and not to impose upon business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days, the courts should be prompt to recognize the altered use, if they are satisfied that there is in fact a change. I do not say that a contract on cost, freight, and insurance terms means today anything different from what it ever meant; but, if the courts at other times have rightly imputed to the contract a different meaning from what I have suggested, in my judgment the true meaning of the words is now altered."

* *

A decision of the English prize court in proceedings to condemn a cargo of

wheat captured shortly after the World War began, while being carried on the Miramichi, a British ship, turned on the effect of a c.i.f. contract as to when title passed.

American sellers contracted to sell a cargo of wheat, c.i.f., Rotterdam, to German firms. The war not being foreseen, shipment was made in a British vessel. Before the voyage was completed, and after war was declared, the steamer proceeded to a British port on telegraphic orders, and proceedings to condemn the cargo were instituted.

The court held that the question as to whether the wheat was subject to condemnation depended on whether it belonged to the neutral sellers or to the enemy buyers. It was found that title had not yet passed to the buyers, and that therefore the cargo was not subject to condemnation. This finding turned on the facts that the shipping documents had been attached to the bills of exchange drawn on the German buyers, and that the bills of exchange had not been paid.

The attorney general, who sought to enforce a condemnation, took the position that right to capture was tested by the question as to who bore the risk of capture, as between buyer and seller. He argued that the fact that the sellers had retained control over the shipping documents to secure collection of the price did not prevent the buyers from possessing the main property rights or, at least, assuming the transportation risks; and that the sellers were entitled to payment on presentation of the shipping documents to the buyers, regardless of what happened to the goods on the voyage.

The court did not overrule this claim, so far as concerns the point that the risk of loss in transit might rest on the German buyers under the c.i.f. contract, but it was decided that the test of the right of capture was not who bore the transportation risks, but who had the legal title to the cargo when it was captured. And since the buyers had not acquired that title by paying the bills of exchange the property must be regarded as being free from condemnation as belonging to neutrals.

SECTION 201. DETERIORATION OF GOODS IN TRANSIT

"We have experienced some very unhappy and expensive deals in handling bran which has arrived at destination in heated and sometimes unsalable condition," complained a wholesale feed firm. "We buy bran in good faith and sell it in good faith, and our customers take up their drafts. But on receipt of the cars the contents are found to be hot and badly damaged, through no fault of ours, cars or carrier." I was asked to express views as to the legal rights of the parties in such cases.

I find little ground for controversy as to what the law is on this subject. The solution of a given dispute must turn largely on controverted questions of fact, and particularly as to the condition of the goods at the time when they were delivered to the buyer. There may be room for litigation as to what the actual facts of a transaction were, but the law on this subject is inelastic.

Usually, when a claim arises like that mentioned, the rights of the parties are to be tested by questions as to where the goods were to be delivered to the buyer, whether there was any special warranty of quality, and what was the condition of the goods at the time and place of delivery.

If bran, or other mill product, is sold f.o.b. the mill or shipping point, the condition of the shipment on its arrival at the destination is immaterial, excepting as it may tend to show actual condition at the time the goods became the buyer's property at the mill or shipping point.

In the absence of special warranty of quality or special disclaimer of warranty, it seems to be well-settled law that the seller impliedly warrants that the goods delivered will, at the time and place of delivery, be in merchantable condition—not of the worst quality nor yet necessarily the best.

One more rule is involved in the subject—that even where goods are sold f.o.b. place of shipment, the shipping seller must not contribute to deterioration in transit by using improper shipping methods.

As supporting the above stated conclusion, reference is made to some appellate court decisions.,

What the appellate court of Indiana said of a sale of apples f.o.b. point of shipment in New York, with destination in Indiana, applies with equal force to a shipment of mill products, if not with greater force on account of the difference in perishable character. In the case of Rinelli vs. Rubino, 120 N.E. 388, the court said:

"The general rule seems to be that, where goods are sold by description and the buyer has not had an opportunity of inspecting the goods, they must not only, in fact, answer the description, but must also be salable or merchantable under that description," citing, among other cases, the decision of the New York court of appeals in the case of Bierman

vs. City Mills Co., 151 N.Y. 482, 45 N.E. 856, 37 L.R.A. 799, 56 Am. St. Rep. 635.

"The question then arises: at what time and place should the inquiry as to merchantability be directed? Manifestly, under the contract in suit it should be directed to the time and place of delivery to the carrier, and the court should have instructed the jury clearly on this point. Apples are perishable goods. In the sale of perishable property there is no implied warranty that it will continue sound or merchantable for a definite period, or any period after delivery."

In another case—English vs. Spokane Commission Co., 57 Fed. 451—the United States circuit court of appeals, ninth circuit, decided that a contract to sell "strictly fresh eggs" on track in Omaha for shipment to Spokane did not necessarily require that the eggs be fresh on their arrival at destination. The court remarks:

"It is perfectly clear that the warranty, as expressed by the plaintiffs and as understood by defendant, had reference to the condition of the eggs in the car at Omaha. In the very nature of things, this must have been the intention and understanding of both parties. Eggs transported by rail, however fresh when placed upon the cars, are liable to deteriorate to some extent upon the journey.

"The plaintiffs contracted to ship a carload of 'strictly fresh eggs' from Omaha, the eggs to be properly packed in new cases, and placed in the car so as to be safely transported to the defendant at Spokane; and for any breach in this respect, if there was any, they would be liable in damages. They cannot be held liable for any loss in quality of the eggs except such as arose by a breach of their contract. They are not liable for the ordinary and necessary shrinkage in quality incident to the handling of the eggs, and the deterioration which would naturally occur in their transportation to the place of delivery.

"In Bull vs. Robinson, supra, the court said: 'A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in the course of transit from one place to another; or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission.'"

Bringing the rule in full application to the sale of mill products, we cite the case of Mann vs. Everston, 32 Ind. Rep., 355, in which the Indiana supreme court decided that a sale of kiln dried corn meal for shipment to a southern market implied a warranty that the meal would be properly packed and fit for such shipment, but not that the meal would continue sound for any particular length of time. The meal was sold for shipment to New Orleans from defendant's mill in Indiana, and plaintiff sued for damages, claiming that the meal was spoiled on arrival. Referring to instructions given by the trial court to the jury, the supreme court says:

"The court instructed the jury that, if the meal was sold for shipment to a southern market, a warranty would be implied that it was properly packed and fit for such shipment, and such as was contemplated by the purchase, but *not that it would continue sound for any particular or definite length of time.* The appellant's counsel suggest that that part of the instruction put above in italics contravenes the rule of law as held in Brenton vs. Davis, 8 Blackf. 317, and the authorities there cited. The argument is that, under the instruction, the jury would understand that it must find for the defendant, in the absence of positive proof that the meal was unsound and spoiled when delivered.

"We do not so understand the instruction, and do not see how the jury could so understand it. It is plain, in the nature of things, and was made plain by the evidence, that the period during which corn meal properly dried and packed, and reasonably fit for shipment to New Orleans, will remain sound, is not definite and certain, but depends largely upon unforeseen contingencies, such as the season, whether unusually wet or dry, the degree of exposure, and the manner of storage during the voyage [apparently this was a river shipment]. The implied warranty would not cover these contingencies."

In the case of Leggat vs. Sands' Ale Brewing Co., 60 Ill. 158, the Illinois supreme court went still farther by holding that, where ale was sold f.o.b. Chicago for delivery in Montana, there was no implied warranty that the ale would not deteriorate in transit, or that it would be merchantable on its arrival in Montana.

But where corn was sold for delivery at Shreveport, La., under shipment from Kansas City, it was held by the Kansas City court of appeals, in the case of Atkins Brothers Co. vs. Southern Grain

Co., 119 Mo. App. 119, that there was "an implied warranty . . . that the corn would be sound and merchantable when it arrived at Shreveport, the place of delivery where the contract was to be completed." As showing the pertinence of facts concerning condition of a shipment at each end of the journey, we quote the following from the same opinion:

"We consider that the evidence tending to show that the corn was in good condition when it left point of shipment tended to show, by reasonable inference, that it arrived at Shreveport in like condition six days later; there being nothing to show that it was exposed to injurious influences on the way. So, on the other hand, we consider the evidence tending to show that it arrived at Shreveport in bad condition, if there was any, tends to show that it left point of destination in bad condition."

See, also, the decision of Meader vs. Trout Brook Ice & Feed Co., 114 Atl. 668, decided by the Connecticut supreme court of errors, where feed was damaged.

In connection with the matter of proving the actual condition of goods claimed by a buyer to have been unsound at the point of delivery, it is not to be overlooked that before he can establish right to damages against the seller he has the burden of proving that the goods were unsound at the time and place of delivery. This means that if there is a direct conflict in the testimony, thereby preventing judge or jury from determining which is the correct version of the facts, the buyer must lose. This is an application of the general rule applicable to the trial of all lawsuits, that one who asserts a fact affirmatively as a basis for legal relief must prove that fact by the preponderance of the evidence; it is not enough that his evidence be just as strong as his adversary's.

A decision of the Minnesota supreme court bears on the subject of implied warranty here discussed. In the case of Drews vs. Ann River Logging Co., 53 Minn., 199, that court held that it was not sufficient that rye sold be sound at the time it was contracted to be sold, if it was agreed that delivery was thereafter to be made by the seller on board cars. The court said:

"The rye was raised upon a farm near the village of Bronson, and the trade was made at Stillwater, several miles distant. The rye was then on the farm, but, according to the pleadings and proof, was to be delivered to plaintiffs free on board cars at Bronson railway station. The substance of the instruction to the jury, requested by defendant's counsel and refused by the court, was that, if the grain was as represented when the trade was made at Stillwater, the warranty was satisfied, notwithstanding it was to be delivered on board the cars at the station; and if it deteriorated in value before delivery, without fault on the defendant's part, the loss would fall upon plaintiff.

"As before stated, the contract was to sell and deliver on board cars at Bronson station, and the transaction at Stillwater amounted to nothing more than an executory agreement for sale and delivery. An agreement, no matter when or where made, to sell and deliver good, sound rye on board cars at a railway station is not performed in any of its parts until good, sound rye is delivered on the cars."

On the other hand, it was decided by the Kansas supreme court, in the case of Lukens vs. Freiund, 27 Kan. 664, that where a farmer bought from a miller a sack of bran, but before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the buyer's cows swallowed them and was killed thereby, the buyer had no valid claim against the seller of the bran.

Boiled down to simplest terms, the law seems to be as follows: ordinarily, there is an implied warranty that mill products are of merchantable quality at the time and place when and where they become the buyer's property, especially where the seller is the manufacturer of the goods.

The New York court of appeals has stated the law as being that, in the case of a sale where the seller is the manufacturer of the article sold, and the contract is for the future delivery of something of a particular kind, there is an implied warranty that the article shall be merchantable and free from any defect arising from the process of manufacture or the use of defective materials, and not discoverable by ordinary inspection and tests, (Bierman vs. City Mills Co., 151 N.Y. 482.) This case involved a sale of cloth, but the Kansas City court of appeals has applied the same general principle to a sale of flour. In the case of Glasgow Milling Co. vs. Burgher, 122 Mo. App. 14, the Kansas City court said:

"The sale was manifestly a sale of merchantable flour. The plaintiff can be held, on proper plea to that effect, on an implied warranty that the flour should be delivered in a merchantable condition. (Atkins Bros. vs. Grain Co., 119 Mo. App. 119.) The evidence conclusively

showed that after the flour arrived at Coatsville it was found to be in badly damaged condition, sacks torn and covered with dirt, and that it had been loaded in a dirty car. Witnesses stated that there were appearances about the car and the flour which indicated that it had been in a wreck. We are satisfied that the evidence, taken as a whole, tended to show that the flour arrived at Coatsville (where plaintiff was to deliver it) in an unfit and unmerchantable condition."

For a more nearly complete citation of appellate court decisions on this subject, reference is made to the cases cited in the notes under the following statements of the law:

"While there is an implied warranty that the goods to be shipped will be fit for shipment and properly packed, there is no warranty implied that they will bear shipment or any warranty against deterioration during shipment." 35 Cyc. 399.

"Unless otherwise expressed, a warranty relates only to the time of sale and does not cover future defects not then in existence or inherent in the article, and this is true, although the contract is for future delivery. That is to say, a breach of warranty can be predicated only on a loss caused by a defect which existed at the time of the sale. Consequently, a warranty of quality will not cover deterioration of the goods during shipment, unless by the terms of the contract the goods are to be transported by the seller to the place of delivery." 35 Cyc. 414-415.

The rule that the seller discharges his obligation by delivering goods in merchantable condition at the time and place of delivery contracted for applies whether the transaction be one of a sale and shipment direct from the mill to the ultimate consumer or whether there are several distinct sales occurring between shipment from a mill and arrival of the bran or other goods at the final destination. But, of course, where there are two or more successive sales while goods are in transit, the merchantability is to be determined under the respective contracts at the different places of delivery provided for by the different contracts.

So the mill selling for delivery in Kansas City is not bound by the condition of the shipment when it arrives at St. Louis or New Orleans, excepting as such condition may be evidence of actual condition at Kansas City when there is a dispute whether the goods were in merchantable condition at Kansas City.

I do not mean to intimate that the fact that a shipment passes two successive buyers in the course of transit exonerates the mill from liability to its customer on the goods being found to be in bad condition at the ultimate destination. But, as previously stated, his acceptance of the shipment and resale of it places the burden on him to prove that the goods were not in merchantable condition at Kansas City.

The condition at St. Louis or New Orleans has no bearing on the mill's liability excepting as coupled with proof that if the goods had been in proper condition at Kansas City they would not have been in the bad condition they were found in at St. Louis or New Orleans. This means that if the buyer proves that bran was hot and musty in New Orleans and that, considering the time of transit, weather conditions, condition of the car, etc., the goods could not have been in merchantable condition at Kansas City, he makes out a valid claim unless the mill's evidence as to the condition at the delivery point should be regarded by the judge or jury as more convincing than the inferences to be drawn from the buyer's showing.

* *

That the condition of perishable goods at the destination of their shipment is no legal evidence of their condition when shipped, except as there may be supplementing proof of circumstances under which it reasonably may be inferred that there was no deterioration in transit, was the holding of the Virginia supreme court of appeals in the case of Reeve vs. L. J. Upton & Co., Inc., 96 S.E. 277.

The goods shipped in this instance were onion sets, but the decision leaves it clear that the same legal principles would apply to hot bran, or deterioration in the quality or condition of other mill products.

The shipment was sold for delivery f.o.b. Chicago and transportation to Norfolk, Va., the seller agreeing that the goods would be in "good merchantable condition at time of shipment." (It seems that there would be an implied warranty to this effect, even if the contract had been silent on this point, and hence the decision of the court may be regarded as covering the ordinary contract for sale of goods f.o.b. place of shipment.)

Defendant refused to pay for the onion sets, and counterclaimed for damages when sued for the price, asserting that the sets were half rotted on their arrival, and were otherwise in an unmerchantable condition.

Plaintiff offered testimony tending to

show that the shipment was in good merchantable condition when loaded in a proper car. Defendant did not undertake to directly contradict this evidence, but offered testimony tending to show that the car was "cool and in proper condition" when it arrived, and that, properly refrigerated, the shipment should be in the same condition at destination as at the place of shipment, even after seven days consumed in transportation. But there was no evidence that the car was properly refrigerated when transit was begun, or that it was kept so—conditions for which no attempt seems to have been made to hold the shipping seller liable.

In deciding this phase of the case in the seller's favor, the supreme court of appeals said:

"If we take the most favorable view of it for defendant, such evidence leaves it equally probable that such condition may have been due to the negligence of the transportation company or the natural tendency to decay, due to the onion sets having been grown in a wet season, and not to their not having been in the condition the contract stipulated that they should be at the time of shipment.

"For the last-named default only could the plaintiff be held responsible. He did not warrant the keeping quality of the onion sets, or that they would not germinate, nor was he responsible for any injury resulting from negligence of the carrier. Since the evidence left it equally probable that the defective condition complained of by defendant was as likely due to other causes for which the plaintiff was not responsible as to a cause for which he was responsible, under a well-established rule of law there was no evidence to support a verdict of the jury in favor of the defendant on the first aspect of it, which we have under review."

* *

The fact that a contract to sell goods which are to be shipped from one point to another permits an inspection by the buyer at the destination is an important circumstance in determining whether title passes at the point where the shipment originates or at the destination, according to the decision of the Texas court of civil appeals in the case of Farmers' Rice Milling Co. vs. Standard Rice Co., 264 S. W. 276.

Rice shipped from a Gulf point to New York, under a contract requiring it to conform to a sample, was in good condition when so shipped, but had deteriorated and was inferior to the contract requirement as to quality when it reached its destination. The court held that the buyer properly rejected the shipment, saying, in part:

"Not only was the rice consigned to appellant's [the seller's] order in New York and the bill of lading, with draft attached for the purchase price, forwarded to appellant's own agent there, with the intention that the draft should be paid before the bill of lading was surrendered or rice delivered to appellee [the buyer], but the bill of lading also had indorsed on it this notation, 'Allow inspection.' If it was the intention of the parties to this contract of sale and purchase that the title to the rice should pass to appellant upon delivery to the railroad company at Bellevue, La., what was the necessity or reason for appellant's consigning the shipment to its own order and attaching the draft and forwarding the same to its own agent in New York for collection, as it did, and, especially, why was the notation, 'Allow inspection,' indorsed on the bill of lading, if it was, in fact, considered and intended by appellant that the rice should belong to appellee when it was delivered to the railroad company in Louisiana? It seems to us that the only reasonable conclusion would be that appellant, in so handling the shipment, intended that when it arrived at New York, and was received by its agent there, it should be tendered to appellee for inspection as to whether it came up to sample, and, if so, that appellee should pay for the rice according to the contract price, and that this money should be collected by appellant's agent before the rice should be delivered to appellee."

CHAPTER XXI

RESCISSION BY BUYER*

SECTION 202. GROUNDS IN GENERAL

SEE the case of Rock vs. Petty Store Co., 224 S.W. 5, referred to in the chapter on Breach of Contract by the Buyer, holding that a contract of purchase was voidable if obtained from an assistant manager of a store either under deceit or without authority on his part to place the order.

* *

The Kansas supreme court affirmed judgment in plaintiff's favor in the case of Phipps vs. Consolidated Flour Mills Co., 213 Pac. 637, awarding return of the price paid for a quantity of flour which proved to be unsatisfactory. The mill's appeal mainly presented objections to rulings made by the trial judge in the admission of evidence.

At the trial an issue was presented as to whether the flour delivered conformed to the standard of the brand under which it was sold, or was of inferior quality and unfit for food. The supreme court decided that, in view of this question, the trial judge properly admitted evidence tending to show that the salesman who took the order stated that Gilt Edge, the brand sold, was a whole wheat flour of the same grade as government flour, which plaintiff was then handling, and that it was warranted to make good biscuit and light bread. The mill's attorney objected to this evidence on the ground that it tended to vary the terms of the written contract of sale, which specified that there were no representations or warranties not mentioned in the contract, and that no agent or representative was empowered to modify the contract. But the court said:

"The testimony referred to was competent as tending to show by the declarations of the defendant's representative the character of flour usually manufactured and sold under that designation."

Another objection related to testimony of the plaintiff that he would not have made the purchase but for the represensations made by the salesman. This objection was overruled on the ground that any error in admitting the evidence was cured by an instruction given by the trial judge to the jury to the effect that the written contract superseded the salesman's representations, leaving only a question of implied warranty as to quality. The supreme court also ruled that this instruction cured any error committed by the trial judge in admitting the testimony mentioned in the third paragraph of this section.

The plaintiff presented testimony tending to show that when the flour arrived it was musty and unfit for food, that it had a bad smell, and that bread made from it could not be eaten. The mill's attorney objected to this, on the ground that the evidence threw no light on the character of the flour when it was shipped, 17 days before. Holding that the objection was properly overruled, the supreme court said:

"Evidence was produced that the sacks containing the flour were not stained, so as to show any damage received in transit, but were in perfect condition. . . . This had some tendency to show that no change in the flour had taken place in transit, and the fact in that regard was a fair matter for the determination of the jury. There was no presumption that anything had happened to the flour after its shipment to alter its character, and if that had occurred it seems reasonable to suppose that the appearance of the sacks would have indicated it.

"The rule that a condition once shown is presumed to continue, but not to have existed in the past, is not of universal application. Its effect varies with circumstances. A retrospective presumption has been indulged where 'the present condition or state of facts is one that would not ordinarily exist, unless it had also existed at the time as to which the presumption is invoked.' . . .

"Testimony as to the unpalatable character of bread baked from the flour is said by the defendant to have been hear-

*For a discussion of the question whether excessive or deficient quantity shipped under a contract of sale justifies the buyer in rejecting delivery and in rescinding his contract, see sections 122-124.

say, but the witnesses appear to have spoken of matters within their own knowledge."

* *

That goods are not shipped by a seller by the most direct route does not entitle the buyer to reject them, where prompt delivery is not thereby prevented, according to the appellate division of the New York supreme court in the case of Bennett vs. Lewis (209 N. Y. S. 467).

SECTION 203. BREACH OF CONTRACT BY SELLER—IN GENERAL

In an action to recover damages for breach of a contract to buy 500 bbls of flour, determined by the supreme court of North Carolina, defendant buyer unsuccessfully interposed a defense that it was justified in terminating the contract on the ground that plaintiff seller had imposed excessive carrying charges. Statesville Flour Mills Co. vs. Wayne Distributing Co., 88 S.E. 771.

The agreement provided that, if the flour should not be ordered out within a specified time, the seller might impose a carrying charge of 5c per bbl per month, or fraction of a month. Defendant buyer having failed to order out any of the flour within the agreed shipment period, $7.50 was imposed by plaintiff as carrying charges, when the first order, which was for 100 bbls, was placed.

After some correspondence over the justness of the charge, defendant canceled the contract, refusing to receive further shipments. Plaintiff thereupon sued as for breach of the contract, and was awarded $272.50 damages. In affirming this judgment, the supreme court said:

"The defendant contends that the plaintiff broke the contract by overcharging on one item, as indicated in the above statement. It is plain, we think, that, if this was a breach at all, it was not such a one as justified the defendant in canceling the contract. It seems to us to have been the result of a misunderstanding as to the nature of the shipments, and as soon as plaintiff discovered its mistake, in a very small amount, it agreed to rectify it, by giving the defendant credit for the amount, with leave to deduct it from the next invoice.

"What else could plaintiff have done? Defendant then owed it more than enough to cover the amount of the discrepancy, and was fully protected had plaintiff been insolvent, and was doubly protected if it had complied with the contract, as it had the right, and the express permission, to deduct the amount from the next invoice. . . . But upon well-settled legal principles the defendant was in the wrong, apart from the question of good faith, in canceling the contract. The doctrine is well expressed in 9 Cyc. 650:

" 'When there are several terms in a contract, a breach committed by one of the parties may be a breach of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. Such a term is said to be subsidiary, and a breach thereof does not discharge the other party. He is bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default.' "

* *

In F. W. Stock & Sons vs. Snell, 116 N.E. 263, question was raised before the Massachusetts supreme judicial court whether defendant was justified in refusing to honor drafts embracing carrying charges. The court said:

"If there was no agreement of that kind,—if the defendant was not responsible for carrying charges,—then the defendant was not under any obligation to accept the draft for a larger amount than that which was legally and properly due from him. He could refuse to accept it, and if the acceptance of the draft was a condition upon which the goods should be delivered to him, and he had a right to refuse to accept the draft, then of course he had a right to refuse to receive the goods and he would not be liable for any damages in consequence of failing to receive the fifth carload of flour."

* *

The Lillard Milling Co., Decatur, Texas, won a decision before the Texas court of civil appeals in a case involving the liability of Brooks & Few, Jacksonville, Texas, for damages on refusing to receive a shipment of flour. (204 S.W. 686.)

The suit was defended on the ground that it was agreed between the parties that draft for the price, with bill of lading attached, should be sent to the Farmers' Guaranty Bank, of Jacksonville, but that the mill sent the papers to the First National Bank, same town; that the latter bank did not notify defendants of the arrival of the draft and bill of lading until demurrage had accrued on the shipment, and that the mill refused to allow a credit because of this demurrage item.

Instructing the jury as to the law of the case, the trial judge said that if the mill violated an agreement to send the draft and bill of lading to the Farmers' Guaranty Bank, and demurrage accrued in consequence, the defendants were with-

in their legal rights in refusing to receive the goods unless the mill should bear the demurrage expense.

On appeal, the court of civil appeals decided that this instruction was erroneous, under the peculiar circumstances of the case, as ignoring evidence offered by the mill at the trial, tending to show that after the demurrage accrued an agreement was reached whereby the defendants promised to take the shipment at a reduction of 20c per bbl and pay the demurrage. The higher court remarked that the trial judge's error in his instruction to the jury was rendered specially harmful to the mill because of the existence of evidence tending to show that defendants knew when the car arrived, and that the real reason why they did not accept the flour was lack of warehouse room.

* *

An instructive decision showing how a seller may be relieved from obligation under a contract, by reason of the buyer's repudiation of it in some respect, is to be found in the case of McCaull-Dinsmore Co. vs. Jackson, 189 Pac. 771, decided by the Montana supreme court.

Defendant agreed to sell plaintiff a quantity of wheat for shipment to Duluth from a Montana point, to be paid for through draft attached to bill of lading. Both parties contracted in contemplation of the fact that the railway company's only form of bill of lading contained a loss and damage exemption clause. But shortly afterwards plaintiff buyer notified defendant that, a railroad strike being imminent, plaintiff would, after the date of the letter, "accept drafts attached to bills of lading with delay in transit clause only. We will not honor drafts attached to bills of lading that have loss and damage exemption clauses in them."

This letter was not received until after the strike had been averted. Defendant seller ascertained that bill of lading without the loss and damage clause could not be obtained, and later sold the wheat to some one else at an advanced price, notifying plaintiff that delivery would not be made to it.

Plaintiff was nonsuited in an attempt to recover damages, the courts holding that the buyer's letter concerning the form of bill of lading that would be accepted warranted the seller in terminating the contract; and that the contract could be terminated without first giving plaintiff seller notice.

Affirming judgment in defendant's favor, the supreme court said: "The rule of law which governs the transactions is well settled, and is stated succinctly in 6 R.C.L. 1012, as follows: 'Where one party repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is excused from further performance on his part.'

"The same principle is announced in 35 Cyc. 249, as follows: 'The failure of the seller to perform is excused when performance is prevented by the acts and conduct of the buyer, as, for example, by acts or conduct preventing the seller from obtaining the goods to fulfill his contract, by acts and conduct indicating an intent to abandon the contract and refuse performance thereof, or by the failure of the buyer to perform conditions imposed on him by the contract.' . . .

"If this was a case of technical rescission, it is doubtless true that the obligation would rest upon the defendant to notify the plaintiff before he put it out of his power to comply with the contract; but if the act of the plaintiff amounted to a repudiation of a material provision of the contract, and we think it did, then there was no duty imposed upon the defendant to give notice, and notice, if given, would have been without effect."

It is well settled law in Iowa, according to a decision of the supreme court of that state, that, when goods have been sold upon an express warranty as to quality, and that warranty is broken, the buyer may, by promptly tendering return of the property, rescind the purchase and recover payments made; or he may retain the goods and claim damages for the breach of warranty in an independent suit brought against the seller, or by way of counterclaim in a suit brought by the seller to recover any unpaid balance.

If there be a breach of an express warranty, mere failure of the buyer to notify the seller does not prevent subsequent recovery of damages. Nor is he required to refuse to accept the property in order to reserve that right, unless there be some stipulation to the contrary in the agreement of sale.

A different rule applies where the warranty relied upon is implied and not express, also where the sale is by description rather than by warranty, or upon an order by the purchaser to be filled by the seller. In cases of this class, where the buyer claims that the goods sent do not correspond with the order or description,

he must examine the property within a reasonable time and accept or reject it.

* *

In the case of Kansas Flour Mills Co. vs. Murry, 228 S. W. 854, the Springfield, Mo., court of appeals held that where a buyer gave shipping orders under one contract he was justified in rejecting a shipment tendered under independent contracts.

See, also, first case cited in section 148.

SECTION 204. PREMATURE DEMAND FOR PAYMENT OF PRICE

One who has agreed to buy goods to be shipped to him is entitled to cancel the contract where, although credit has been extended under the terms of sale, the seller attaches the bill of lading to draft on the buyer and insists upon its payment, according to the holding of the Maryland court of appeals in the case of Hazel Hill Canning Co. vs. Roberts Bros., 99 Atl. 424.

Plaintiff agreed to sell goods to defendant at an agreed price, "cash less 1½ per cent 10 days," but attached the bill of lading to a draft for the price less the discount, payable 10 days after sight. Defendant refused to accept the draft, because it did not conform to the terms of sale, and when plaintiff insisted that the draft be accepted, defendant gave notice of its rescission of the contract.

Plaintiff sued as for breach of the contract to receive the goods, but the court of appeals affirmed a judgment of the trial court upholding defendant's right to cancel. It was held that defendant had the option to either pay within 10 days of delivery, taking a 1½ per cent discount, or to defer payment, losing the discount, and that plaintiff's insistence upon a right to compel acceptance of a 10-day draft before defendant could obtain the bill of lading was such repudiation of the agreed terms of sale as entitled defendant to rescind. The opinion intimated, however, that had plaintiff promptly waived its demand for acceptance of the draft, defendant buyer would not have been released from the contract.

SECTION 205. DEFICIENT CONDITION OF GOODS

Notwithstanding passing of title to the buyer under a contract for delivery f.o.b. shipping point, the buyer may rescind by showing that the goods were not in proper condition when shipped, if not then inspected by him. (California district court of appeal, in Whitaker vs. Dunlop-Morgan Co., 186 Pac. 181.)

In the case of Reed vs. David Stott Flour Mills, Inc., 185 N. W. 715, referred to in section 141 on the subject of implied warranties, it was decided by the Wisconsin supreme court that a buyer of flour was entitled to rescind his contract on discovering, after receipt of the flour, that it was not of the quality bargained for.

* *

On the subject of quality requirements generally, see Chapter XI. See, also, Miner-Hillard Milling Co. vs. Rosato, 81 Pa. Super. Ct. 94, and section 203.

* *

A contract to buy flour is not subject to cancellation by the buyer because a shipment of the same brand, made under a separate contract between the same parties, had proved to be unfit for use, particularly where earlier shipments had been satisfactory. This very important legal point was decided by the Kansas supreme court in the case of Rock vs. Gaede (207 Pac. 323), where the court said:

"A buyer who has contracted for flour cannot be required to accept an article that will not make bread. Kaull vs. Blacker, 107 Kansas, 578, 193 Pac. 182. But it does not follow that one who has contracted with the manufacturer for flour of a designated brand may, without liability, refuse to accept it because a shipment of the same brand, purchased under a separate contract, proves unfit for that purpose, where former shipments have been satisfactory. The breach of one contract does not justify the aggrieved party in refusing to perform another."

* *

But the right of defendant to cancel a contract for further delivery of flour and feed on the ground of unsatisfactory character of feed delivered was upheld by the Kentucky court of appeals in the case of Milroy Milling Co. vs. Kentucky Block Cannel Coal Co., 271 S. W. 1070.

After correspondence had passed between the parties, defendant signed a contract to buy a specified quantity of flour and feed, inserting in it this clause: "If first car proves unsatisfactory remainder may be canceled." The feed shipped in the first car proved to be unsatisfactory, and further correspondence passed between the parties. The decision of the court of appeals on the main points of the case is as follows:

"The contract was to take so much flour and so much millfeed in each car. . . . There was no contract to take the quantity of flour specified, apart from the millfeed. To do this would have add-

ed considerable burden in the way of additional freight charges. If the millfeed was not satisfactory, appellant [the buyer] had a right to cancel the contract for the other two cars. The letters passing between appellant and appellee [the seller] are letters of business men, and are not to be read with technical strictness. The question is, what did the writers understand and intend the other party to understand? Read in this light, these letters show that both the parties understood that the millfeed was unsatisfactory, and that no further shipments were to be made unless the parties came to a further agreement. This they did not do, and the appellant is not answerable to the appellee in damages for any loss on the flour."

* *

A contract to sell flour and feed was so worded as to justify termination of the contract as to undelivered installments for deficient quality of an installment delivered, held the Springfield, Mo., court of appeals in the case of Lyons Milling Co. vs. Farmers' Supply Co., 245 S. W. 572.

There was written across the face of the contract the words, "Satisfaction of flour guaranteed." There was also evidence tending to show, the court of appeals found, that the flour covered by the first shipment proved to be unsatisfactory to defendant's customers; "that the flour did not smell good, did not taste good, seemed to be musty, and wasn't right"; that it made sappy bread. Holding that this deficient condition of the flour entitled defendant to rescind the contract as to the undelivered installment called for by the contract, the court of appeals followed similar decisions previously reached by it in other cases. There are, however, decisions of high authority in jurisdictions other than Missouri at variance with the view of the law just quoted.

* *

See, also, the decision of the Kansas City court of appeals in the case of Buhler Mill & Elevator Co. vs. Jolly, 261 S. W. 353.

SECTION 206. GOVERNMENTAL REGULATIONS AFFECTING CONTRACT

The decision of the Alabama supreme court in the case of Lawrenceburg Roller Mills Co. vs. Chas. A. Jones & Co., 85 So. 719, constitutes an important judicial precedent governing flour sales contracts, and particularly those affected by federal regulations. The decision defeated the mill's claim for damages for breach of contracts to buy quantities of flour.

Plaintiff alleged that defendant contracted to buy flour Aug. 6 and 8, 1917, under agreements calling for 1,500 and 1,000 bbls, respectively, subject to purchaser's orders, but that the contracts were broken.

One of the defenses presented was that when the contracts were made it was understood that if Congress or the government should make any regulations controlling the price of flour, or the quantity that a dealer might have on hand, the contracts were to be terminated; that Aug. 10—two days after the second contract was made—Congress passed the food control act, and that the Food Administrator promulgated an order Aug. 24 that no miller should make or have outstanding at any time contracts for flour, except those requiring shipment within 30 days after the date thereof, and that no miller should deliver products, knowing that such delivery would supply the purchaser with a quantity in excess of his requirements.

It was averred that these regulations abrogated the contracts in suit, and it was specifically pleaded that the contracts did not require shipment within 30 days.

Trial of the suit at Birmingham ended in judgment in favor of defendant, and this judgment was affirmed by the supreme court.

The higher court said: "We may observe that if there was confirmation of the contract of sale of the 1,000 bbls of flour (that of Aug. 8, 1917) by W. G. Vail's telegram and by the letter of Aug. 10, 1917, recovery could not be had. The telegram in no wise varied the original written contract. By the express provisions of this letter, the contract was made subject 'to government regulations.' That the government, by act of Congress, and food control regulations made thereunder, fixed the price of flour at Birmingham at $10.90 per bbl was not controverted at the trial, and was testified by the witness Johnson.

"It does not make the case different that the witness testified he requested defendant to order out the flour, for if such request was made, plaintiff was insisting that defendant take the flour without regard to the quantity on hand within said six months, and to pay for it, not at the price fixed by the government regulations ($10.90 per bbl), but at the price of $12 per bbl, as named in the contract.

"If the contract was confirmed by the letter as to price and quantity, it was ex-

pressly made subject to government control regulations. Plaintiff's insistence for delivery and payment was contrary to the express reservations contained in that contract, for it is further shown by the evidence that during the period in question defendant endeavored to induce plaintiff to deliver him flour at the rate fixed by the government, rather than that indicated in the contract. This plaintiff refused to do.

"On this theory of the case, the affirmative charge [direction to jury by the trial judge to return a verdict in favor of defendant] requested by defendant in writing was properly given. As to this, plaintiff insists that the food control regulations having application to millers, promulgated on Aug. 24, provided that such regulations only became effective on and after Sept. 10, 1917, and had not the effect of abrogating contracts entered into prior to the enactment of the food control act on Aug. 10, 1917.

"We have stated that the alleged confirmation of said contract (if such there was) subjected the parties thereto to any government food control regulations then existing, or that might thereafter be adopted or promulgated by the department of government having jurisdiction of the same while the contract was executory. . . .

"The act of Congress approved . . . four days after the date of the first order, and two days after the date of the second, and on the date of the alleged acceptance of the last order, prohibited any dealer from having on hand any necessaries 'in a quantity in excess of the reasonable requirements of his business for a reasonable time.' The flour in question was such necessary in the hands of the purchasing merchant, and as such was subject in quantity to the reasonable requirements of defendant's business, in its sale as an article of commerce.

"Without deciding whether Congress had the right to adopt such law under the war powers and give it retroactive effect in its application to existing contracts, if the President and Food Administrator interpreted the act as not intended to impair the obligation of existing contracts, but only to apply to contracts thereafter entered into, this did not change the express provision of the contract, by act of the parties made subject to government regulations.

"The only purpose of the incorporation of such provision in the contract was to give it a prospective operation, the contract of necessity being subject to such regulations as existed at the time it was entered into. The letter in question, if in confirmation of the contract, was the agreement of the parties that it should be subject to such terms and regulations thereafter fixed by the government in the control and regulation of the purchase of flour as an article of commerce.

"If the contract had been as plaintiff contends, being so controlled, it was made impossible of execution, for the flour, delivery of which is alleged to have been contracted for, was in excess of that permitted to the defendant under the act of Congress and orders thereunder 'for his business requirements during a reasonable time thereafter' (during the next 30 days).

"The first of the alleged contracts would have secured to the defendant a three months' supply of flour in excess of government regulations, it being shown that his necessities were 500 bbls per month. The other contract, being for 1,000 bbls, would have given defendant a two months' supply. It was uncontroverted that he had a month's supply in store. Being impossible of performance in compliance with such regulations, the parties, if theretofore bound, were discharged from the obligations of such contract.

"Plaintiff insists there was no evidence showing the act of Congress and applicable orders thereunder by the Food Administrator. The court takes judicial knowledge of the rules and regulations promulgated under the authority of the act of Congress of Aug. 10, 1917."

* *

Where goods are contracted for sale f.o.b. steamer at seaboard, does the fact that the buyer ascertains that he cannot obtain a necessary export shipping license under existing war regulations justify him in repudiating his contract and in refusing to accept delivery? This question was answered in the negative by the appellate term of the New York supreme court in Cooper vs. Mundial Trading Co., 172 N. Y. Supp. 378, affirmed by the appellate division (176 N. Y. Supp. 894). The court also found that this conclusion is not to be avoided by the circumstance that the seller may have understood that the shipment was intended to be made by the buyer to a country, voyages to which require such licenses.

"Presumably the gain in contemplation was sufficient to make it a wise business venture for the defendant to gamble upon the chance of procuring the license; but however that may be, the element of

chance cannot be foisted upon the plaintiff," says the court. "And it would seem to be unnecessary to cite the many authorities holding that a man may not be excused from performance of a contract in which he has failed to make suitable provision for relief in the event of occurrence of contingencies like that dealt with here."

The court cites a decision of the English court of appeals in a recent case involving breach of a contract to ship aluminum from an English port to Vladivostok. There the goods were to be delivered by the seller at the destination. He was unable to secure a shipping license, and was held to have been exonerated from liability, a condition that he be able to obtain a license to export being read into the agreement by the court as an implied understanding.

In that case the law prevented the seller from delivering at the agreed port, but in the New York case, delivery could have been lawfully made to the buyer at the agreed place, although he was prevented from transporting the goods to an intended destination.

For a discussion of the effect on a contract of an uncontemplated subsequent federal regulation, see sections 27-29.

SECTION 207. WAIVER OF RIGHT TO RESCIND

If a buyer of goods shipped to him desires to reject them on their arrival on the ground of inferiority to the requirements of the contract, he must give the seller prompt and explicit notice to that effect, held the Georgia court of appeals in Brewer vs. Fair & Martin, 106 S. E. 22. Mere complaint against the condition of the goods, although made by telegraph, will not be treated as sufficient notice.

* *

In a case decided by the supreme court of Mississippi (J. B. Camors & Co., Inc., vs. Morlet), 95 So. 317, it appears that plaintiff, a wholesale grocer, sold defendant, a baker, a bill of goods to be shipped June 20, 1921. They were shipped June 10, and arrived at the destination June 12. A transfer company, which had blanket instructions from the baker to receive and deliver all freight addressed to him, placed the goods in the bakery storeroom. June 19, they were destroyed in a fire which burned the bakery and its contents. The baker knew that the goods had been delivered to his place of business, and made no protest, but he refused to pay for them. Holding that he was liable for the contract price, the supreme court said:

"By accepting the goods and permitting them to remain in his storehouse without protest until they were destroyed by fire six days later, the appellee waived the objection that they were prematurely shipped. He should have declined to receive the goods at the time, and notified the shipper of the fact that he had declined them, or, since the goods were received from the transportation company and delivered at appellee's storehouse, he should have immediately notified the shipper that the goods were held subject to its order and risk. He did neither of these things, and we think he is liable for the purchase price of the goods so accepted by him."

* *

In an action for damages for breach of a contract to buy oats (Smith Bros. Grain Co. vs. Adluh Milling Co., 122 S. E. 868) the South Carolina supreme court said concerning the buyer's right to reject oats as not coming up to the quality required by the contract of sale:

"The defendant wrote a letter to the plaintiffs, making no mention whatever of the inspection made prior thereto, and reiterating its promise to accept the oats and deliver to the bank a check in full to cover the price. The evidence is conclusive that the defendant has waived its right now to object to the condition of the oats. . . . The buyer has, of course, a reasonable time within which to inspect the goods; but if he knows of the defects, or accepts them without inspection after the lapse of a reasonable time, he is held to have waived all objections to their condition. In the present case the evidence is conclusive that the defendant not only had such reasonable time, but knew of the condition, and after its own inspection acknowledged its liability; it strongly tends also to excite the suspicion that the declining market was a potent factor in the defendant's refusal to carry out its engagement."

* *

A buyer is not entitled to cancel a purchase of goods after receiving them, on the ground of inferiority of quality or unfitness for use, where he has continued to use the goods in his business, nor are damages recoverable by the buyer on that ground so far as the same are enhanced by continuing to use the goods after knowing of the inferiority or unfitness. (Lambron & Co. vs. Green & Green, 262 S. W. 467, decided by the Tennessee supreme court.)

* *

The buyer of goods will be held to

have made a binding acceptance of delivery, precluding himself from afterwards attempting to avoid liability for the price on the ground that the goods were defective, where he has retained them several days without opening them and has not notified the seller of any claimed defect in quality until two weeks after delivery. This is the gist of a decision handed down by the appellate term of the New York supreme court in the case of Lieberman vs. Beck & Conhaim, 179 N.Y. Supp. 472.

* *

In the case of Webb & Maury vs. Smith Bros., 93 S.E. 74, the Georgia court of appeals decided that on arrival of chops it was defendants' duty as contract buyers to promptly inspect the shipment and then either accept or reject the goods; and that an unreasonable delay in making an inspection was equivalent to an acceptance. It was further decided that defendants were not justified in delaying such inspection by pendency of a claim against plaintiffs growing out of a former shipment.

* *

A flouring mill bought a gas engine under a contract whereby the selling manufacturer agreed that the engine would develop specified power, and it was understood that if it should fail to do so the mill should not be required to pay therefor, and that the engine should be removed by the seller on demand. The mill, being dissatisfied with the test made, refused to accept title or pay for the engine, although use of the engine in the mill was continued, and the manufacturer brought suit to recover the price.

Under these circumstances, the United States circuit court of appeals, eighth circuit, decided the case in the seller's favor, holding that when the suit was brought the mill was bound to choose between the right to reject the engine and demand its removal and the right to retain it and enforce a claim for damages for any breach of the contract which may have been committed by the seller. And since it appears that the mill retained the engine and continued to use it, the right to reject was waived and the only recourse left the mill was to counterclaim for damages.

Incidentally, the court decided that when a buyer of machinery asserts its failure to comply with a warranty under which it was sold, the burden is on him to affirmatively establish that fact, rather than being on the seller to affirmatively show by the greater weight of the evidence that the machinery did come up to the requirements of the agreement of sale. (H. N. Strait Mfg. Co. vs. Crescent Milling Co., 227 Fed. 804.)

* *

The El Paso Milling Co. secured a ruling of the Springfield, Mo., court of appeals on important aspects of sales contracts, with special bearing on sales of cooperage and bagging supplies, etc. (183 S.W. 361). The decision was rendered in a case brought by the milling company to recover the agreed price of crates sold defendant for packing onions. Defendant used 3,500 of the 5,000 crates ordered, but resisted plaintiff's suit on the ground that the crates were defectively constructed and were too small.

Reversing judgment in defendant's favor, the court of appeals held that defendant could not interpose as a defense to the suit to recover the price a claim that the crates were too small or defective, defendant's only remedy being a counterclaim for damages for any breach of warranty on the plaintiff's part concerning the crates.

The court applied the general rule that where a buyer accepts goods and, using them, fails to rescind the contract of purchase within a reasonable time, he cannot resist recovery of the agreed price, except that he may assert a counterclaim for damages for any breach of warranty and thereby reduce the seller's recovery.

* *

The action of the appellate term of the New York supreme court in directing judgment in favor of plaintiffs in the case of Cohen et al. vs. John Curtin, Inc., 177 N.Y. Supp. 246, throws legal light on several important aspects of sales contracts, as affected by delays in transportation of goods from seller to buyer.

The contract of sale in this case contained on one line the words, "Terms net 10 days. On way to New York. No freight allowance." On the next line appeared, "Delivery two to four weeks."

The contract was made Sept. 10, 1918, but shipments were not made until Oct. 2 and 5, followed by invoices with bills of lading attached. Defendant, the buyer, retained the bills of lading for 10 and 12 days, respectively, and then returned them, refusing to accept delivery. Plaintiffs, the sellers, then resold the goods for the defendant's account, and sued for the excess of the contract price above the proceeds of such resale.

Defendant claimed that the clause in the contract, "on the way to New York," amounted to a representation that the

goods were in transit when the contract was made. The trial judge upheld this claim, but the appellate term reversed the decision, holding that the fact that there was a specific provision for delivery in two to four weeks, and the further fact that the quoted phrase was used in connection with a statement of the terms, merely manifested intention that the term of credit was to begin when the goods should be on their way to New York.

Aside from any question of the seller's responsibility for a delay in transportation of the goods, the court found that defendant buyer's retention of the bills of lading amounted to an acceptance of the goods. On this point the court said:

"The serious controversy in the case arises over the fact of the acceptance of the bills of lading after the expiration of the term 'two to four weeks' within which deliveries were to be made under the contract, and the retaining of the bills of lading for a period of more than 10 days without any notice to plaintiffs of refusal to accept the goods because of the delay in delivery. The delivery and acceptance of the bills of lading constituted a delivery of the goods and a vesting of title thereto in the defendant. . . .

"That it was the intent of the parties to the contract that delivery of the goods should be made by merely delivering the bills of lading is borne out by the fact that on receipt of each bill of lading the defendant herein signed a receipt, not for the bill of lading, but for the goods in good order as set forth in the bills of lading. . . .

"There was, by reason of the acceptance and retention of the bills of lading for more than a reasonable time, an acceptance of the merchandise so delivered and a waiver of any right of rejection on the ground of delay. . . .

"After the return of the bills of lading and the attempted rejection of the goods by the defendant, plaintiffs, under their right of lien for the unpaid purchase price, were entitled to sell the goods and recover from the defendant the difference between the amount realized on the resale and the contract price." The decision in this case was affirmed on further appeal (181 N. Y. Supp. 931).

* *

In the case of Fowler vs. Cobb, 232 S.W. 1084, decided by the Kansas City court of appeals, plaintiff sued for defendant's refusal to accept delivery of corn shipped to him. Plaintiff seller sought to invoke the general rule of law that where one party to a contract objects to the other party's performance in some particular regard he will not afterwards be permitted to claim some independent ground for refusing to go on with the contract. Plaintiff's counsel took the position that by refusing to accept delivery of the corn on the sole ground that an excessive quantity had been shipped, defendant was estopped afterwards to justify the rejection on the ground of deficient quality.

This contention, however, was overruled by the court of appeals on the ground that defendant did not know of the quality of the corn when the shipment was rejected; the rejection being made before arrival of the corn, on the information disclosed by the invoice that an excessive quantity of corn had been put in transit.

The court said on this phase of the case: "It must be concluded that defendant did not waive objection to the quality of the corn until he had knowledge that it was not of the grade ordered. . . . A waiver implies an act which the party knows is leading a person, upon whom an obligation rests to perform some duty owing to that person, to believe it will not be required. The record in the instant case is silent as to any act of defendant that could possibly lead plaintiff to believe that defendant would not require strict performance of the covenant as to the grade of corn."

See, also, section 148 on waiver by the buyer of quality rights, in Chapter XI.

SECTION 208. NECESSITY FOR ENTIRE RESCISSION

There is a general rule that a single contract to buy or sell goods is not subject to partial rescission and partial affirmance by one of the parties. Subject to certain exceptions, it has been declared frequently by the courts that, unless modified by mutual agreement, an entire contract must be wholly affirmed or wholly disaffirmed. But a decision of the Minnesota supreme court notes an important qualification, by holding that if a seller of mill products knows that the buyer is not apt to discover that goods delivered are not up to the quality bargained for, until they have been partly resold and consumed, the buyer, on discovering the deficiency in quality, may rescind the contract by returning the part of the goods remaining on hand, and may require the seller to refund a corresponding portion of the purchase price.

In this case, Clifford vs. Stewart, 190 N. W. 613, it was shown that plaintiff,

a retail merchant, bought a carload of flour from defendant, a miller. Plaintiff sold all but about 40 of the 400 sacks shortly after they were received, retailing them among his customers. Complaints against the quality of the flour were made to plaintiff by his patrons, and in many instances he replaced, with other flour, sacks returned to him. About two months after the flour had been received from defendant and resold, plaintiff had 217 sacks of it on hand, including the small quantity that had not been sold and those bags that had been returned. He returned them to defendant, stating that the flour was not good. Defendant accepted redelivery, paying the freight, but informed plaintiff that the flour was held in storage for his account. Later the plaintiff sued to recover the portion of the purchase price represented by the flour so returned to defendant. His complaint averred that the flour was not good and merchantable, as represented, and had not been manufactured from North Dakota wheat at defendant's mill in that state, as stated in the contract and on the sacks delivered.

* *

In an interesting decision (National Novelty Import Co. vs. Bowen & Fine, 108 S. E. 473) the Georgia court of appeals held that where goods are found on their arrival to be materially different from those contracted, and the buyer, immediately on discovering that fact, cancels his purchase, he is entitled to retain enough of the goods to reimburse himself on account of freight charges paid before discovering the nonconformity of the shipment to the contract.

The appellate term of the New York supreme court decided that a buyer's rejection of a shipment made under a single contract must apply to the entire shipment; he cannot pick out part of the goods, accept them, and then deny his acceptance of the remainder, although he may have accepted all of the goods conforming to the contract. He must accept or reject the shipment as an entirety, and enforce claim against the seller on account of any damages sustained through any breach of the contract of sale on the seller's part. (172 N.Y. Supp. 334.)

* *

When goods are sold with reference to a sample, but the buyer accepts partial delivery of goods inferior to that standard, he precludes himself from refusing to receive the remainder of the contract quantity, assuming that the same is equal in quality to the partial delivery. This, in brief, was the holding of the Iowa supreme court in the case of Halloran vs. Quaker Oats Co., 171 N.W. 139.

Defendant agreed to buy 1,500 bus corn from plaintiff, and accepted delivery of about one third, but refused to receive the remainder on the ground that the contract was made with reference to a sample which would grade No. 2 white, and that the corn tendered graded only No. 3 mixed.

In plaintiff's suit to recover damages for rejection of the last delivery tendered, defendant was held liable on the theory that the contract was an entire transaction, and that if defendant desired to reject the corn because it was not of the quality represented by the sample, that should have been done when the first delivery was tendered. Affirming the judgment in plaintiff's favor, the supreme court remarked:

"It is a well-settled rule that upon sales by sample, where the contract is entire, the buyer cannot accept the benefit of the contract in part and rescind it in part. And this is especially true where the alleged inferiority to sample is visible to or discoverable by the purchaser when the first delivery is made. . . . A mere verbal declaration of dissatisfaction with the quality of the thing delivered is of no avail if the delivery is in fact accepted.

"If there be an exception to this rule where the quality of the article is not visible upon a casual inspection, or where the purchaser has not had reasonable opportunity to ascertain the quality, it cannot affect the result in this case, for it appears without dispute that the defendant did examine the corn, and did ascertain its quality and grade before it received the first delivery. It was then its duty to exercise its option to accept and pay for the corn according to the contract, or to refuse the offered delivery. . . .

"A different result would be possible if there was any showing that the corn tendered for the second delivery was in any way inferior to that which had already been accepted by the defendant."

SECTION 209. ENTIRE AND SEVERABLE CONTRACTS

The court decisions leave no field for argument against the proposition that a default under one contract does not justify the aggrieved party in rescinding an independent contract between the same parties.

"One contract cannot be rescinded for

breach of another and independent contract." 13 Corpus Juris, 613.

This rule was specifically applied to the flour trade in the case of Sleepy Eye Milling Co. vs. Hartman et al., 184 Ill. App. 308, decided by the Illinois appellate court. Holding that defendants were not entitled to justify rejection of a shipment under one contract by showing inferiority of a previous shipment, the court said:

"There is no contention that defendants ever examined or handled in any way any of the flour shipped under the second contract of purchase, but as to the condition, standard and value of that flour they rely wholly upon their experience with the first shipment.

"Their business was not, and it cannot be contended that their business was, in any way injured or damaged by reason of the second contract or shipment of flour under that contract, as none of it was used by defendants, and the damage, if any was sustained, is wholly chargeable to the flour received and accepted under the first shipment; and under this state of facts no such loss or damage could be shown by way of recoupment in an action to recover for the second contract of purchase, and the court did not err in rejecting this evidence. . . .

"The mere fact that the flour shipped by plaintiff to the defendants under the first contract of purchase was not the quality of grade or standard purchased would not justify the conclusion arrived at by the defendants that the second shipment was of the same grade or character as the first."

See, also, the decision of the Kansas City court of appeals in the case of Buhler Mill & Elevator Co. vs. Jolly, 261 S. W. 353.

* *

That a mill may ship inferior flour under one contract, thereby committing a breach of that agreement, will not justify the buyer in refusing to carry out an independent contract for deliveries of flour of the same contract grade. This conclusion is supported by what the Kentucky court of appeals said in the case of Ten Broeck Tyre Co. vs. Rubber Trading Co., 217 S.W. 345: "The authorities are agreed that, where the contracts are separate and distinct, the breach of one by the seller will not justify the buyer's failure to perform the other."

But the court noted that a different rule applies to several deliveries under a single contract: "Under the rule in force in this state, a seller's breach in any delivery made under an entire contract for successive deliveries will relieve the buyer from liability for subsequent deliveries, if notice of his refusal to perform is promptly given, and this right is not waived by the retention of the defective shipment, where the buyer complained thereof and was allowed a deduction therefor from the contract price. . . . And there is additional reason why this rule should apply to a case where the buyer is denied the right of inspection until he has paid for and received the goods."

On the question of the buyer's right to inspect, the opinion makes this further holding: "Here each of the contracts provided for payment by a sight draft against bill of lading. Such contracts have been uniformly construed to deny the right of inspection before payment; the reason for the rule being that the buyer is not entitled to the bill of lading or the possession of the goods until the draft has been paid."

* *

The law is not clear on the question as to whether delivery of inferior flour in one installment under a contract gives a right to terminate the contract as to future deliveries. But if the buyer rejects the deficient shipment promptly it seems that the weight of judicial authority entitles him to terminate the contract as to all future deliveries under it. And, even where defective flour has been accepted, it has been held that the buyer was justified in canceling as to further deliveries.

One of the latest reported decisions on this phase of the subject was handed down by the Springfield, Mo., court of appeals March 24, 1917, in the case of Lindsborg Milling & Elevator Co. vs. Danzero, 193 S.W. 606. (For an earlier hearing of this case see 174 S.W. 459.) In that case it appeared that a contract was made for delivery of 2,015 bbls of flour in monthly installments to defendant, a baker. No complaint was made against the first two deliveries, but, claiming that the third and fourth installments were defective in quality, defendant refused to receive further shipment made after he had given notice of his termination of the contract on account of the quality of the third and fourth shipments.

Appealing from a judgment in defendant's favor, the mill's counsel contended that, as defendant accepted and paid for the first four shipments of flour, he was not legally entitled to rescind the

contract as to the other shipments, but was bound to receive them if they measured up to the standard required by the contract. In overruling this contention the court remarked:

"As we understand the law, if the shipments made by appellant in November and December were deficient in quality and did not, for that reason, comply with the requirements of the contract, then the appellant by shipping an inferior grade of flour breached the contract on its part, and, if it did, then the respondent was justified in refusing to receive other shipments."

The Missouri court referred to the decision of the United States circuit court of appeals in the case of Baer Grocery Co. vs. Barber Milling Co., 223 Fed. 969, wherein it was decided that a buyer of flour under a contract for delivery in installments was not entitled to reject deliveries because of the defective quality of previous shipments. But the opinion in the Missouri case reconciles the two decisions by saying:

"In that case the plaintiff had sold the defendant 5,000 bbls of flour to be shipped in installments, and in that respect was similar to this case. The plaintiff had shipped and the defendant had accepted 1,650 bbls during a period of time extending over several months, then refused to accept any more, and, when sued, sought to defend on the ground of a breach of warranty as to the grade or quality and as being unsatisfactory to the customers of defendant, and the court there held that, under the facts in that case, that defense was not good, but we notice that the facts there were entirely different from the facts here.

"In that case no complaint was made by the purchaser to the seller, but the complaints had come from the customers of the purchaser to whom it had sold the flour in the regular course of business, and we find that the purchaser had received from Nov. 10, 1910, to March 3, 1911, 1,035 bbls of flour after the complaints regarding the quality of the flour had been received by defendant from its customers and also after these complaints had ceased to be made, and, the purchaser in that case having received shipments of flour after knowledge and without notifying the seller, it was held that his refusal to take later shipments was without justification, so we do not think that our holding on the facts in this case is in conflict with that one."

An examination of the federal decision cited by the Missouri court shows that the United States circuit court of appeals does draw a distinction on the point whether the buyer has promptly rescinded on discovering defective quality in installments delivered. It is noted in the opinion that the market value of flour had declined sharply when the buyer sought to cancel. The circuit court of appeals said:

"The defendant was liable under the provisions of this contract to pay for the entire flour bought, because of the acceptance of various installments thereunder, and its refusal [failure?] earlier to repudiate the same. . . .

"The defendant, after thus ordering the flour under its contract, and continuously for some months receiving the same thereunder, ought not in good faith and fair dealing, having partly performed the contract, to be permitted to rescind the same at its option because of the alleged defect in quality of some of the flour furnished. Its remedy, if any, under the circumstances, would be by way of offset or recoupment from the purchase money, or a suit for damages for breach of the contract."

* *

In Moran vs. Wagner, 28 App. D.C., 317, the court of appeals for the District of Columbia applied the rule that the unperformed part of a contract may be terminated by the buyer where he seasonably takes advantage of inferior quality of goods shipped. Wagner sued because of Moran's refusal to accept all the installments called for by a contract to sell 18 carloads of oats. After several cars had been received and paid for, and on arrival of a car claimed to be in dirty condition, the buyer gave immediate notice of his termination of the contract. Referring to a decision of the United States Supreme Court, the court says:

"We fail to perceive any difference between a failure to deliver the quantity of oats at the time agreed upon, and the failure to deliver the kind or quality of oats called for under the contract. . . . We do not think the defendant was called upon to wait until another shipment was received, before he determined to rescind the contract. On the contrary, we think the breach of the contract by the plaintiff entitled the defendant, immediately the breach became known, to rescind the contract in toto, provided only that he acted with due diligence. . . .

"The result certainly would be remarkable, should we hold that, under the authority of Norrington vs. Wright, the delivery of a car containing 1,300 bus. instead of 1,400 bus, of No. 2 oats, would justify the rescission of the contract, but

that the delivery of a car containing 1,400 bus of oats of an inferior grade, and therefore not susceptible of use by the defendant, would not. Had a car been delivered containing 1,300 bus of No. 2 oats, he could have used the whole quantity immediately, and the delay incident to the delivery of the 100 bus would not have been a very serious matter; but when a car containing oats he could not use and which he had not bought was shipped to him, he certainly was injured.

"That some other dealer bought and cleaned these oats, and thereby made them merchantable, has nothing to do with this case. Appellant contracted for one thing, and received another which he was not bound to accept.

"We attach no significance to the fact that in this case the contract was not rescinded until after several deliveries had been made. The contract demanded that each shipment should be No. 2 oats, and it is obvious that until some shipments fell below that grade there would be [no] breach, and no right of rescission. When a shipment, whether the first or the last one, fell below contract grade, the right of rescission accrued.'"

There are some decisions which seem to unqualifiedly hold that, after accepting installments, a buyer cannot terminate the contract; that he is limited in his remedy to rejection of the installments that may fall below grade or to a claim for damages, if he accepts delivery. The theory on which these cases proceed is that there can be no rescission of the contract unless the buyer can restore, or offers to restore, all the goods he has received under the contract.

In my judgment this line of authorities constitutes feeble reliance outside the jurisdictions in which the decisions were rendered, in so far as they are to be interpreted as holding that a buyer may not terminate a contract because of a defect in quality in one or more installments, by acting promptly on discovery of the defect.

* *

In the case of Henderson Elevator Co. vs. North Georgia Milling Co., et al., 126 Ga. 279, it was held that a buyer of corn could not rescind the unperformed part of a contract after accepting partial deliveries, on the ground of the inferior quality of shipments accepted, the court saying:

"If a vendee has accepted a portion of a quantity of goods contracted for, and they prove inferior to those stipulated for, he cannot for this reason refuse to accept the residue; but if the residue prove inferior, he may refuse to accept them. . . .

"The defendants had contracted for corn to be delivered during the months of February, March and April. On March 23 they undertook to countermand their orders, but made no offer to restore such corn as had previously been received. If corn not coming up to warranty was shipped, it could be summarily rejected; if not shipped within the time contracted for, the defendants could, if able to make restitution, elect to rescind the contract, or, without returning any of the corn received, hold the plaintiff liable for all proximate damages flowing from the delay.

"Corn under both of the contracts had been accepted, and until the time limited within which delivery could be made had expired, the plaintiff could call upon the defendants to accept additional shipments of corn coming up to warranty. By wrongfully refusing to further carry out the contracts, the defendants subjected themselves to a suit for damages for the breach."

It is quite clear that the Georgia decision follows the general principle of law that a contract must be wholly accepted or wholly rejected; that one is not to be permitted to accept that part of contract performance which favors him, and reject the remainder; that a contract cannot be partly ratified and partly rescinded.

But, as a guide for use in future transactions, I feel that it is safer to perform a contract by delivering what it has been agreed would be delivered than to attempt to convince a judge or jury that a buyer should not be permitted to rescind merely the unperformed part of his contract, if he acts promptly, when the quality of deliveries falls below that required by contract. It seems to me that the reasoning of the court of appeals for the District of Columbia carries within itself evident soundness.

A different situation arises, however, where it is clear that an attempted cancellation rests solely on a declining market, and that reliance upon inferiority of quality of previous deliveries is an afterthought.

Following its decision handed down in the case of Henderson Elevator Co. vs. North Georgia Milling Co., et al., the Georgia supreme court held that where there is a contract for a sale of goods, and a part of the agreed quantity is accepted and paid for by the buyer, he is not entitled to rescind the contract upon the ground that the installment deliv-

ered was inferior in quality to the contract grade.

But if the seller delivers goods not conforming to the contract, and delays delivery beyond the agreed time, and his default in these respects amounts to a substantial noncompliance with the contract as a whole, the buyer may cancel the contract and refuse to accept performance as to the undelivered installments. (N. L. Willett Seed Co. vs. Kirkeby-Gundestrup Seed Co., 89 S.E. 486.)

SECTION 210. CONTRACTS EXCLUDING RESCISSION RIGHTS

Application of the general rule that a buyer may reject an entire shipment for shortage in quantity or defect in quality may, of course, be avoided by suitable provision in the contract of sale. This is illustrated by the decision of the United States circuit court of appeals, third circuit, in the case of Pottash vs. Herman Reach & Co., 272 Fed. 658.

In that case a contract for importation of burlap from Calcutta was involved. It contained these clauses: "No arrival, no sale. If goods lost, not to be replaced by us. If any claims be made on account of quality, unmerchantable condition, or any other reasons, notice must be given within 14 days of the landing of the goods, but in no event can goods be rejected after arrival."

Defendant buyers refused to accept delivery, and plaintiff seller sued to recover damages. The circuit court of appeals affirmed judgment in plaintiff's favor.

The defendants unsuccessfully sought to justify rejection of delivery on three grounds. The first was that of unreasonable delay in the arrival of the goods, and was based on the proposition that where a seller undertakes to deliver goods at a distant place, he assumes the risk of carriage (unless otherwise provided), and, the carrier being his agent, he is responsible for delay; the second was that the goods were damaged; the third, that there was a shortage in the consignment, bringing the case within the rule that "where the seller delivers to the buyer a quantity of goods less than the quantity he contracted to sell, the buyer may reject them."

"We question none of these principles," says the court on appeal, "but find them inapplicable to the second contract in suit, because it is evident from its terms that the parties . . . contracted expressly to exclude their application. . . .

"Against the buyer's right to reject damaged goods when not conforming to an implied warranty of merchantable condition, the parties contracted that 'if any claims be made on account of quality, unmerchantable condition, or other reasons, notice must be given within 14 days of the landing of the goods, but in no event can goods be rejected after arrival,' clearly stipulating against the law of implied warranty, providing for acceptance in any event, and arranging a method of adjusting claims for damages after acceptance.

"In their defense that they were not bound to accept a part consignment, due to the loss of six bales, the defendants were confronted with the stipulation that 'if goods lost, not to be replaced' by the plaintiff, which, read in connection with the rest of the contract, we regard to be a stipulation, not with reference to the loss of the whole consignment but with reference to loss of any part of it, abrogating the customary rule in such case.

"We concur in the interpretation of the learned trial judge that the contract between these parties showed in the main that 'the plaintiff did not agree to deliver, but to ship within the contract time. The defendants did not agree to assume the risks of loss in transit, nor any responsibility until the goods arrived at the place of delivery, but if the goods were shipped in accordance with the contract, they (the defendants) did agree to accept, as and when delivered and such as were delivered.'

"Thus the parties split the risks of war and made a contract, which, though contrary to the law usually applicable to such transactions, was entirely valid."

SECTION 210A. RIGHTS OF BUYER ON RESCINDING

Presumably, the United States circuit court of appeals, fifth circuit, found no greater difficulty in pronouncing judgment than in pronouncing the name of the plaintiff in the case of Naamlooze Vannootschap-Gebrs. Van Den Bergh's Industrie en Handelmaatschappy vs. Wichita Mill & Elevator Co., 3 Fed. (2d Ser.), 931.

Defendant sold plaintiff flour "c.i.f. Rotterdam, sailing in July," but the shipment did not leave the American port until August. Plaintiff did not pay the draft until after it gave notice of its rejection of the flour, and the parties had agreed to an arbitration on condition that the plaintiff should be reimbursed against loss, should the arbitrators find in plaintiff's favor. The finding was in its favor. Affirming judgment for plaintiff, the court remarked:

"There was an absence of evidence to prove that after the consignee's rejection of the flour, or after the award was made, the shipper offered to pay to the consignee the amounts expended by the latter in paying the drafts and in handling the flour. This being so, the consignee had the right to sell the flour (which came under its control upon its paying the drafts) at the highest obtainable price, and credit the net proceeds to its demand against the shipper. . . .

"Evidence adduced tended to prove that the drafts, which were payable in dollars, were paid by the consignee in Rotterdam, Holland, with dollars bought by it with florins; that the expenditure of the consignee in handling and selling the flour was made in florins; and that the amount for which the consignee sold the flour was paid in foreign currency. The right of action asserted having accrued in Holland, and the suit having been brought in this country, any recovery to which the consignee was entitled was payable in dollars, and the proper amount of the recovery was the equivalent in dollars of what the consignee was entitled to in foreign money, when and where the demand in its favor accrued."

See, also, section 173.

CHAPTER XXII

ACTIONS FOR NONDELIVERY*

SECTION 211. BUYER'S REMEDIES

CONTRACTS on the Millers' National Federation Sales Contract form are governed by their own specific provisions concerning the buyer's rights on the seller's nonfulfillment of the contract. (See "The Miller's Almanack," 1925, pp. 88-90.)

Special meaning is ascribed judicially to the terms, "deficit," "default," and "incomplete shipment," as related to failure to fully perform contracts for sale of grain or other commodities, in a decision handed down by the Texas court of civil appeals in the case of Gottlieb vs. Early-Foster Co., 214 S.W. 520. The principal points in the case arose under the following quoted rule of the Texas Grain Dealers' Association:

"When the seller finds that he will not be able to complete a contract within the agreed limit, it shall be his duty at once to advise the buyer by mail, telephone, or telegraph, whereupon it shall be the duty of the buyer at once to elect either to buy in or to cancel the deficit, or, with the consent of the shipper, to extend the contract to cover said deficit. If the seller fails to notify the buyer of his inability to complete his contract as above provided, the liability of the seller shall continue until the buyer, by the exercise of due diligence, can determine whether the seller has defaulted, when the buyer shall immediately (a) agree with the seller upon an extension of the contract to cover the deficit; (b) cancel the contract outright; or (c) buy in the deficit for the seller's account."

Summarized, the decision of the court under this rule is as follows:

The rule applies only to contracts which have been partly performed.

The first part of the rule does not apply to a willful breach by the seller; it applies only to contracts which the seller has found himself unable to perform within the agreed time limit for some reason other than mere unwillingness, or intentional refusal to perform.

The latter part of the rule covers not only a case of inability, but also an intentional or willful breach or default. The use of the word "defaulted," in association with its context, seems to express the intention to embrace a willful breach of contract, as distinguished from mere inability to complete performance.

Where a contract calling for shipment of two cars was performed as to one, the seller defaulting as to the other, the buyer could not recover damages, having failed to avail himself of any one of the three courses open to him, under the last part of the rule, which was made a part of the contract.

But where there is a total failure of the seller to make delivery under his contract, the rule does not apply, and the buyer can sue for damages, regardless of that rule.

*Excuses for nondelivery are specially considered in Chapter XIX.

MEASURE OF DAMAGES

SECTION 212. IN GENERAL

To entitle a buyer aggrieved by the seller's failure or refusal to make agreed delivery to recover on the basis of market value, it is not necessary that he make a substitute purchase. But if he does make one, and at a price below market value, his damages must be limited to his actual loss—the excess of what he was compelled to pay for the substitute goods above the price at which the defaulting seller agreed to sell. On the other hand, if the buyer pays more to supply himself with the goods than he could have readily obtained them for, he must bear his part of the loss, as being self-inflicted.

* *

The proper measure of damages for breach of a contract to sell feed to be manufactured according to a special formula was considered by the St. Louis court of appeals in the case of Heffernan vs. Neumond et al., 201 S.W. 645.

The court decided that "ordinarily the measure of the vendee's damages resulting from a breach by the vendor of a contract of this character is the difference between the contract price and the market value of the goods at the time and place when and where, by the con-

tract, they were to be delivered, if the goods have such a market value; or if they have no market value, then the difference between the contract price and the reasonable value of the goods."

But, it appearing that as this feed was to be manufactured according to a special formula it was not obtainable on the open market, it was decided that the trial judge did not err in instructing the jury that in assessing damages the jury should "take the difference between the actual cost of the best available substitute (provided you further find it was impossible at the time to procure feed exactly like that contracted for at a lower price than that at which the substitute could be obtained, and that plaintiff used due diligence in procuring the substitute feed and bought on the best terms he could) and the price and value that plaintiff agreed to pay under the contract. . . . together with interest," etc.

And it was further held by the court that, in any event, defendants were estopped to deny the justness of the measure of damages declared by the trial judge, because it appeared that before plaintiff made a substitute purchase there was an arrangement had with defendants under which such a substitute purchase should be made with a view to minimizing plaintiff's loss in the transaction.

* *

It was decided by the Texas court of civil appeals, in the case of Early-Foster Co. vs. Dallas Waste Mills, 218 S.W. 515, that where a buyer aggrieved in one capacity by nondelivery of goods does business under two different names, he or it will not be permitted to buy substitute goods from himself or itself in the other capacity, and hold the delinquent seller liable in damages based on the excess of the price paid for such substitute goods above what the delinquent seller agreed to sell for.

On the other hand, it is decided that a provision in the broken contract, authorizing the buyer to buy other goods in the open market and hold the seller liable for increased cost over the contract price, does not preclude the buyer from waiving that remedy and suing under the common law to recover the excess of the price at which he could have sold the goods above the contract price.

See, also, section 214.

SECTION 213. PLACE OF DELIVERY AS BASIS

In Humphrey vs. Farmers' Union & Milling Co., 190 Pac. 489, a suit in which plaintiff was awarded recovery for nondelivery of beans contracted to be shipped by defendant from Stockton, Cal., to Evansville, Ind., defendant unsuccessfully contended on appeal that the trial court erred in assessing damages, it being claimed that the damages should have been measured on the price at which substitute beans could have been bought in the market nearest Evansville, and not at Stockton. This contention was based on a California statute providing that, in estimating damages, the value of the property to a buyer deprived of its possession is deemed to be the price at which he might have bought the equivalent thing in the market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such purchase.

Disposing of this point, the California district court of appeal said: "There is nothing in the record to show that the beans could have been bought at any less price at any place nearer Evansville. . . . We think, under the circumstances, that the court was justified in accepting the proved price at the city of Stockton as the price at which plaintiff could have bought equivalent beans. If there was any place nearer Evansville at which they could have been bought, then the matter was entirely open for the defendant to make such proof."

SECTION 214. C. I. F. CONTRACTS

Where a contract for a sale of flour to be exported under a c.i.f. provision does not contain stipulations negativing such mutual understanding, delivery is to be regarded as contracted for at the point where the shipment originates. And, if the seller breaks the contract by failing to make delivery, the buyer's damages are to be assessed with reference to market values prevailing there, rather than at the foreign destination.

This is the gist of the main point decided by the United States circuit court of appeals, eighth circuit, in the case of Jacques Setton vs. Eberle-Albrecht Flour Co., 258 Fed. 905.

In other words, there is nothing in a c.i.f. provision to be interpreted as providing for delivery at the destination in applying the general rule of law that damages for nondelivery are to be assessed on the basis of market values at the time and place when and where delivery was to have been made under the contract.

The full text of the opinion of the circuit court of appeals, in which Judges Hook and Amidon concurred and Judge Carland dissented, is as follows:

"The plaintiff, Setton, a flour merchant of Alexandria, Egypt, brought this action against the defendant, the Eberle-Albrecht Flour Co., of St. Louis, Mo., for a breach of the following contract, dated July 11, 1914:

"'We offer to buy of you 2,000 bags "White Owl" at 23/6 per 280 lbs, c.i.f., Alexandria, all August shipment.'

"This offer was accepted by cable. The contract was wholly by correspondence and cable. The defendant failed to deliver the flour, as performance became difficult by the breaking out of the World War early in August. Probably the principal cause of the breach was obstruction to shipping facilities. It may also be that enhancement of price was a factor. It is not claimed that either of these causes was legal justification for the breach.

"In the trial court the case turned wholly on the proper measure of damages, plaintiff insisting that they should be based on the difference between the contract price and the market price at Alexandria, and the defendant on the difference between the contract price and the market price at St. Louis. The trial court held with defendant and excluded evidence as to prices in Egypt, and as plaintiff offered no evidence of market price at St. Louis, it directed a verdict in favor of defendant at the conclusion of plaintiff's case and entered judgment accordingly. Plaintiff brings error (an appeal) to review that judgment.

"Some time was spent in the trial court explaining the letters c.i.f. They mean 'cost, insurance and freight.' Their significance was explained by Lord Justice Blackburn, in Ireland vs. Livingston, L. R. 5 H. L., 395, 406, in language quoted in Williston on Sales, page 408, and in the fourth edition of Benjamin on Sales, section 891. The Lord Justice concludes his statement as follows:

"'In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way.' The duty which this feature of the contract imposed upon the seller has no bearing upon the question now under review.

"The general rule as to damages is stated by Sedgwick, at section 734, as follows:

"'When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when and the place where it should have been delivered, with interest.'

"The same rule is expressed in slightly different language, and a multitude of cases cited, in the fourth edition of Sutherland on Damages, at section 651.

"The words 'place of delivery' in the rule mean the place where title passes. If the goods are to be shipped by carrier, this will be the place at which they are delivered to the carrier. If there is no local market at that place the words have been enlarged to include places in the same vicinity where there is a market, allowances being made for freight.

"The rule as stated by Sedgwick has been adopted by the federal courts. Grand Towere Co. vs. Phillips, 23 Wallace, 471; Globe Refining Co. vs. Land Cotton Co., 190 U.S. 540; Salmon vs. Helena Box Co., 147 Fed. 408, 412, 413, and by all state courts entitled to speak with authority on such a subject. Cahen vs. Platt, 69 N.Y. 340; Rahm vs. Deig, 121 Ind. 283, 23 N.E. 141. An examination of these authorities will show that using the market price at the place of ultimate receipt by the consignee in measuring damages has resulted in a reversal in all ordinary mercantile transactions.

"To the general rule there is an exception which is accurately expressed in Sutherland on Damages, section 662, page 2343, as follows:

"'If the buyer has, in advance, made a contract for resale and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable for damages on the basis of the profits the vendee would realize upon his contract for such resale.'

"This exception is well illustrated and explained in Rahm vs. Deig, 121 Ind. 283, 23 N.E. 141; Howard Supply Co. vs. Wells, 176 Fed. 512; West Drug Co. vs. Byrd, 92 Fed. 290, 293; Southern Flour & Grain Co. vs. McGahan, 144 Wis. 130, 128 N.W. 879.

"Mere knowledge that goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under

the exception. If that were not so the exception would swallow up the general rule completely, for it is always known that when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale.

"To bring a case within the exception the buyer must have an existing contract for resale at the time of the purchase and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the purpose of enabling the buyer to perform his obligations under the contract of resale. The same result will follow if the buyer is acting as the agent of the seller, as in Cook Mfg. Co. vs. Randall, 17 N.W. 510, and McCormick Harvesting Co. vs. Johnson, 45 N.W. 160.

"It will be found upon a careful examination of authorities entitled to be considered that, in order to take a case out of the general rule, there must be present some special feature such as those to which we have adverted. Such special features must be sufficient to take the case out of the special title of sales and place it under the general law of contracts. Then the rule of Hadley vs. Baxendale, as qualified by later decisions, may control. Globe Refining Co. vs. Landa Cotton Oil Co., 190 U.S. 540.

"Mere knowledge that these goods are purchased for resale is not sufficient to produce that result. One reason for this is that the market price at the place where the goods are to be resold carries the transaction one stage nearer the ultimate consumer than the original sale, and always shows a higher market value than that which controlled between the original buyer and seller. It would be manifestly unjust to measure the damages by a market value thus enhanced. This feature is well explained by Judge Adams, speaking for this court in Salmon vs. Helena Box Co., 147 Fed. 408, 412, 413.

"It is likewise true that all courts regard the damages when they are measured by the exception as special damages, and the facts showing that the exception ought to apply must be pleaded in the complaint. No such allegations are contained in the complaint in this case, and a reading of the correspondence between the parties convinces us that the facts would not justify such claim.

"The ruling of the trial court was therefore right, and its judgment is affirmed."

This opinion of the circuit court of appeals is not to be misunderstood as indicating that market values at the destination are not the proper bases for assessing damages when it appears that a particular contract was so worded as to show a mutual intention that title was not to pass to the buyer until arrival of the goods abroad.

As applied to the case specifically presented to the court the whole opinion proceeds upon a theory that the contract did not specify any place of delivery, and that, therefore, the transaction was governed by the well-settled rule that where nothing is agreed to the contrary it will be inferred that goods shipped from seller to buyer were mutually intended to pass to the latter when placed in transit, the transportation companies becoming the buyer's agent.

In other words, the court holds that the provision for a sale of the flour by defendant to plaintiff "at 23/6 per 280 lbs, c.i.f., Alexandria," merely indicated the price to be paid, and did not constitute a stipulation as to the place of delivery.

This holding constitutes no departure from what other courts of high authority have decided on both sides of the Atlantic in previous cases of similar nature.

SECTION 215. ORDER SHIPMENTS

The primary legal principle that delivery to the carrier is delivery to the buyer, in the absence of some provision in the contract to the contrary, leads to some confusion when it appears that a particular contract calls for shipment to the seller's order with bill of lading attached to draft on the buyer. Most of the American courts seem to hold that there is no delivery to the buyer until he takes up the draft; and that, in the absence of anything else in the contract to indicate mutual intention as to where delivery was intended to be made, a shipper's order contract implies that the destination is to be the place of delivery.

That it is safest to provide specifically for delivery at point of origin where the seller is to retain control of the bill of lading merely as a means of securing payment of the agreed price is suggested by a decision handed down by the Wisconsin supreme court. In that case—Southern Flour & Grain Co. vs. McGeehan et al., 128 N.W. 879, defendants broke a contract to deliver hay for shipment from Wisconsin to Georgia. The agreement provided for a sale at a certain price, f.o.b., Wisconsin loading point, but for payment of the price

through draft attached to a bill of lading drawn to the seller's order.

It was decided that the place agreed upon for delivery, for the purpose of assessing damages, was the loading point. The court remarked that the f.o.b. provision, standing alone, would indicate intention that delivery be made at the f.o.b. point; and that the provision for shipping to the seller's order, standing alone, would indicate intention to deliver at the destination; but that since both provisions were used in the same contract they should be harmonized.

"We cannot make the provision for delivery, f.o.b., Highbridge yield to the later provision," said the court, "because the later not only may have, but apparently from the writing did have, the other purpose of merely securing the seller. . . . Where the place of delivery is fixed otherwise in the writing, but the seller in this way retains title as security, and not as owner until the property arrives at its destination, the place of delivery, for the purpose at least of fixing the measure of damages for failure to deliver, is the place specified for delivery f.o.b. cars. So long as the delivery is a matter of intention this must be the rule."

TIME AS ELEMENT

SECTION 216. IN GENERAL

As a general rule, damages for nondelivery of goods are to be assessed on the basis of market value of the goods at the time agreed on for delivery.

Where the market value of goods contracted to be sold fluctuates, the seller's liability for default in making delivery is to be based upon market value at the time of the breach, according to the decision of the Kansas City court of appeals in Heller vs. Ferguson, 176 S.W. 1126.

* *

Damages for breach of a contract to deliver wheat are assessable as of the day when the breach occurred, as declared by the Washington supreme court in Oriental Trading Co. vs. Houser, 151 Pac. 242.

* *

In the case of Street & Co. vs. Werthan Bag & Burlap Co., 200 S.W. 739, it was decided that where defendant became in default by failing to deliver on or before the last day of August, which fell on Sunday, and Monday was a holiday, a purchase made by plaintiffs on Sept. 4 in the open market at the destination was in proper time for the purpose of charging defendant with the excess of what substitute bagging cost plaintiffs at prevailing market prices above the price at which defendant had agreed to deliver.

* *

The Union Warehouse & Elevator Co. was denied, by the Washington supreme court, the right to recover damages against one Baumann for breach of a contract to deliver wheat under a contract of sale, because there was no claim that the market value of the grain at the time and place agreed upon for delivery was in excess of the contract price.

Defendant failed to deliver the contract grain "on or before Sept. 1, 1914," as agreed, but, in suing for damages, plaintiff failed to allege what substitute wheat could be bought for in the market at that time, relying rather upon the fact that the market was up May 1, 1915. Holding that the suit was properly dismissed, the court said:

"We think there is a total want of any allegation of damage suffered by appellant which can be recovered in this action. For aught that appears in the complaint, the market price of the wheat on Sept. 1, 1914, may have been less than sixty-eight cents per bushel. No special damages are claimed. Plainly, under the facts appearing in the complaint, whatever damages the appellant suffered must be measured as of the date the contract was to be performed, and not at a later date, as appellant seeks to have its damage measured." (167 Pac. 1100.)

* *

"The market price should be taken as of the time of the breach of the contract, and not within a reasonable time thereafter, provided there is a market price at such time, and it is not at this particular time unnaturally inflated or depressed by unlawful means. If the time of delivery has been extended, the market price will be taken as of the time to which the delivery was postponed, or if postponed indefinitely, at a reasonable time after demanding performance. So, also, if no exact time of delivery is fixed by the contract, the market price should be fixed as at a reasonable time. If delivery is to be made in installments, the measure of damages for the breach of any installment is to be computed on the market price at the time such installment should have been delivered.

"Although notice has been given of an intention not to deliver, the market price

as of the date when the delivery should have been made will be taken, and not the market price on the date of such notice; but if the goods were deliverable within a certain period at the seller's option, the market price on the day when he gave plaintiff notice of his intention not to deliver is to be taken in computing the damages, that day being the time of default." 35 Cyc. 637-638.

The reason on which these rules rest is that damages for nondelivery of goods should be assessed as of the time of the breach of contract, when the aggrieved buyer is in a position to make substitute purchases and when damages can be fairly based on circumstances contemplated by both parties. It is reasonable that damages be assessed as of the time when they are inflicted, rather than to give the buyer an opportunity to speculate on future rises or falls in market values.

If I have agreed to deliver flour today at $14 and fail to do so, but my customer can make a substitute purchase at $14.50, the difference clearly represents his actual loss. He should not be permitted to pass up the opportunity to make the substitute purchase, and later demand increased damages from me on flour jumping to $20. If that should be fair, then on flour declining to $10, without his having made a substitute purchase, he should pay me the $4 I saved him by breaking my contract.

SECTION 217. EXTENDED TIME FOR DELIVERY

In the case of Kansas Flour Mills Co. vs. Dirks, 164 Pac. 273, it appeared that defendant agreed to sell 1,000 bus of wheat and deliver it at plaintiff's elevator on or before Dec. 30, 1914, and stipulated that, on default in delivering, the mill might extend time for delivery, cancel the contract, or buy for the defendant's account, at the mill's option.

Delivery was not made within the specified time, and the mill notified defendant that the contract was extended until Jan. 15, and that, in default of delivery, substitute grain would be bought for defendant's account, and any loss charged to him. The wheat was not delivered within the extended period, and the mill sued for damages, based on the market value of the wheat Jan. 15,—$1.29,—and defendant replied that any damages awarded must be assessed with regard to the prevailing price Dec. 30, the last day for delivery under the original contract, which price was $1.12.

The trial court sustained defendant's position, but the Kansas supreme court reversed the judgment, ordering judgment in the mill's favor under its claim that the option clause of the original contract entitled it to extend the time for delivery.

"The option to extend the time of delivery was a part of the contract," declared the higher court. "It was supported by the same consideration as the stipulation fixing Dec. 30 as the time of delivery, and, when the option was exercised and a reasonable time named by plaintiff for delivery, it was just as binding upon the defendant as if it had been the original time fixed by the contract. . . . If prices had declined between Dec. 30, 1914, and Jan. 15, 1915, defendant would have had a right to settle by the ruling price on Jan. 15, which had become the agreed date for delivery, by the action taken in accordance with the provisions of the contract."

* *

An instance in which it was found to be proper to read grain exchange rules in connection with the wording of a sales contract was presented in the case of Cavers Elevator Co. vs. Droge Elevator Co., 171 N.W. 696, decided by the Iowa supreme court.

Defendant contracted to sell plaintiff a quantity of wheat, f.o.b., Council Bluffs, for delivery by July 31, 1916. Partial delivery was made within that time, and some time later there was further delivery, leaving 1,016 bus undelivered, when, about three months after the contract delivery date, plaintiff gave formal notice of cancellation and made a substitute purchase in the open market. Controversy then arose as to whether plaintiff's damages as to the undelivered quantity should be assessed, as claimed by it, with reference to market values when the substitute purchase was made, or, as claimed by defendant, when delivery was not completed within the time specified in the contract.

The decision of the supreme court upholding plaintiff's contention rests on the facts that the sale was made "subject to Omaha . . . inspection," and under agreement that if delivery should not be made when due, the seller reserved the right to cancel, or to extend, or to make a substitute purchase at its option, any loss resulting therefrom to be paid by the buyer.

Defendant claimed that this last mentioned clause required plaintiff to elect within a reasonable time whether it would cancel the contract, extend it, or make a substitute purchase. And as throwing light on this clause, evidence was received by the trial court as to rules of the Omaha Grain Exchange to

the following stated effect: Where grain is sold to arrive, Omaha terms, and there is no delivery within the specified time, the contract is to be regarded as open for the benefit of both parties until filled or until canceled by notice in writing by the seller, or by notice to the buyer from the seller of cancellation unless delivery be made by a certain date. Damage claims are to be adjusted on the basis of current market values applying when notice of cancellation is received.

"The defendant insists strongly that it is not permissible to introduce evidence of custom to contradict a contract," says the supreme court. "Without doubt this is a correct legal proposition. But no evidence of custom contradictory to the contract was received in this case. Such evidence was received only for the purpose of construing terms of the contract which might otherwise be deemed ambiguous. We think that the rules of the exchange herein set forth were receivable as an aid to a proper construction of the quoted clause of the contract. . . . Moreover, the defendant itself put this construction upon the contract and delivered 526 bus of grain some days after the expiration of the time limit.

"The rules of the exchange above quoted are entirely fair to both purchaser and seller. The general effect of them is to extend the contract after the time limit and to keep it binding upon both parties until one notifies the other of his purpose to terminate the same. Under these rules and under the clause of the contract above quoted the plaintiff, as purchaser, continued bound to the defendant, as seller, to receive the undelivered grain at the contract price until Nov. 4 [when plaintiff canceled]. If the market price had gone below the contract, this rule would have operated in favor of the seller. . . .

"We reach the conclusion, therefore, that by the terms of the contract it continued in force after the expiration of the time limit until one party or the other terminated it by appropriate notice."

* *

In Wichita Mill & Elevator Co. vs. Liberal Elevator Co., 243 Fed. 99, the United States circuit court of appeals, eighth circuit, awarded judgment for $6,359.50 in favor of plaintiff on account of nondelivery of wheat under a contract with defendant.

Defendant agreed to sell 25,000 bus of wheat, delivered, f.o.b., Galveston during July, 1914, subject to the Kansas Grain Dealers' Association rule that, on discovering that delivery cannot be made within an agreed time limit, a seller must so advise the buyer, who must "at once" elect to buy in or cancel or extend the contract; and that on the seller's failure to give such notice, the contract shall remain in force unless and until completed, extended, bought in, or canceled.

After shipping 7,055 bus, defendant seller, on July 29, gave notice of inability to complete deliveries within the month because of a railway embargo. No further deliveries were made, and after an extended correspondence, plaintiff, on Sept. 3, being refused further performance, although the embargo had been lifted, bought in the deficit at Galveston, and sued to cover resulting loss.

The trial judge, holding that there was a distinct breach of the contract on Aug. 10, assessed damages as of that date, the amount being $986.97. Asserting that this was an insufficient award, and that the damages should be assessed as of Sept. 3, the plaintiff appealed, and the circuit court of appeals upheld the claim in this respect, on the ground that plaintiff had seasonably extended the contract to that date.

The controversy turned upon somewhat involved negotiations extending from July 29 until Sept. 3, in which the parties failed to agree upon any terms for delay or cancellation, and the fact that on Aug. 10 the buyer had stated that the contract would be extended. Late in August the embargo was lifted, but the seller ignored the buyer's demands for delivery. Sept. 3 the buyer wired that wheat would be bought in for the seller's failure to respond to demands and offers to extend contract until Sept. 15. The same day the seller denied obligation under the contract, considering it as having been canceled. This, the court holds, constituted a definite breach, fixing the measure of damages as of that date.

Defendant denied that there had been a valid extension of the contract by plaintiff, because not made "at once" when it was notified July 29 that timely delivery would not be made, and not until Aug. 10. But the court holds that "at once" does not mean instantaneously, but with reasonable expedition under all of the circumstances.

"The contract gave the buyer the absolute right to extend the contract if it acted promptly," said the court. "If there was here any delay, it resulted from causes actively participated in by the seller. It was its [seller's] assurance of the very brief delay of two days over the contract time that would have made an

immediate election under the contract by the buyer unnecessary. Beginning with the end of that period, it was an active party in attempting to arrange some amicable adjustment of the situation which would have made an extension useless.

"Those negotiations were not in accord with any powers given by the contract, but were commendable efforts to arrive at a mutually satisfactory solution of the difficulty. Promptly upon their failure the buyer exercised its election to extend the contract. Under these circumstances it acted within the terms of the contract."

Defendant objected that there had been no valid extension of the contract under the grain association rule made part of the agreement, because no definite time was fixed. This point was overruled by the circuit court of appeals, which said:

"Ordinarily, where time of contract performance is limited, a failure to complete within the period is a finished breach, with its attendant damage liability. However, this contract provided that the buyer might elect to waive the breach and extend the time for performance. The position of the seller regarding this contention is based upon a misconception of the meaning of the contract. This is not a contract where performance must be upon a certain day. If it were, the seller might be correct in its contention. But this contract provided delivery during any day of July after its execution.

"Any extension under the contract was intended by it to be of similar character. This contract, by 'extension,' means, not the fixing of a definite future date upon which delivery must be made, but an additional period during every day of which the seller may make delivery. In no way can the seller be injured by an extension; nor by an indefinite extension, because every day of the extension is an additional opportunity, uncontrolled by the buyer, for it to perform its contract.

"The buyer does not have to grant any extension; it can claim the advantage of the breach caused by the seller. If it does extend, it can be for as short or as long a period as it may elect. If it chooses to set a definite day, that simply marks the end of the extension, and limits the time within which the seller must deliver. It is obvious that, if the delivery continues in default, the buyer would ultimately have to prescribe a definite date for terminating the extension. But there is no requirement in the terms of the contract, as expressed or as implied by law, to require such date to be determined at the time the extension is granted."

SECTION 218. CONTRACTS SILENT AS TO DELIVERY TIME

Question as to the date as of which damages should be assessed for breach of a contract to deliver corn and oats was the subject of controversy in the recent case of Davenport Elevator Co. vs. Halloran, 178 N.W. 350, decided by the Iowa supreme court.

It seems that no specific time for delivery was agreed upon, and that delivery was postponed from time to time on account of poor condition of the roads over which the corn and oats must be hauled; defendant seller giving continued assurance that delivery would be completed as soon as the roads should become passable. But later, and on a rising market, defendant definitely refused to complete delivery, and plaintiff was awarded judgment for $1,576.71 damages.

The supreme court reversed the judgment and ordered a new trial, on the ground that the trial judge erred, in refusing to instruct the jury, at the defendant's request, that damages should be assessed as of the time when the contract was declared terminated by defendant. In other words, he was not liable for damages on the basis of market values increased after he gave notice that he would not deliver the remainder of the corn and oats called for by his contract.

* *

Conclusion having been reached that defendant mill was in default in refusing to deliver flour covered by contract, the question was presented to the Oklahoma supreme court whether the trial court applied the proper measure of damages. (Westbrook Brothers vs. Kingfisher Mill & Elevator Co., 192 Pac. 209.) The mill contended that the proper measure of damages, if any, was the difference between the price of the two cars of flour under contract and the market price at the time the mill first communicated its intention to the plaintiffs not to comply with the agreement.

On the other hand, plaintiffs' attorney argued that the proper measure of damages was the difference between the contract price and the market price at the time when delivery was due under the contract. The supreme court held that the case was governed by the following Oklahoma statute, which codifies a fundamental principle of law:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly

provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

"It seems to be agreed," says the supreme court, "that since no time was specified, the flour was to be delivered within a reasonable time. From the evidence in the record it reasonably appears that it was the intention of the parties that the flour was to be delivered from time to time as needed. In fact, the three cars of flour were furnished as follows: The first on July 29, 1916, the second on Aug. 23, 1916, and the third on Sept. 15, 1916. There was evidence showing the market price of flour was $2.55 in July and $4.80 in November.

"It is plaintiffs' contention that the other two cars of flour should have been delivered within a reasonable time after the first three, and under all the facts and circumstances in evidence we cannot say that the jury was not authorized to find that the time of delivery was either October or November. Based on the November market, plaintiffs' recovery should have been for a larger amount than that awarded; but, since it was also in evidence that the price of flour was constantly rising, it seems that the jury gave the defendant the benefit of the doubt as to the time of delivery."

SECTION 219. ANTICIPATORY BREACH BY SELLER

When a mill which has contracted to buy a quantity of wheat is notified by the seller in advance of the agreed time for delivery that the contract is repudiated, are the mill's recoverable damages necessarily based upon the market price of wheat on the delivery date, or may the prevailing price on an earlier day, on which the mill makes a substitute purchase, be considered?

This important question was answered by the Kansas supreme court in the case of Kansas Flour Mills Co. vs. Brandt, 158 Pac. 1120, in a decision which awarded $510 damages to plaintiff for breach of a contract to sell 3,000 bus wheat. The contract was made in August, 1914, for delivery Sept. 15, or before, at 83c per bu. Sept. 9, defendant gave notice that delivery would not be made, and the mill made a substitute purchase at the current price at the place of delivery, $1. Sept. 15 the market price was 82c. In upholding the mill's right to recover on the basis of the Sept. 9 price, the supreme court said:

"The plaintiff, when notified by the defendant that the wheat would not be delivered, had a right to reduce the damage that it would sustain, by going on the market and buying wheat in amount equal to that the defendant had agreed to sell, and collect the difference in price from the defendant. The authorities say that this should generally be done at the time and place of delivery. . . .

"The damage to the plaintiff was caused by the defendant. . . . He refused to perform his contract, and compelled the plaintiff to adopt such measures as he deemed best to reduce his losses. The defendant ought not to be permitted to cast on the plaintiff the burden of reducing these losses and then say that the plaintiff could nave better reduced the losses by purchasing wheat on a different day."

As supporting the decision, the Kansas court cites similar holdings by the United States Supreme Court, and the highest courts of Alabama, Illinois, Kentucky, New York and Pennsylvania.

* *

The case of A. Waller & Co. vs. Royster, 217 S.W. 684, was a suit for damages for nondelivery of corn. The kernel of the Kentucky court of appeal's decision was as follows:

"We apprehend that the measure of damages to which plaintiffs were entitled is the difference between the contract price of corn per bushel, and the market price of similar corn on the day on which the defendant notified the plaintiffs that he would not comply with his contract by delivering the corn. . . .

"Up to that time, if that was not an unreasonable time [the contract did not specify a time for delivery], according to the custom among dealers in corn in that vicinity, defendant had the privilege of requesting additional time of the purchaser in which to deliver the corn, and under the written contract it appears that, had defendant requested such additional time in which to deliver the corn and such request had been made within a reasonable time after the making of the contract, plaintiffs would have been obliged to have granted the request or have released defendant from the contract, especially in view of the fact that high water and mud interfered with the handling of the corn.

"In other words, defendant was not required to do the impossible thing, but his contract was subject to all natural conditions over which he had no power

of control, such as winds, floods, and other natural causes. However, when defendant announced his purpose not to comply with the contract and deliver the corn, plaintiffs' cause of action immediately accrued, and such should have been the case had he made such an announcement any day subsequent to the making of the contract."

* *

When a contract for sale of grain calls for delivery at destination and shipment within a certain month, damages for any failure of the seller to deliver are to be measured by the market value of the grain on the day that it would have been delivered in the regular course of transportation if shipped on the last day of the month, although the seller may have repudiated the contract early in the month; the market prices being in the meantime above the agreed price. It was so decided by the Kansas supreme court in Wallingford Bros. vs. Bushton Grain Co., 164 Pac. 275.

It was conceded by plaintiffs that if, after defendant repudiated its contract to deliver and before the time for delivery had expired, plaintiffs could have bought substitute wheat at or below the price agreed upon, they would have been bound to have done so, to avoid damage through defendant's breach of the contract. But, in view of the jury's finding that the market price was above the contract price at all times involved after the breach, the court holds that the damages should be assessed with regard to the latest shipment that defendant could have made in conformity to the contract.

* *

A later decision of the Kansas supreme court also applies to instances in which a contract seller of grain or flour announces in advance of the time for delivery that he will not perform.

The decision was handed down in the case of Cardwell vs. Uhl, 182 Pac. 415, in which plaintiff recovered judgment for defendant's failure to perform two contracts to sell wheat.

One of the contracts called for delivery by Dec. 15, 1916, and plaintiff sued Dec. 13 for breach of the agreement. Defendant asserted that the suit was prematurely brought, but the evidence showed that on Nov. 30 defendant had explicitly declared that he would not carry out either contract. Under these circumstances, the court said:

"The plaintiff was justified in treating this as an anticipatory breach, and there was no occasion to delay the bringing of the action until the time originally fixed for performance."

The final ground on which defendant contested the suit was that plaintiff was not entitled to an assessment of damages based on the market value of wheat bought several days after defendant had given notice that the contract would not be performed. On this point the opinion says:

"It has been determined by this court that, where the seller in advance of the time fixed for delivery declares that he will not fulfill his contract, the buyer may at once purchase at the market price and look to the seller for the difference (Flour Co. vs. Brandt, 98 Kansas 587, 158 Pac. 1120, L.R.A. 1917A, 1000). The seller certainly cannot complain of a delay of a few days during which a further opportunity is given him to reconsider his decision and carry out the contract, at least where, as in this instance, he makes no showing of any increase in price during the interval."

* *

In the case of Fahey vs. Updike Elevator Co., 166 N.W. 622, before the Nebraska supreme court, it was decided that where one who has contracted to sell grain for future delivery repudiates the agreement before expiration of the agreed shipping period, the buyer is not bound to treat the contract as canceled, and recover damages on the basis of market prices prevailing at the time of such repudiation. The buyer is entitled to wait until the time agreed upon for shipment has expired, and then buy substitute grain in the open market as a basis for holding the seller liable for the excess of the then prevailing prices above the contract prices. The court said on this point:

"When prices rise after sale and before delivery, the seller is exposed to a temptation to evade the purchase, if cancellation can be accomplished without a full measure of responsibility for resulting damages. The buyer is exposed to a similar temptation when prices begin to fall. . . . A seller of undelivered grain cannot arbitrarily shorten the stipulated period for delivery, and thus take the fruits of the buyer's bargain, without incurring liability for resulting damages. . . .

"Plaintiff had a right to make continuous demands for shipments as long as the stipulated shipping periods lasted, though defendant gave notice of nonperformance. After plaintiff refused to recognize the cancellations, defendant

was free to ship the grain sold, and in that event to collect the contract prices.

"Under the circumstances, a cause of action did not accrue until the time fixed for performance had elapsed. While defendant, by incurring liability for damages, could refuse performance at any time, it could not, by a mere breach of contract, fix the date of accountability to suit its own interests. . . . The same result could not be accomplished by a mere tender of performance during a temporary suspension of shipping facilities, not attributable to either party; such facilities being restored in time for performance within the stipulated shipping periods."

SECTION 220. SAME BRAND OR GRADE AS BASIS

The suit of Wright vs. Seattle Grocery Co., 177 Pac. 818, was brought to recover damages for nondelivery of a quantity of Gold Medal flour. The seven judges of the Washington supreme court split four to three in opinion as to what was the proper measure of recovery to which plaintiff was entitled for defendant's nondelivery of the car of flour.

The majority opinion, which became decisive as to the law of such cases in Washington, holds that, although defendant controlled the market price of Gold Medal flour in Seattle, the price at which it was selling at the time of the breach of the contract must be taken as one of the bases for ascertaining the amount of damages recoverable. The three dissenting judges, supporting the trial judge's ruling, adopted a view that plaintiff was entitled to have his damages assessed with regard to the prevailing market price of the same grade of flour, regardless of the source of manufacture.

At the date of the breach of the contract Gold Medal was selling in Seattle for $12.50 bbl, and there was evidence that defendant was the mill's exclusive agent for that brand in Seattle, fixing the selling price within his territory. There were 100 bbls tendered to plaintiff at that price, which was in excess of the contract price. The only evidence introduced on this point by plaintiff was that of experts, who testified that other flour of similar quality was selling at $14.70 at the time involved. In this state of the proof the majority opinion of the court says:

"This could in no sense refute the evidence that the price of Gold Medal flour was a less sum. There was, it is true, evidence of a sale of this flour made by defendant at $15 per bbl; but this was four months later, and flour had been advancing in the meantime. Under the evidence the court should have withdrawn from the jury the question of finding the market value, and instructed them, if they found for plaintiff, to assess his damages in a sum equal to the difference between the contract price of the flour and $12.50 per barrel."

"As I read the record in this case," said Mr. Justice Mackintosh, speaking for the minority of the court, "it discloses an effort on the part of defendant to fix its own measure of damages which are to be recovered against it for its breach of contract to deliver a carload of flour. When inquiry was made of it in regard to delivery, the defendant refused to deliver according to the terms of the contract, but notified the plaintiff that he could have some of the flour contracted for at the price of $12.50 per barrel. The majority opinion fixes the measure of the plaintiff's recovery at the difference between the contract price and this $12.50 per barrel.

"One who has breached his contract to deliver at a certain price cannot limit the recovery against him for such breach by offering, at the time of the breach, to deliver the identical goods contracted for, at some other price higher than that stipulated in the contract but less than the market price. He cannot accomplish this, even though the rule is enforced against the other party to the contract that he must do all in his power to minimize his damages. Under that rule, he is not compelled to accept from the party who has breached his contract the very goods agreed to be delivered, at an increased price.

"The majority opinion accomplishes this result, but seems to attempt to place it upon the ground that $12.50 was the market price, the defendant being the only representative handling the brand of flour contracted for. The rule is in such cases: If there is in the market a commodity of the same quality as that contracted for, even though of another brand, the measure of recovery will be the difference between the market price of the commodity contracted for or commodities of similar quality, and the contract price. In other words, that it does not lie in the power of the contract violator, by reason of the fact that he is the only one in his community handling the brand of commodity mentioned in the contract, to establish the market value of that commodity for the purpose of reducing his liability.

"The evidence discloses that flour of similar quality was worth $14.70 per bar-

rel in the market, at the time the defendant offered to sell at $12.50, which price it testified was the market price on that date. The [trial] court properly instructed the jury as to the measure of damages, and the verdict based upon those instructions should not be disturbed; in other words, no premium should be awarded to the defendant for having breached its contract."

* *

The suit of Verhasselt vs. National Grocery Co., 105 Atl. 367, passed upon by the Rhode Island supreme court, involved, as the main point in dispute, the amount of damages to which plaintiff, a Woonsocket baker, was entitled on account of defendant's breach of contract to deliver 100 bbls of flour in the fall of 1916 at $5.50. The evidence showed that plaintiff had never previously used the particular brand of flour bargained for, but that it was represented as being equal in quality to any flour used by plaintiff.

When defendant became in default in delivery, plaintiff could not obtain substitute flour of the same brand, and bought 25 bbls of another brand at $10.40. This proving to be inferior in quality, plaintiff bought 100 bbls of a third brand, which he had previously used, and paid $11.25 bbl for it. Defendant offered no evidence, and a jury returned a verdict for $591.25—approximately the difference between the price at which defendant agreed to sell and what plaintiff paid for the substitute flour.

Reviewing the award, the supreme court held that the evidence sufficiently supported the verdict despite any undisclosed difference in quality that may have existed between the standards of the brand bargained for and of that bought by plaintiff as a substitute.

* *

Before there can be recovery of damages as for breach of a contract to sell goods, plaintiff must establish the market value at the time of the breach. Applying this rule in the case of Boehringer vs. Dorman, 195 S.W. 1183, the Texas court of civil appeals held that plaintiff was not entitled to recover for defendant's failure to deliver No. 2 sacked white corn at Eagle Pass, at $1.01½, as agreed, if the only evidence upon which an award could be made, on the basis of excess of the market value at the contract time and place for delivery above the contract price, consisted of testimony that plaintiff had bought "corn" in the open market at $1.05½@ 1.07½.

"The evidence did not in any manner tend to show what kind of corn was bought, but it did appear that plaintiff concluded he wanted No. 3 instead of No. 2 corn, and that No. 3 is worth more than No. 2 corn," said the court. "The No. 3 corn could only be bought in Texas at that time. Which did he buy in the open market? The evidence fails to show. As held in our former opinion, it might be presumed that the market price was paid for the corn, but what class we cannot presume, especially as plaintiff wanted No. 3 corn and had so telegraphed to defendant. The case was not developed, and upon a reconsideration we do not feel disposed to affirm the judgment on the loosely constructed and uncertain testimony."

SECTION 221. QUANTITY AS TO WHICH DAMAGES ARE ASSESSED

In Ferguson vs. W. F. Covington Mfg. Co., 85 So. 726, it was decided by the Alabama supreme court that the buyer's damages for breach of a contract to sell and deliver a "carload" of goods are to be assessed on the basis of the capacity of a railroad car ordinarily used in transporting the particular kind of goods, and not on the basis of a car of minimum or maximum capacity. This case is reviewed in section 118, with others of similar nature.

SECTION 222. BUYER'S DUTY TO MINIMIZE LOSS

In the case of Malin vs. J. W. Denio Milling Co., 165 Pac. 1113, a suit to recover damages for nondelivery of three cars of a certain brand of flour, the Wyoming supreme court said:

"If plaintiff could have purchased flour of the same grade and quality in the market upon defendant's breach of the contract, it was his duty to do so to minimize his damages so far as he reasonably could, and if he did not do so he could not thereby enhance his damages beyond the difference between the contract price and the market price at the time of the breach.

"But it is contended, and plaintiff testified, that he could not procure the brand of flour contracted for except from defendant and at an advanced price, and that he was not required to so purchase from defendant; that to have done so would have been a waiver of his claim for damages. On that question the court instructed the jury that: 'It was not the duty of the plaintiff to purchase said flour from defendant at

an advanced price over the contract price, in order to lessen the amount of defendant's liability.'

"We think the instruction was erroneous. If plaintiff could have procured the flour either in the market or from the defendant at an advanced price, and he had done so, it is clear that the measure of his damages would be the difference between the contract price and the price he was required to pay."

The general rule that one aggrieved by another's breach of contract cannot recover damages in so far as they might have been avoided has been held by the Texas court of civil appeals not to extend so far as to require a buyer to accept delivery at a point other than contracted for. In the case of Early-Foster Co. vs. Dallas Waste Mills, 218 S.W. 515, it is decided that the buyer may treat refusal to deliver excepting at a point other than that specified in the contract of sale as a breach of the contract, although he could limit his loss to mere transportation charges by accepting the offer of delivery at a noncontract place.

See, also, Chapter XIV, on place for delivery.

SECTION 223. SPECIAL DAMAGES

Special damages may be recovered by a buyer for nondelivery when the seller was charged with notice that they would probably result from his default. For instance, the Colorado supreme court decided in the case of Richner vs. Plateau Live Stock Co., 98 Pac. 178, that, on breach of a contract to deliver feed, the seller might be held responsible for injury to live stock which he knew depended upon delivery for proper feeding.

* *

In the case of Dreyer Commission Co. vs. Fruen Cereal Co., 182 N. W. 520, decided by the Minnesota supreme court, it appeared that a contract called for a sale of hominy feed, to be delivered within 60 days. Plaintiff buyer notified defendant seller that it had resold the feed at a profit and was expecting delivery of this particular quantity to fill the contract. The supreme court ruled that defendant, on failing to deliver, was properly charged with plaintiff's resulting loss of profit, saying:

"Expected profits from a resale are special damages and may be recovered where the parties may be considered to have contracted in reference to a resale. If at the time of making the contract the buyer has an existing contract of resale, and the purchase is made in contemplation of such contract of resale and for the purpose of fulfilling it, and the goods cannot be otherwise procured in the market, and the seller is apprised of these facts at the time the contract is made, the buyer may recover the profits he loses by reason of the breach."

But the Texas court of civil appeals held in the case of Early-Foster Co. vs. Barnes, 228 S. W. 248, a suit by a buyer to recover damages for nondelivery of oats, that defendant seller could not be charged with plaintiff's loss of a sale to a third party, where defendant was not advised as to what particular disposition of the oats was intended by plaintiff. Therefore, the measure of plaintiff's recovery was limited to the excess of the market value of the oats at the time and place agreed on for delivery above the contract price.

See, also, the decision of the Louisiana supreme court in the case of C. F. Bonsor & Co. vs. Simon Rice Milling Co., 92 So. 711.

* *

In Manor vs. Hindman, 97 S.E. 332, the Virginia supreme court of appeals decided that where a contract seller of flour knows that his seller is buying to fill resales in a particular market or under particular contracts the seller is liable for losses of profit suffered by the buyer in consequence of breach of contract by the seller.

On the question of damages, defendants objected to plaintiff being permitted to prove loss because of the defendants' failure to supply the flour under contracts which he made on the faith of his contracts with defendant millers.

"The rule in such cases appears to be perfectly well settled," said the court, "and is thus stated in 2 Mechem on Sales:

" 'Sec. 1763. If, however, at the time the contract is made, the seller has such notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, that he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered.'

" 'Sec. 1765. It is sometimes objected that a loss of profits is not a proper subject of compensation, and this is often true. It is not, however, because profits in themselves may not, if lost, be properly made the basis of a recovery, but because in most cases in which such claim

is made the profits in question were too speculative, uncertain and remote to be considered. Where, on the other hand, the loss of profits can be shown with reasonable certainty, it has been settled . . . that a recovery may be had for the amounts so lost.'

"The buyer in such circumstances, who has made a subcontract, is entitled to obtain and supply the article which his vendor has failed to furnish under his contract, and, if he is compelled to pay a higher price for the substitute thus procured he may recover as damages the difference between what he was to pay for the original article and what he is thus compelled to pay for the substitute."

For further discussion of the buyer's right to recover special damages, see the case of Setton vs. Eberle-Albrecht Flour Co., 258 Fed. 905, referred to fully in section 214.

SECTION 224. NOMINAL DAMAGES

In an action to recover for breach of defendant's contract to deliver grain (174 N.W. 557), the Wisconsin supreme court said:

"We are also satisfied from the evidence that the court below was in error in holding that no damages were proved. There was some evidence in the case of substantial damage, and the amount thereof was a question for the jury. But in any event the plaintiff proved a breach of contract, and was entitled to nominal damages, and the nonsuit was improperly granted, even if only nominal damages had been shown."

SECTION 225. PROVING DAMAGE

It is observable in the law reports that suits to recover damages for breach of contracts for sale or purchase of commodities having market value often fail for want of proof of an element essential to an assessment of damages, although there may be a meritorious claim.

For example, in the case of Hallam vs. Duckworth, 209 S.W. 222, passed upon by the Texas court of civil appeals, a suit to recover damages for defendant's breach of a contract to sell wheat f.o.b. cars at Jean, Texas, for shipment to Fort Worth, the court ruled that plaintiff was entitled to recover the excess of the market value of the wheat at Jean, at the contract time for delivery, above the agreed price. But, as plaintiff failed to prove what the market value of the grain was at that time and place, it was decided that he was not entitled to an assessment of damages, although he proved the market value at Fort Worth and other Texas points.

* *

When an issue is raised as to the damages sustained through breach of a contract to sell and deliver wheat or other commodity having a market value, and the prevailing prices on the open market at the time involved are shown by authentic publications or trade bulletins accepted by grain dealers generally as standards, it is improper to admit testimony of particular transactions on the Board of Trade involving payment of different prices. In applying this rule in the case of Fahey et al vs. Updike Elevator Co., 166 N.W. 622, the Nebraska supreme court said:

"In making their contracts for future deliveries, the parties contemplated the usual and recognized sources of knowledge for determining prices on the open market."

SECTION 226. BREACH OF CONTRACT BY BUYER

The general rule of law that one party to a contract will not be permitted to recover damages as for breach by the other, without showing that he had offered to perform his part of the agreement, was applied by the Washington supreme court in the case of Houser vs. Atherton, 167 Pac. 1109, in which plaintiff unsuccessfully sought to recover damages for nondelivery of wheat.

It was agreed that defendant would deliver 2,000 bus of F. F. wheat, subject to grading by the buyer according to "the statutes in force at the place of delivery and lawful regulations thereunder." Plaintiff refused to accept delivery of the wheat tendered, unless defendant would consent to a deduction of three cents per bushel, because the wheat contained 1½ degrees of smut.

Under Washington grain inspection regulations, plaintiff was entitled to deduct 2.46c per bu, .54c less than the deduction demanded. Defendant testified that he refused to consent to a deduction of more than 1 lb per bu, and plaintiff testified that he refused to deduct more than 1c per bu; the agreed price being 70c. The disagreement resulted in nondelivery. The supreme court said:

"The burden was upon the appellant to show that he had offered to perform the contract according to its terms, before he would be entitled to damages. Since he at no time offered to perform with a deduction of 2.46c per bu, which both his pleading and the evidence offered in his behalf shows was the proper

deduction under the rules and regulations of the Public Service Commission, it follows that he did not make out a case.

"We have not overlooked the fact that the respondent testified that he would not have acceded to a deduction of more than 1 lb per bu, but before appellant could prevail it was necessary that he offer to perform the contract according to its terms, and show that the respondent had refused to so perform; in other words, before the appellant could put the respondent in default the latter had a right to an opportunity to refuse to perform with an offered deduction on the part of appellant of 2.46c per bu."

See, also, Chapter XIX.

SECTION 227. BUYER'S ABILITY TO COMPLETE CONTRACT

A buyer was not entitled to recover damages for breach of a contract to sell her flour, without showing that the sale was on credit, or that she tendered payment, or was ready and willing to pay for the flour when demand for delivery was made. This point was decided in the case of Brown vs. Sexton, 36 Ill. App. Ct. Rep. 281.

* *

In J. C. Lysle Milling Co. vs. North Alabama Grocery Co., 77 So. 748, the Alabama supreme court ruled that defendant was not entitled to recover on a counterclaim for damages for nondelivery of flour, because there was no allegation that defendant was ready, willing and able to pay for the undelivered flour on delivery.

The evidence showed that the contract or contracts called for delivery of 800 bbls of flour at a certain price and to be shipped on defendant's orders, and that 175 bbls were to be delivered on open account, the remainder to be paid for through draft attached to the bill of lading. Holding that it is incumbent upon the defendant in a case of this kind to affirmatively show that he was ready and able to take up such draft, the supreme court said:

"The pleas failed to aver that the defendant was ready, willing, and able to comply with its part of the contract, to receive and pay for the flour upon arrival, and the fact that the shipments were to be made upon the draft with bill of lading attached did not relieve the defendant of the necessity to make this material averment in its pleas.

"Moreover, the third plea is not sufficiently definite in averment that defendant had paid for the 175 bbls of flour received by it from the plaintiff, under the contract, as it had contracted to do, or that it was not so in default as to such payment as to authorize a rescission of the whole contract. It should have been averred that the defendant was not only ready and able to pay, but was willing to pay, and that it offered to pay, in compliance with the contract provisions, for said 175 bbls of flour, or else that payment therefor was excused by the contract.

"For aught that appears in the plea, when, on Sept. 3, 1914, the defendant demanded of the plaintiff 'the remainder of said flour so contracted to be shipped each week,' it was in default for nonpayment of the contract price for the 175 bbls already received. If such was the fact, no rule of law would require the seller to make further shipments under the contract until receipt of payment of the agreed consideration for the deliveries actually made. . . .

"This agreement, without other averment of its terms, did not obligate the plaintiff to ship the first 175 bbls on open account, and relieve the defendant of the duty to pay on receipt of same or within a reasonable time thereafter. There is no averment of a general custom of the market, governing such sales, that relieved the buyer of its obligation to pay within the designated time, and compelled the seller to deliver subsequent installment shipments on the contract, regardless of default in payment for installments actually delivered; nor is there any averment that any such custom was made a part of the contract sued on, or that the contract was made in reference thereto."

See, also, Chapter XIX.

SECTION 228. ENFORCEMENT OF CLAIM BY COUNTERCLAIM

The supreme court of Alabama ordered a new trial in the case of J. C. Lysle Milling Co. vs. North Alabama Grocery Co., 77 So. 748, a suit brought by plaintiff to recover for 175 bbls of flour sold and delivered to defendant, in which defendant set up a counterclaim for damages for an asserted breach of contract by the mill in failing to make further delivery under the same agreement. The court recognizes the well-established rule that, where a seller of goods sues to recover the price of goods delivered, it is open to the defending buyer to set off damages resulting from any breach of the same contract by the seller; the buyer not being bound to resort to the more expensive and inconvenient remedy of bringing independent suit on his damage claim.

CHAPTER XXIII

RESCISSION BY SELLER*

BREACH BY BUYER AS GROUND

SECTION 229. IN GENERAL

"A VENDOR who has contracted to deliver personal property in the future at a certain price, and when the time for delivery arrives is ready and willing to deliver and is prevented from doing so by the refusal of the vendee to accept, may elect to consider the contract at an end." (Illinois appellate court in Middle Division Elevator Co. vs. Vandeventer, 80 Ill. App. 669.)

Insistence by a contract buyer of goods on a privilege of inspection at variance with the express terms of the contract, and as a condition precedent to his payment of the price, is such breach of the agreement as justifies the seller in refusing further performance of the contract on his part, according to a holding by the Arkansas supreme court. (222 S.W. 18.)

In a Wisconsin case, the supreme court recognized the right of a seller to waive previous defaults on the part of the buyer as to previous deliveries under a single contract, without affecting the former's right to insist upon strict performance on the latter's part as to future deliveries, especially where the seller specifically requested the buyer to live up to the agreement in the future. (118 N.W. 548.)

But the Delaware superior court has declared that the refusal of a buyer to allow the true weight of goods already delivered did not constitute such repudiation of the contract of purchase as warranted cancellation on the part of the seller. (56 Atl. 672.)

The buyer's demand that insurance certificates be attached to drafts did not justify the seller in canceling the contract, although the agreement did not provide for insurance, where the buyer immediately waived the demand on notice of attempted cancellation by the seller, according to a holding of the Texas court of civil appeals. (44 S.W. 200.)

If a contract binds the buyer to purchase all of his requirements from the seller, purchase of quantities from a third person is such breach as warrants the seller in refusing further performance on his part, under a holding of the California supreme court. (106 Pac. 55.)

If a contract of sale does not contemplate immediate shipment, it cannot be canceled for failure of the buyer to give immediate shipping directions. (182 Ill. App. 112.)

For general discussion of effect of the buyer's failure to give timely shipping instructions, see Chapter XIX.

* *

A representative of a firm of grain merchants negotiated by telephone for a purchase of 8,000 bus of wheat from an elevator owner. The same day the firm mailed to the seller a written confirmation calling for "this week shipment." On receiving it, the seller telephoned a denial that it was agreed that shipment should be made within a week, claiming that he was to have about two weeks longer in which to ship. The buyers maintaining that delivery must be made in accordance with the terms stated in the written confirmation, the seller never shipped, and the buyers sued to recover damages.

Judgment was awarded in favor of defendant, on the theory that he was justified in rescinding the contract on the ground that the plaintiffs' insistence that the confirmation stated the agreement and disclaimer of obligation to pay the agreed price unless shipment should be made within the week amounted to a repudiation of the contract to purchase. This judgment was affirmed by the Kansas supreme court in the case of Wallingford Bros. vs. McCray, 165 Pac. 813, that court holding that, having once repudiated the contract, the plaintiffs could not afterwards reinstate it and bind de-

*For closely related matter, dealing particularly with excuses for nondelivery of goods, see Chapter XIX.

fendant to make delivery by offering to pay the agreed price for deferred delivery on a rising market.

* *

In Kuros vs. Banner Cone Co., 232 S.W. 582, the Arkansas supreme court recognized the legal principle that before one party to a contract will be justified in treating a contract of sale as repudiated by the other, "there must be an intention clearly manifested or expressed, of a refusal to perform the contract." But it is held that where one of the contracting parties is shown to have endeavored to cancel an order, and to have treated it as a nullity, the other party may elect to treat the agreement as abrogated.

* *

Where a certain grade or quality of goods has been contracted for sale, the mere fact that the buyer afterwards asks for delivery of a better grade does not entitle the seller to treat the contract as repudiated by the buyer, and to refuse, on that ground, to make delivery, although an insistence by the buyer for delivery of a better grade would, no doubt, entitle the seller to treat the contract as repudiated. This is the substance of the decision of the Mississippi supreme court in the case of Crenshaw Bros. Seed Co. vs. Rauch, 73 So. 53.

Defendant agreed to sell a quantity of peas to plaintiff, the agreement apparently not requiring them to be cleaned nor of first class stock. Telegrams were intended to close the contract, but, in confirming the purchase by letter, plaintiff requested that cleaned and first class peas be delivered. This letter was received after part of the peas were shipped, they being accepted by plaintiff. Treating the letter as a repudiation of the contract, defendant refused to complete the delivery, and plaintiff sued for damages measured by the excess plaintiff was required to pay above the contract price in obtaining substitute peas in the open market.

In sustaining plaintiff's right to recover these damages, the supreme court held that there was nothing to show that plaintiff would have refused to accept peas of the contract grade, and hence no excuse for defendant's breach of the agreement to deliver.

SECTION 230. BUYER'S REJECTION OF INSTALLMENT TENDERED

A suit brought to recover damages for asserted breach of agreement to deliver wheat—Brunswig vs. Farmers' Grain, Fuel & Live Stock Co., 164 Pac. 154—was decided by the Kansas supreme court in defendant's favor.

Under three separate contracts, defendant agreed to deliver four cars of wheat at Galveston, shipping from a Kansas point. The various times for delivery covered a period of about six weeks. Being notified that the defendant seller was ready to load the first car, but that the railroad refused to accept Galveston shipments, the buyer telegraphed, "Bill wheat to Fort Worth, Texas." Defendant immediately shipped the first car, drawing on the buyer for the price. The buyer about the same time assigned its rights under the contract to plaintiff, who refused, however, to pay the draft, claiming that he was entitled to delivery at Galveston.

In these circumstances the court holds that, in the absence of anything showing a mutual understanding to the contrary, the original buyer's instructions to ship to Fort Worth must be deemed to apply to all the wheat covered by the three contracts, and not merely the single car called for by the first agreement; that plaintiff, as assignee of the contracts, was bound by the original buyer's instructions to deliver at Fort Worth, instead of Galveston; and that plaintiff's refusal to receive the first car justified defendant in canceling the contracts as to the remaining deliveries.

* *

Where a contract of sale provides for an indivisible transaction, it is a well-settled rule of law that neither party to the agreement will be permitted to partly affirm and partly rescind it; the contract must be wholly confirmed or wholly repudiated. But a decision of the Illinois appellate court shows that a different principle is applied in the case of a severable agreement.

The Maney Milling Co., Omaha, Neb., agreed to deliver 4,000 bbls of flour at an Illinois point, at the rate of 1,000 bbls a month, on shipping instructions from the buyer, who agreed to make payments as the different installments were delivered.

The court held that this contract was severable as to the various deliveries, and, therefore, that the milling company could treat the buyer's refusal to receive the first two installments as a cancellation of the agreement as to them, without losing the right to insist upon performance of the contract as to the remaining installments. (Maney Milling Co. vs. Baker-Wignall & Co., 181 Ill. App. 390.)

SECTION 231. NONPAYMENT OF PRICE

Whether plaintiff's delay in paying for

installments of goods delivered under a contract constituted such material breach as justified defendant seller in refusing to make further deliveries under that contract was the question presented to the appellate division of the New York supreme court in E. Heller & Brother vs. Continental Mills, 187 N. Y. Supp. 511. Affirmed, 135 N. E. 951.

The contract called for weekly deliveries and weekly payments, but when defendant refused to make further deliveries, no payment had been made on time. On delivery of the fifth of 12 installments called for by the contract, the buyer was in default 10 days in payment of the second installment, although two statements in addition to the original invoice had been sent. The second installment of the price was 26 days overdue when paid, the third 31 days, and the fourth 24 days. Under these circumstances, the court held that the jury was justified in finding that there was such material breach of the contract as to payments as justified defendant in refusing to make further deliveries.

See, also, Freund vs. A. Shapiro & Son, 4 Fed. (2d Ser.) 383.

* *

The right of a seller of goods to recover them on discovering that the buyer obtained delivery without intending to pay was upheld by the Kentucky court of appeals in the case of Nashville Grain & Feed Co. vs. American Co-operative Association, et al., 262 S. W. 634.

The plaintiff sold a quantity of red dog to one Jackson at Owensboro, who later induced the plaintiff to release the bill of lading attached to the draft without payment.

Defendant had a claim against Jackson, on account of his having previously obtained money on misrepresenting that a carload of shorts was in transit. Defendant induced Jackson to transfer the red dog to it in satisfaction of this claim.

Holding that plaintiff was entitled to reclaim the red dog in defendant's hands, the court said:

"It is clear from the record that Jackson obtained the goods from plaintiff without any intention or reasonable expectation of paying for same, and with the design of cheating plaintiff out of same; that, having thus obtained the red dog feed from plaintiff, he turned same over to defendant to avoid threatened criminal prosecution for obtaining money from it some months theretofore upon fraudulent representations.

"In these circumstances we think plaintiff, upon discovery of the fraud that had been practiced upon it, clearly had the right to treat the contract of sale as a nullity, and to bring such an action as this for the recovery of the property, if same had still been in Jackson's possession. . . .

"This being true, it seems equally clear that Jackson's assignee, in possession of the goods, could defend only upon the ground that it was an innocent purchaser for value, without notice. . . .

"While the lower court did not say so in so many words, it is evident from its separate findings of law and fact that it concluded from the evidence that the defendant association was a bona fide purchaser for value without notice. In so holding we think it was clearly in error.

"Defendant knew from experience that Jackson was dishonest, and was threatening him with criminal prosecution for the fraud practiced upon it when the goods obtained from plaintiff in the same way arrived in Owensboro with the bill of lading attached to a sight draft, and without which Jackson could not get possession of the goods. As soon as this bill of lading was released to Jackson it was turned over to the defendant. Jackson never had actual possession of this merchandise, and defendant did not pay him anything therefor, but only released him from an obligation long since past due, with knowledge, as we think must be inferred from all the facts and circumstances, that he had not paid, and did not intend to pay, plaintiff therefor.

"We are therefore of the opinion that the defendant association was not an innocent purchaser for value, and that it occupied no better position than would have Jackson in resisting plaintiff's claim of title and right of possession to the property."

* *

Is a mill legally entitled to cancel a contract for a sale of flour where the buyer fails to take up drafts, or in some other detail as to payment or terms fails to live up to the letter of the contract entered into by him?

In general, any intentional breach on the part of the buyer of a condition imposed upon him by his contract entitles the seller to rescind the agreement. There are numerous decisions upholding the principle that when a contract of sale contemplates payment of the price in advance of, or concurrently with, delivery, the buyer's failure to conform to the agreement in this regard affords justification to the seller to cancel the contract as to all goods remaining unde-

livered. This is true in cases where the agreement calls for delivery in more than one installment, and the buyer is in default in paying for a delivery made.

However, the supreme courts of several states have declared that if a contract of sale is so worded that each delivery is properly regarded as a separate transaction, refusal to pay for one delivery does not excuse refusal to make another, if the buyer lives up to the conditions attached to the latter.

And it was decided by the United States circuit court of appeals that when a seller is in default in making deliveries under a contract, and the buyer's damage exceeds an amount remaining overdue on account of deliveries, the buyer's default in payment does not justify rescission by the seller. (185 Fed. 454.)

The Missouri court of appeals has declared that a buyer's slight delay in paying the seller s draft will not warrant cancellation of the agreement as to future deliveries, if the resulting damage to the seller is slight. (133 S.W. 856.) But where the buyer's delay in paying such draft amounts to a material breach of the agreement, it affords clear ground for rescission.

In a Pennsylvania case, the buyer agreed to make settlements by sending 60-day notes about the fifteenth of the month following shipments, and the United States circuit court decided that his failure to send the note covering August shipments prior to Sept. 19, notwithstanding requests therefor, justified the seller in refusing to make further shipments and in rescinding the contract. (176 Fed. 972.)

According to a decision of the United States circuit court of appeals, a buyer's refusal to pay for monthly deliveries, because of the seller's refusal to deliver more than the contract quantity and to give a bond to insure future deliveries, not contemplated by the agreement, justified rescission by the seller. (206 Fed. 456.)

The Massachusetts supreme judicial court has adjudged that a buyer's demand, persisted in under threat not to pay further drafts, for a certain guaranty of quality not contemplated by the agreement, entitles the seller to rescind. (37 N.E. 456.)

But the Texas court of civil appeals recognizes the rule that failure to pay for goods delivered under a previous contract does not justify cancellation of an independent agreement as to which the buyer was not in default. (85 S.W. 845.)

When a contract does not provide when payments shall be made, but there is a well-established custom requiring payments to be made by a certain time, the buyer's refusal to live up to the custom affords the seller reason for rescission, the same as if the terms of the custom had been expressly incorporated into the agreement. (California supreme court, 71 Pac. 110.)

The Mississippi supreme court has held that where draft on the buyer was attached to bills of lading, and they were delivered to him on mere acceptance of the draft, without payment thereof, the bank became liable to the seller for the amount called for by the draft, but that the buyer was not guilty of such default as justified the seller in terminating the agreement. (40 So. 20.)

* *

In a decision of the appellate term of the New York supreme court, announced in the case of Wilfand vs. Zwerner, 168 N. Y. Supp. 564, Judge Lehman seems to have followed well-settled judicial precedents in his statement of the law applicable to an attempted cancellation of contracts to sell flour.

Feb. 19, 1917, defendant contracted to sell plaintiff 100 bbls of rye flour at $7.57½. Partial deliveries were made before another contract was made, March 29, to deliver 100 bbls of common flour. The opinion shows that on April 19 defendant sent plaintiff a letter stating that the 40 bbls remaining undelivered on the first contract would be delivered by defendant's truckman the next day, and asked that cash payment be ready.

Plaintiff did not receive the letter until 20 minutes before the truckman arrived, and, his bank being closed, was unable to pay. The truckman, refusing to wait until plaintiff could secure the cash from his neighbors, took the flour back, and defendant gave notice of cancellation of the second contract. Plaintiff demanded delivery of the remaining rye flour called for by the first contract, offering to pay cash on delivery, but defendant declined to deliver.

Plaintiff's suit, brought to recover damages as for breach of both contracts as to the undelivered quantities called for by them, was dismissed by the trial judge, on the ground that, before the plaintiff could put the defendant in default, he was bound to tender the purchase price. Reversing this decision, the higher court said on appeal:

"There can be no doubt, I think, that so far as concerns the contract for the

rye flour the learned trial justice was in error. It is true that the plaintiff could not put the defendant in default in his deliveries until he tendered to the defendant the agreed price of the flour; but the defendant has put himself in default by repudiating his contract.

"The law does not require a party to do a vain and fruitless act, and after the defendant had repudiated his obligation under the contract, and so declared, it would have been a useless act for the plaintiff to make an offer to perform. . . . Even if the plaintiff had been in default through failure to pay for the 'Nemco' flour tendered to him on April 20, such default could not affect the obligation of the parties under the other contract for the sale of the rye flour.

"Moreover, it seems to me that the plaintiff was not in default under the contract of March 29. It is true that payment and delivery are concurrent conditions, and that the plaintiff was obliged under his contract to pay for the flour tendered him before the defendant was bound to make delivery, and that if he had refused to make such payment upon tender he would have been in default. The plaintiff, however, was entitled upon such tender to a reasonable opportunity to make such payment.

"In view of the fact that no time was set for the delivery of the flour, and that he received notice of such delivery 20 minutes before the actual delivery, and at a time when the banks were not open, he could not, as a matter of law, be required to have the cash in his drawer, and the defendant should have given him a reasonable opportunity to obtain such cash.

"While the defendant's failure to give the plaintiff such an opportunity cannot be considered a repudiation by him of his own obligation, and in the absence of a subsequent demand for the flour and tender by the plaintiff of the price of the flour, the defendant could not be placed in default, yet he had no right to cancel the contract by reason of plaintiff's failure to accept the delivery tendered to him under the circumstances, and his cancellation constituted a breach of the contract, which absolved the plaintiff from any further requirement to make a tender."

* *

"Where a sale is for cash, payment and delivery are concurrent and mutually dependent acts, and if the vendor makes delivery in expectation of immediate payment, such delivery is conditional only and he may reclaim his goods if payment be not made. . . . In the absence of evidence indicating that credit is to be given, a sale is presumed to be for cash."

These points of law were reaffirmed by the Minnesota supreme court in the case of Dalrymple vs. Randall, Gee & Mitchell Co., 174 N.W. 520. At the same time, the court gave effect to rules of the Minneapolis Chamber of Commerce under which sales of grain on the floor in carload lots are made subject to state weights and are to be understood as being made for cash, payable before 2 o'clock of the day on which the weights are given out.

Plaintiff sold a carload of grain to one Johnstone on the chamber floor, and he resold it to defendant, who in turn sold it to a fourth person. Johnstone failed to pay within the time required by the chamber rules, and plaintiff notified defendant, who still held the proceeds of the grain, that the grain, not having been paid for, belonged to plaintiff. In the meantime, the grain was commingled by the last buyer and its identity thereby lost.

Defendant conceded that the proceeds belonged either to plaintiff or to Johnstone's trustee in bankruptcy, and paid the amount into court. Deciding that plaintiff was entitled to the money, as against the trustee in bankruptcy, the supreme court held that the evidence in the case supported the trial judge's finding that the sale from plaintiff to Johnstone was for cash, that delivery of the grain was conditional on payment, that plaintiff never waived the condition, but remained owner of the grain and entitled to its proceeds.

* *

One who secures delivery to him of goods on the faith of a check for the purchase price is guilty of cheating by false pretenses on it appearing that to his own knowledge there were no funds to meet the check in the bank on which it was drawn, held the Iowa supreme court in the case of Mulroney Mfg. Co. vs. Weeks, 171 N.W. 36.

And the seller, having innocently relied upon the supposed genuineness of the check, although negligent in failing to discover that the buyer was insolvent, may recover possession of the goods by acting with reasonable promptness. This right to rescind the sale may be exercised as against one who comes into possession of the goods as the buyer's assignee for the benefit of creditors.

* *

In the case of Wilbur vs. Means, 177

N.W. 575, the Wisconsin supreme court drew attention to an interesting and important principle of sales law. The point involves a qualification of the general rule of law that failure of the buyer to make payment by a stipulated time will justify the seller in declaring a cancellation of the contract as to future deliveries called for by the same agreement. It was held that where a buyer delays in making monthly settlements under a contract calling for several or numerous deliveries, but the seller does not complain nor insist that future payments be made on time, subsequent delays of like duration will not justify a cancellation of the contract unless reasonable notice and opportunity to make payment be first given to the buyer.

SECTION 232. FALSE CREDIT STATEMENTS

A decision of particular importance to the sales and credit departments of mills was announced by the Connecticut supreme court of errors in twin lawsuits reported under the title of Bay State Milling Co. vs. Susman-Feuer Co., 100 Atl. 19.

Soloway & Katz, wholesale grocers at New Haven, obtained a contract from plaintiff under which the mill agreed to sell the firm flour on 60 days' credit, not to aggregate more than $6,000 at any one time. The duration of the agreement was fixed at one year, subject to termination thereafter on 30 days' notice given by either party. The contract was based upon the buying firm's written statement of financial condition.

A few months later, Soloway & Katz became pecuniarily embarrassed, and bankruptcy proceedings followed, immediately preceding the filing of which plaintiff mill brought suit to replevy flour which Soloway & Katz had resold to defendant on credit. At that time, Soloway & Katz owed plaintiff $8,000, and plaintiff, as ground for the replevin, asserted that the firm had obtained the flour on fraudulent misrepresentations as to the firm's financial condition, not intending to pay for the goods, and that defendant did not acquire the flour as a bona fide purchaser.

A jury specially found these allegations to be true, and judgment was accordingly rendered in favor of the mill for recovery of its flour still remaining in defendant's possession. Defendant appealed, but the higher court affirmed the action of the lower court, holding the following points of law:

The financial statement furnished by Soloway & Katz to plaintiff at the time the contract was entered into was properly admitted in evidence to prove the conditions under which the line of credit was originally given, and in connection with the firm's claimed insolvency it was admissible as evincing an intention to defraud the mill, either in the first instance, or by concealing subsequently developed insolvency, while still asking for and obtaining credit on the strength of the statement.

The fact that the mill filed a claim in the bankruptcy proceedings for money due from the bankrupt firm for flour delivered, stating that proceedings were pending to replevy part of the flour from defendant, and that credit for any flour recovered in the replevin suit would be given on the claim in bankruptcy, does not show such ratification of the sale of the flour by the mill as precluded the replevy, especially since it appears that the claim was later amended by giving credit for the value of the flour involved in the replevin suit.

Furthermore, the mill was entitled to treat as severable transactions the sale of distinct shipments of flour which it could trace into the hands of defendant, unaffected by any ratification by plaintiff of other shipments made to the bankrupt firm. The orders placed by Soloway & Katz involved severable sales, although placed under the general contract for credit; the prices to be charged under the different orders being separately agreed upon. Notice to defendant's assistant manager of Soloway & Katz's insolvency before the flour was resold by that firm to defendant was notice to defendant of that fact, as affecting defendant's good faith. Notice to defendant of any circumstances indicating intention on Soloway & Katz's part to defraud plaintiff was equivalent to notice of all facts defendant could ascertain by diligent inquiry.

SECTION 233. INSOLVENCY OF BUYER*

"If one who at the time is insolvent, or in failing circumstances, obtains goods from another on credit, with no intention of paying for them, or at least with no reasonable expectation of being able to pay for them, and the sale was induced by false or fraudulent representations as to his financial condition, on which the seller relied, or would not have been made but for his fraudulent concealment of his financial condition, or of the fact that he did not intend to pay,

*For matter pertaining to bankruptcy in general, including the right to follow the proceeds of goods delivered to a bankrupt, see the chapter on Bankruptcy and Insolvency, Chapter LX.

or reasonably expect to be able to pay, for the goods, the seller has the right to rescind the sale and recover his property."

This statement of law was made by the United States circuit court of appeals, fifth circuit, in the case of Jones vs. H. M. Hobbie Grocery Co., 246 Fed. 431, involving bankruptcy proceedings against one Collins. It was decided that the facts of the case brought it within the rule stated, and that hence the grocery company was entitled to reclaim from the trustee in bankruptcy goods that had been sold to the bankrupt a few days before he filed a voluntary petition in bankruptcy.

* *

Judge Connor, of the United States district court for the eastern district of North Carolina, in the matter of bankruptcy proceedings against the Hunter-Rand Co., 241 Fed. 175, said:

"I am of the opinion that a reasonably correct conclusion to be drawn from the numerous and somewhat conflicting decisions, may be stated: (1) A conceived purpose by an insolvent person, purchasing personal property on credit, not to pay for it, renders the sale invalid at the option of the owner. This result is reached either upon the theory that, because of the state of mind of the buyer, there was no coming together of the minds of the parties, or that getting the property with the intention not to pay for it is a fraud upon the seller entitling him to rescind.

"(2) When the buyer is insolvent, and, by a false and fraudulent representation in regard to his financial condition, conceals the truth from the seller, and thereby induces him to sell to the buyer personal property on credit, such fraud entitles the seller to rescind the contract. The state of mind, the intention of the buyer, is a fact to be ascertained by competent and relevant testimony, so that, when it is shown to the court that he was, at the time of making the purchase, hopelessly insolvent, having no reasonable ground upon which to base an expectation of ability to pay the contract price, this condition, known to him and uncommunicated to the seller, is sufficient evidence of an intention not to pay."

* *

Defendant milling company contracted to sell plaintiff, an eastern broker, 4,750 bbls flour, to be delivered in installments covering three months. The terms of payment being cash on delivery, bills of lading covering shipments made Feb. 19 were attached to drafts for the agreed price of the respective shipments. The drafts were not paid until April 16. In the meantime, plaintiff requested defendant mill to withhold further shipments until advised. April 12 and 16 additional shipments were ordered by plaintiff under the contract, but defendant refused to make them, claiming that the delay in paying the previous drafts warranted the mill in assuming that plaintiff would be unable to pay for future deliveries.

Plaintiff sued for damages as for breach of the contract, relying upon his reserved right to inspect the flour shipments on their arrival in New York before paying the drafts, and asserting that transportation troubles had delayed his opportunity for inspection.

Defendant's evidence showed that the shipments made had arrived in such time, with prompt notice to plaintiff, and that he had had more than a month in which to inspect before the drafts were paid.

Judgment was awarded in the mill's favor, and was affirmed by the Kansas City court of appeals, which says:

"There is evidence to the effect that plaintiff was not able to pay the purchase price of the flour, but was depending upon reselling it to obtain the necessary funds to pay the drafts. Insolvency of the vendee is sufficient justification of a refusal of the vendor to ship goods, or of stopping shipments in transit."

The evidence as to the date of arrivals in New York and of notice to plaintiff was furnished by a deposition of the terminal carrier's general foreman at the delivery station, and plaintiff attacked the admissibility of the deposition. But the court of appeals held that the foreman was properly permitted to testify to the railway company's records, over which he had supervision, producing copies which he prepared himself and verified as being correct, although he did not make the original entries himself; the original books not being subject to production in Missouri, where the case was tried, since they were in New York. (Schwall vs. Higginsville Milling Co., 190 S.W. 959.)

* *

In permitting the Hecker-Jones-Jewell Milling Co. to recover 725 sacks of flour sold the bankrupt concern of K. Marks & Co., the United States circuit court of appeals for the second circuit held that a seller of goods may reclaim them when credit has been obtained by the seller while insolvent and without intent to pay the price. (218 Fed. 453.)

But it was decided that the seller is not entitled to rescind a sale under such circumstances, unless he shows, not only insolvency on the buyer's part, but concealment of that fact and intent not to pay.

Proof of fraudulent concealment of insolvency is established, the circuit court of appeals ruled, when an insolvent concern is given a good mercantile rating, and, in response to a request for a statement, writes: "Look us up in the commercial agencies, and you will find that we have good credit, and are amply responsible for all of our obligations."

* *

The right of mills and dealers to recover flour sold on credit to insolvent customers is affected by a decision of the Massachusetts supreme judicial court to the effect that, although goods may be recovered by a seller when it appears that the buyer purchased with fraudulent intent not to pay for them, the mere fact of the buyer's insolvency is not conclusive that such intent was entertained.

"It is settled," says the court, "that mere silence or failure by the buyer to inform the seller of facts which for his own protection in the transaction he ought to know, does not of itself constitute fraud. . . . And where a purchaser who is insolvent buys merchandise without disclosing his financial condition to the seller, who is ignorant of it but makes no inquiry and is not misled by any misrepresentations, there is no fraud in law which will avoid the contract, if the purchase is made with a hope to be able to pay and with an intention to pay if possible." (113 N.E. 285.)

Other court decisions establish the propositions that, when a sale has once been executed by delivery to the buyer, the seller cannot rescind the transaction and recover possession of the goods, unless he can show that the buyer was not only insolvent when the contract was made, but entertained a fraudulent intent to acquire the goods without paying for them.

* *

A seller will not be heard to excuse nondelivery of goods on the ground of the buyer's financial condition, where there is nothing to show that the latter was pecuniarily irresponsible for the amount to be paid by him, or that he fraudulently misrepresented his condition, and where the seller has not investigated references as to financial ability given by the buyer, nor made any independent investigation on that point. (Texas court of civil appeals, Gottlieb vs. Early-Foster Co., 214 S.W. 520.)

SECTION 234. WAIVER OF BREACH

If one party to a contract of sale signifies intention to waive a default by the other, it is not open to the former to afterwards rely upon the default as ground for rescinding the agreement, when a fluctuating market has made a cancellation desirable. It was so decided by the Kansas supreme court in Wallingford Bros. vs. Bushton Grain Co., 164 Pac. 275, a suit to recover damages for failure to deliver wheat during August, 1914.

Defendant relied upon plaintiffs' failure to take up a draft covering a shipment made under the contract, as justifying a rescission of the contract, but it was found that, notwithstanding any default in this respect, defendant had indicated that delivery of the remaining wheat would be made. "It follows as a matter of law," said the court, "that defendant could not afterwards, and when the price of wheat had risen, take advantage of the breach and rescind the contract."

CHAPTER XXIV

BREACH OF CONTRACT BY THE BUYER*

SECTION 235. ACTS CONSTITUTING BREACH

NOTIFYING the seller that a contract to buy flour deliverable in the future will not be carried out is legally equivalent to refusal to accept tendered delivery, according to the decision of the Kentucky court of appeals in the case of Acme-Jones Co. vs. Ellis Milling Co., 255 S. W. 829.

* *

A buyer's refusal to give shipping instructions was held to constitute an actionable breach of contract in Rock vs. Deason & Keith, 225 S.W. 317. In that case the Arkansas supreme court said:

"W. A. Chain, the general manager of the Security Flour Mills Co., was a witness for appellant. According to his testimony the company received the order from Deason & Keith dated Aug. 7, 1917, and accepted it in a letter mailed to them on Aug. 9, 1917. The company asked for shipping instructions from Deason & Keith. The latter refused to give them or to receive the flour. The company was then compelled to sell the flour to other parties at a reduced price, so that it suffered a loss in the sum of $283.50. The chancellor should have found that the appellees breached the contract, and have entered a decree in favor of appellant for the loss suffered."

* *

The Kansas City court of appeals affirmed judgment in favor of the Canton (Kansas) Milling Co. on a counterclaim interposed in a suit brought by the Lonsdale Grain Co., Kansas City, Mo., growing out of a contract for a sale of wheat. (193 S.W. 853.)

June 22, 1914, the grain company contracted to buy 10,000 bus of wheat from defendant mill for delivery, f.o.b., Galveston, under August shipment. One half of the quantity was delivered, and plaintiff grain company sued for damages as for refusal of the mill to deliver the remainder. The mill defended on the ground that the contract had been canceled by plaintiff, and interposed a counterclaim for a balance due on the wheat delivered.

The controversy turned on the fact that on Aug. 3 plaintiff telegraphed to the mill, "On account existing stringency in money matters we think it better for all concerned that shipments to Gulf be stopped at once. In fact we have reached a point where we will have to refuse payment on drafts covering such shipments. Will make any extensions necessary in contracts, and are bending our best efforts toward making arrangements to have as much of this wheat as possible diverted to this market and will give you instructions to ship your wheat at the earliest possible moment."

The mill treated the contract as canceled, and refused to make delivery when plaintiff later—Aug. 21—wrote the mill extending the time for shipment until Sept. 15.

In these circumstances, the court of appeals ruled that judgment was properly entered in the mill's favor, saying:

"It seems to be undoubted law, and it is good reason, too, that one party alone cannot make a valid cancellation of a contract and thus of his own will escape its performance, or deprive the other party of a right to its enforcement, and that to have a valid renunciation by one the other must consent thereto. . . . And so it is said that 'a mere assertion of inability to go on with a contract is no notice of repudiation.' . . . And 'a mere threat to abandon a contract does not constitute a breach unless it is carried out.' . . .

"Applying these principles of law, we conclude that plaintiff's letter of Aug. 3 was a repudiation of the contract on its part, and that it gave defendant full right to accept and treat it as such. It is a flat direction to stop further shipments of the wheat, and it is an announcement that, if any more shipments are made, drafts for payment will be refused."

The court added that it was a question for the jury to determine, on the con-

*The buyer's breach as an excuse for nondelivery by the seller and as ground for rescinding the contract is specially treated in chapters XIX and XXIII. As to necessity for tender of delivery see Chapter XVI.

flicting testimony, whether defendant mill treated the contract as canceled; that had the jury found that the mill, after receiving plaintiff's telegram repudiating the contract, agreed to hold the undelivered part of the wheat for later delivery, then plaintiff would have had a valid claim for nondelivery; and that plaintiff, having renounced the contract on the ground of money stringency, could not recover against the mill on the ground that, even if the agreement had not been repudiated by plaintiff, the mill would have been prevented from making delivery by reason of an existing railroad embargo on shipments to Galveston, at which point the mill had agreed to deliver.

* *

In the case of Kehlor Flour Mills Co. vs. Linden & Lindstroem, 119 N.E. 698, an action for damages for breach of a contract to buy flour for export, it appeared that one of the conditions of the contract required defendants immediately to either establish an irrevocable credit in New York or to deposit funds in a bank in Sweden, to secure payment for the flour. This condition not having been met, the court held that the contract was broken by the defendants, in a material respect, entitling plaintiff to recover damages.

After considerable communication between the parties concerning compliance with this part of the agreement, the mill cabled defendants Oct. 7 that unless irrevocable credit should be established within two days the defendants would be regarded as in default, and would be held for damages. This the Massachusetts supreme judicial court decided was sufficient to charge defendants with liability for damages based on fallen market value as of Oct. 9.

SECTION 236. EVIDENCE AS TO GROUND OF BREACH

In a Georgia case involving claimed breach of a contract to buy flour the selling mill attempted to show that defendant's reason for refusing to take flour bargained for was falling market value, and a witness who acted as a broker in the transaction was asked concerning what reasons defendant gave for canceling the contract. His reply, which was stricken out by the trial court, was that "they virtually agreed that the reason why they didn't take the flour was on account of declined price. The market price was off $1 a barrel."

The Georgia court of appeals decided that this answer was properly stricken. In the absence of a statement of the ground of the ruling, we infer that the witness' answer was regarded as being objectionable because he stated his conclusion as to the buyer's attitude, instead of stating just what the buyer said, so that the jury could draw its own conclusions as to why the contract was canceled. (J. C. Lysle Milling Co. vs. Whitfield Grocery Co., 106 S.E. 8.)

Where a contract buyer of goods has broken his contract by failing to furnish shipping instructions, he will not be heard to assert unreadiness or unwillingness on the part of the seller to have made delivery, in defense of a claim for damages by the seller on account of such breach of the contract, ruled the court of appeals for the District of Columbia in the case of Molloy vs. Kellogg, 278 Fed. 1015.

It was also decided in the same case that the fact that the seller may have waived failure to give shipping instructions in earlier but independent transactions between the parties may not be relied on. The court remarked on this point:

"Nor is the averment as to practice under prior contracts material here, for the contract, which is in writing, must speak for itself."

SECTION 237. SELLER'S REMEDIES

The Millers' National Federation uniform sales contract form ("The Miller's Almanack," 1925, pp. 88-90), specifies the courses which are open to the seller under such contract on the buyer's nonfulfillment of contract. That provision, and other specific provisions in other particular contracts of sale, will, of course, ordinarily control over court decisions determining rights under contracts containing no stipulaton as to what the seller's remedies should be in case of breach by the buyer.

In many of the states the seller's remedies are specified by statute. The uniform sales act does this.

A statement of the seller's rights when a buyer refuses to carry out his contract appears in the opinion of the Indiana appellate court in the case of Pillsbury Flour Mills Co. vs. Walsh et al., 110 N.E. 96.

In that case the court allowed judgment in plaintiff mill's favor on account of defendants' breach of a contract to buy flour. The gist of the decision is as follows:

The seller has his choice of at least three remedies, viz: (1) He may retain or store the property for the buyer, and sue on the contract for the entire purchase price; (2) he may sell the property as

agent of the buyer, and recover the difference between the contract price and the price obtained on such resale; (3) he may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery.

The seller's right to pursue either of the first two remedies is dependent on whether the contract has been as fully executed by him as possible; that is to say, the seller's right to choose either of such remedies depends on whether he has done all that was necessary to be done by him under the contract, including all the acts necessary to place title and constructive possession in the buyer.

Although the seller, in choosing either of such remedies, may retain actual possession of the property involved, and by choosing the second remedy may also sell the flour, yet he must show that he retained possession for the buyer; and when the second remedy is chosen, there must be a showing that the resale of the goods was made for the account of the defaulting purchaser and after proper notice to him of intention to make such resale.

In some states this notice is held to be unnecessary, but in most jurisdictions the courts hold that notice is necessary, except where the goods in question are of a perishable nature.

The third remedy above indicated, unlike the other two, contemplates that title to the goods shall remain in the seller, or at least that title shall not pass to the defaulting buyer. In such case, after the buyer's repudiation of the contract, and after passing of the agreed time for delivery, it is wholly immaterial whether the seller keeps or resells the goods, or at what price he resells, because the governing measure of recoverable damage is the excess of the contract price above the market value of the flour, or other goods in question, at the time and place fixed in the broken contract for delivery.

The decision of the St. Louis court of appeals in J. E. Stewart Produce Co. vs. Gamble-Robinson Commission Co., 175 S.W. 319, is in line with the Indiana decision.

* *

In the case of Barber Milling Co. vs. Leichthammer Baking Co., 116 Atl. 677, the Pennsylvania supreme court ordered judgment in plaintiff's favor for breach of defendant's contract to receive a shipment of flour.

Plaintiff, a milling company in Minneapolis, sold to defendant, a baker in Norristown, 400 bbls of rye flour for future delivery. Under the terms of sale, the freight to destination was to be paid by the seller. Before the delivery date, the purchaser notified the seller of cancellation of the sale, and repudiated the contract.

Plaintiff refused to abrogate the agreement, shipped the flour to defendant at Norristown, the place of delivery, and, upon vendee's refusal to accept, endeavored to sell the flour in Norristown, Philadelphia, and other near-by cities, where it turned out there was no market for the commodity, and thereafter disposed of it in New York, which was an available market, at a loss of $1,660.35, measured by the difference between the contract price and the sale price, plus the expenses of the resale. Suit was brought to recover the amount of the loss caused by defendant's breach of contract.

It was admitted on the trial that, at the time of the receipt of vendee's cancellation and until after its shipment, there was an available market for the flour in Minneapolis, where plaintiff could have sold it without any loss. It was also admitted that the loss was due to the fall in the market during the month the flour was in transit, and that the transportation delay was in no way ascribable to plaintiff. Reversing judgment which the trial court entered in favor of defendant buyer, the supreme court said:

"The court below held that shipping the flour to Norristown, and not selling it in Minneapolis, where sale could have been made without loss, plaintiff assumed the risk of loss, under the principle that it was the seller's duty to minimize it. In coming to this conclusion, we think the trial court overlooked two factors of prime moment:

"First that defendant could not relieve itself from the contract by directing cancellation, for, until the vendor should agree that it be wiped out, the contract and all its terms were binding on the vendee, one of its provisions being that delivery should be made at Norristown; and, second, defendant did not request plaintiff to sell in Minneapolis. It was appellant's right to stand on the contract as made, and it was not for appellee, who breached the contract, to set up a variance of its terms in respect to delivery, to the other party's disadvantage.

"In coming to its decision, the court below apparently relied on the dictum of Mr. Justice Dean in McHenry vs. Bulifant, 207 Pa. 15, 56 Atl. 226. In that case, vendees endeavored to escape

liability on the ground of delay in shipment; and their repudiation of the contract, with the right to breach it, was put by them on that ground. It was to this situation the language of the opinion referred, when it said:

"'If the notice (as to breach of the contract by the vendor by delay in shipment and consequent refusal to accept delivery) had been received before shipment plaintiffs would have been bound to retain the goods at point of shipping in California.'

"In the case just mentioned, the defense was that the seller had broken the contract by failure to ship according to its terms; here it is not claimed the seller was at fault, but admitted the breach was by defendant. Under our decisions, and the weight of authority elsewhere, the vendor was not required, by the vendee's cancellation, to resell in the Minneapolis market, and then sue for the loss, if any; vendor could, as it did, treat the contract as continuing, and, upon actual breach by defendant's refusal to accept at the place named for delivery, establish the loss by a resale in an available market. The vendee could have recalled its unaccepted cancellation at any time within the terms of the contract, and if the market had been in its favor, any profit on a sale would have gone to it, not to the vendor. . . .

"Defendant breached the contract; plaintiff, as was its right, stood to its terms; the loss which resulted was due to the former's failure to live up to the agreement it had made and which it alone was powerless to change. In the absence of notice to plaintiff to sell the flour at the place of shipment, defendant cannot complain that appellant, observing the terms of the contract, made delivery as therein provided.

"The trial judge erred in entering judgment for defendant, and that judgment is reversed, with directions to the court below to enter judgment in favor of plaintiff and against defendant for $1,660.35, with interest from June 26, 1918."

* *

In the case of Maddox vs. Washburn-Crosby Co., 69 S.E. 821, the Georgia supreme court held:

"If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or he may sell the property, acting for the purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or he may store or retain the property for the vendee and sue him for the entire price."

It seems that the decision was rendered on an issue as to the sufficiency of the allegations of plaintiff's petition to recover damages for breach of defendant's contract to buy certain flour. The mill was the plaintiff, and not the defendant, as might be inferred from the title of the appeal; the appellant's name appearing first under Georgia appeals.

* *

On the buyer's repudiation of his agreement, the seller may either treat the contract as ended and sue for damages, or sell the goods for the buyer's account and recover the excess of the agreed price above that obtained at the sale for the defaulting buyer's account. (Texas Seed & Floral Co. vs. Chicago Set & Seed Co., 178 S.W. 731.)

* *

A decision of the Delaware supreme court shows that it is the law in that state that where a buyer inexcusably refuses to complete a purchase contracted by him, and the seller has not consented to a cancellation of the agreement, the latter may, at his option, set aside or store the goods covered by the contract for the purchases and sue for the full contract price. Bailey vs. S. & H. Infant Wear Co., 129 Atl. 863.

See, also, Daniel-Miller Co. vs. Roper, 270 S. W. 1087.

But where a buyer repudiates his contract the seller cannot pass constructive delivery to the buyer by setting the goods aside and marking them as belonging to the buyer and then recover the full purchase price, held the Kentucky court of appeals in the case of Covington Brothers & Co. vs. F. W. Woolworth & Co., 229 S. W. 48. In line with the decisions of many other courts, the court held that the legal remedy against a buyer who repudiates his contract in advance of delivery is a claim for damages.

* *

It is frequently misconceived that a contract for the purchase of goods can be made ironclad by providing in the order form, on which it is based, that it is "not subject to countermand." But the generally accepted view of the courts is that if a buyer repudiates his contract before shipment is made, the seller's remedy is a claim for damages for breach of the agreement, rather than to ship the goods in the face of the repudiation of the contract and then sue for the pur-

chase price. One of the decisions on this point was handed down by the Georgia court of appeals (108 S. E. 246).

* *

Where a buyer indicates before the contract for time for delivery that he will not receive or pay for the goods, the seller waives the right to treat this as an anticipatory breach of the contract and to recover damages on the basis of market value at that time, instead of the contract time for delivery, by shipping the goods and thereby refusing to recognize the buyer's repudiation of his contract. (Washburn-Crosby Co. vs. Kubiak, 185 N. W. 162, decided by the Wisconsin supreme court.)

* *

In the case of Bay State Milling Co. vs. Saginaw Baking Co., 196 N. W. 204, the Michigan supreme court decided that a flour sales contract was not so worded as to limit the seller to cancellation of the contract.

* *

That a plaintiff will not be permitted to plead one basis of recovery and obtain judgment on proving another ground is shown by the decision of the Kansas City court of appeals in the case of Rock vs. Farmers' Produce Co., 217 S.W. 635, wherein plaintiff was denied substantial recovery for defendant's breach of a contract to buy flour. The court said:

"The contract of sale provides that if the defendant fails to complete the purchase and accept delivery of the flour, the plaintiff should have the choice of several kinds of recovery in damages. Among others, he could sell the flour for defendant's account, the latter being liable for the sum brought, less than the contract price; or plaintiff could lay his damages on the difference between the contract price and the market price of the flour at the time delivery was to be made. The petition is based on the latter provision, but, as we have stated, the case was made in evidence on the former theory. In other words, the case pleaded and the case made are not the same."

* *

Although it is a general rule of law that the damages recoverable for repudiation of a contract to purchase goods are to be measured by the excess of the agreed price above the market value of the goods at the time and place appointed for delivery, the Pennsylvania supreme court has held that this rule does not apply to a case where it was specially agreed that if, at the expiration of the period fixed for delivery, no shipping orders should be received from the buyer, the seller might carry the goods for the buyer's account, making "carrying charges" therefor.

Under such a special contract, the seller is entitled to set aside the goods, carry them for the buyer, and recover the full contract price; the purchaser, of course, being entitled to a delivery of the goods, at any time, upon payment of the agreed price, plus interest and costs of any proper suit brought. (American Malting Co. vs. Anthracite Brewing Co., 95 Atl. 588.)

* *

A decision of the St. Louis court of appeals shows that Missouri is in line with most other states in recognizing it to be a rule of law that, where a buyer definitely announces that he will not receive goods bargained for, the seller has no right to make shipment and to recover the agreed price. In other words, neither party to the ordinary contract for a sale of goods can require specific performance. What the court said in this case of Loveland vs. Wood, 223 S.W. 756, applies to contracts for the sale of all sorts of commodities:

"While it is clear that the written order for the automobile, having been accepted by plaintiffs, constituted a valid and enforceable contract, yet in light of the fact that the defendant countermanded the order prior to the date upon which the automobile was, in point of fact, delivered to the carrier, plaintiffs had no right to proceed to execute the order, but their duty, even though they felt the defendant's action was a breach of his contract, was to minimize the damages and not increase them by continuing in an endeavor on their part to perform the contract. . . . Plaintiffs' remedy, if any, is an action for damages for the alleged breach of the contract, and not an action to recover for the contract price."

* *

On a refusal to receive and pay for corn, a buyer was held merely to be liable in damages, and not for the full purchase price, in Elwood Grain Co. vs. Whitfield Grocery Co., 268 Fed. 521, passed upon by the United States circuit court of appeals, fifth circuit. The suit turned upon a special clause of the contract involved. This clause provided that, should the buyer fail to pay demand draft attached to bill of lading, it would pay "the difference between the contract price and the price realized for the grain, together with any and all expenses incurred in disposing of said grain."

In plaintiff seller's suit to recover the price, the petition averred defendant buyer's refusal to honor drafts attached to bills of lading covering corn shipped on the contract, but failed to aver what became of the corn. The trial court determined that the petition was fatally defective in this respect and the circuit court of appeals approved that conclusion, saying:

"The provision of the contracts covering the event of the defendant's failure to pay demand drafts accompanying bills of lading for the corn makes it plain that it was contemplated that the plaintiff was to retain control of the corn until such drafts were paid, that in the event of the defendant's failure to pay such a draft the corn covered by the bill of lading accompanying such draft was to be subject to be disposed of by the plaintiff, and that what the defendant obligated itself to pay in that event was not the agreed price of the corn, but the difference between the contract price and the price realized by the plaintiff for the corn, together with any and all expense incurred in disposing of it.

"That provision distinctly negatives the conclusion that the defendant obligated itself to pay the contract price of corn which it did not get, but which remained under the control and subject to the disposition of the plaintiff, though the defendant's failure to get such corn was due to its own fault in failing to pay a draft for the amount of the agreed price of it. When a contract specifically fixes the liability to be incurred by a party in a contingency expressly provided for, there is no room for holding that the happening of that contingency resulted in imposing a substantially different liability, though in the absence of such provision the law would impose on the party in default a liability different from the one expressly provided for."

* *

A suit to recover damages for refusal to accept delivery of flour under a contract of purchase is one in which default judgment may be entered under the Illinois court practice, on filing of proper affidavit, held the United States circuit court of appeals, seventh circuit, in the case of Consolidated Flour Mills Co. vs. Orsinger, 284 Fed. 224.

The opinion also recognized the excess of the contract price above the market value of rejected flour, plus transportation expenses, as a proper basis for awarding judgment in this case.

MEASURE OF DAMAGES

SECTION 238. IN GENERAL

The measure of damages recoverable for a buyer's refusal to carry out a contract to buy flour, or any other staple commodity having market value, is, as a general rule, the excess of the price he agreed to pay above the market value of the goods at the time and place agreed upon for delivery. The Alabama supreme court's decision in the case of Gwin vs. Hopkinsville Milling Co., 67 So. 382, affords an application of this rule to the flour trade.

To the same effect is the decision of the Springfield, Mo., court of appeals in the case of Consolidated Flour Mills Co. vs. Miller, 238 S. W. 510, and of the Colorado supreme court in Lallier vs. Colorado Milling & Elevator Co., 216 Pac. 531.

In making claim under this rule, particular care should be taken to submit to the court passing upon the controversy clear proof of the market value of the goods; otherwise, recovery may be denied for want of showing of any definite basis upon which damages might be assessed.

If there be no market for the goods at the place agreed upon for delivery under the broken contract, the best offer obtainable for them or market value at the nearest market, plus transportation charges to that point, may be taken as a basis.

The general rule does not apply to a contract for special manufacture of goods to fill a particular order, where the buyer repudiates his agreement before the manufacture is completed. The rule of such cases, as supported by numerous court decisions, has been stated as follows:

"Where the contract is for goods to be produced or manufactured by the seller, the measure of damages has been differently stated as being the difference between the contract price and the cost of manufacture and delivery, the difference between the contract price and the market value of the goods, and the profits which the seller would have made on the transaction, based upon the difference between the contract price and the cost of production.

"The theory underlying all of the decisions, however, is that the seller is entitled to such damages as will put him in the same position as if he had been per-

mitted to complete the contract, which ordinarily is the difference between the contract price and what it would have cost him to furnish the goods; but the proper measure of compensation varies according to the facts and circumstances of the particular case, particularly upon whether or not the goods have a market value, whether or not they had already been manufactured at the time of the buyer's breach of contract, and whether they constitute a part of the ordinary commercial product of the seller's factory or something to be specially made for the buyer.

"If the goods have already been manufactured at the time of the breach, and they have a market value, the difference between the contract price and the market value is the proper measure of damages; but if the goods have not been manufactured, the proper measure of damages is the difference between the contract price and the cost of manufacturing them, as the seller is entitled to the benefit of his contract and to any profit which he could make by manufacturing the goods at a less cost than the market price, and on the other hand is not entitled to charge the buyer with a loss which he has not sustained, in case the cost of manufacture would have been greater than such price." 35 Cyc. 594-597.

* *

The courts all agree that ordinarily the proper measure of damages for breach of a contract for the purchase of grain is the difference between the price agreed to be paid and any lower market value of the grain at the contract time and place for delivery. But, as shown in litigation between the Updike Elevator Co. and John T. Fahey and others, before the Nebraska supreme court, it often becomes a material and stoutly contested point as to just when a contract is to be deemed to have been definitely broken, especially when there have been wide fluctuations in market values. (171 N.W. 50.)

The supreme court denied the elevator company's right to damages for the other parties' default under grain purchase contracts, because it was shown that the default did not occur until market values had recovered from a slump and risen above the contract price.

The contracts called for shipments of wheat and corn from Omaha to Baltimore, "shipment Jan. Feb. open port or permit by Feb. 1st." It was explained at the trial that this provision meant that shipment could be made by the seller any time during January or February, 1917, and contemplated the obtaining of special permits for transportation should the port of Baltimore be closed by the government when it should be desired to make shipment. But it was disputed whether the burden of obtaining the permit rested on the buyer or the seller.

The Nebraska supreme court found it unnecessary to determine this point, however, because of a conclusion reached that the seller waived any delay on the buyers' part in failing to secure the permits, and recognized the contract as remaining in force up to March 2, when the seller declared a cancellation on the ground of expiration of the contract's time limit. Only then could the buyers be held to have definitely broken the contract, and at that time the seller was protected against loss by a marked advance in market values.

* *

In a suit brought to recover damages for defendant's failure to accept and pay for carload shipments of oats and corn, the Springfield, Mo., court of appeals decided that the following legal principles controlled the measure of damages:

If the seller undertakes to resell, on the buyer's default, he is entitled to recover against the defendant the excess of the contract price above the amount realized on the resale, if notice of intention to resell has been given defendant. Where no such notice is given, the amount to be allowed is the difference between the contract price and the lower market value at the time and place agreed upon for delivery. If there is no market at that time and place, "this rule would have to be varied to conform to the equities of the case."

Where the defaulting buyer is the only dealer in carload lots of corn at the contract place for delivery, damages for his breach of contract cannot be based on market value at that point. (Pierson-Lathrop Grain Co. vs. Britton, 189 S.W. 584.)

* *

Defendant agreed to buy several carloads of meal, on an understanding that plaintiff seller would give defendant exclusive sales privileges for specified territory. Delivery tendered was rejected on the ground that plaintiff had made a sale to a third person in the territory, and defendant refused to carry out the agreement. In a suit brought by plaintiff to recover damages as for breach of the contract, a conflict appeared in the testimony as to whether the sale made by plaintiff to a third person was

specially excepted in the contract between plaintiff and defendant.

A jury returned a verdict in plaintiff's favor, and defendant appealed to the Arkansas supreme court, which sustained a finding of actionable breach of the contract by defendant, because of the jury's implied finding that when the contract of sale was made, with the exclusive sales provision, it was mutually understood that the specific sale made by plaintiff to the third person might be made.

But the supreme court reversed the judgment in plaintiff's favor, and ordered a new trial because the trial judge failed accurately to lay down to the jury the measure of plaintiff's recoverable damage. The higher court decided that the jury should have been explicitly instructed that the damages should be assessed on the basis of the excess of the agreed sale price above the market value of the meal, plus any freight charges incurred on account of defendant's breach of agreement. (Tennessee Fibre Co. vs. Laser Grain Co., 197 S.W. 1166.)

* *

Unless plainly so worded, a contract for a sale of mill products is not to be read as giving the seller unreasonable latitude in the matter of extending the time for performance, whereby he may virtually choose his own time as of which the buyer is to be treated as having definitely broken his contract, and thereby take advantage of market fluctuations in fixing a basis for the assessment of damages. This is perhaps the most important point decided by the Iowa supreme court in the case of New Prague Flouring Mill Co. vs. Spears, 189 N. W. 815.

Plaintiff mill contracted to sell 100 bbls of flour to defendant, an Iowa baker, "to be shipped Nov. 1, 1920, on directions to be furnished . . . by buyer." The agreement was written on a printed sales form containing numerous terms and conditions. After receiving two installments of flour shipped under the contract before Nov. 1, defendant on Nov. 2 complained that the flour was not old wheat flour, as bargained for by him, and he refused to further recognize his contract as in force.

Afterwards the mill notified him of successive extensions of time for delivery to Dec. 1, Dec. 31, and Jan. 31. The final notice declared that the contract would be terminated on the latter date. Thereafter suit to recover damages was brought, and the trial judge directed a verdict in defendant's favor. The mill appealed, and the Iowa supreme court affirmed the decision, saying, in part:

"Damages so arising are to be assessed upon the theory of compensation as of the date of the breach by the defendant, if such breach be shown. It appears beyond dispute that such breach occurred, if at all, Nov. 1, 1920. That was the date expressly fixed by the contract, and that was the date when defendant refused to further perform. . . .

"No evidence was offered as to the value of the flour or of the equivalent amount of wheat on Nov. 1 or Nov. 2, or of any decline in the market price which had then taken place, but the showing sought to be made was limited entirely to Jan. 31, 1921—three months after the time when, according to the undisputed showing and plaintiff's admission in argument, the contract had been 'abrogated' or repudiated by defendant, and plaintiff had thereby been relieved from any further obligation to deliver the flour. If by contract the property sold is to be delivered as ordered within a stated period of time, the arrears in the total amount become due and deliverable on the last day, and the market price on that day is to be taken as the standard. . . .

"We think there is no merit in the further claim of the appellant that the peculiar provisions of the contract in the form in which it is pleaded and put in evidence permit it to recover damages as of Jan. 31, 1921, long after the time when, even on its own theory of the facts, the defendant had definitely refused to perform. The right of the defendant to refuse performance (subject to his liability to damages) goes to the entire contract, and plaintiff may not by subsequent tenders or offers or demands preserve the life and efficacy of such contract for the purpose of enhancing its recovery by adding thereto other damages accruing after the date when the time of delivery matured, and the contract was renounced. . . .

"In this connection we think it unnecessary to consider or decide the question relating to the measure of damages. The demand for recovery is based upon the proposition that the contract was terminated only by the act of the plaintiff itself on Jan. 31, 1921, and the only evidence offered is of damages alleged to have been sustained as of that date. The testimony offered to show decline in the market value of flour or of its equivalent

in wheat after the making of the contract relates solely to the date thus arbitrarily fixed by the plaintiff, three months after the right of action, if any, had accrued."

* *

Said the Michigan supreme court in the case of New Prague Flouring Mill Co. vs. Hewett Grain & Provision Co., 196 N. W. 890, concerning the damages recoverable by a mill for breach of a contract to buy flour:

"Complaint is made of the rule of damages given to the jury. The rule submitted to the jury was the rule agreed upon by the parties in the contract. This stipulation provided in detail what damages should be recovered, if any, in the event the defendant breached the contract. We do not think the rule agreed upon by the parties was so out of the range of actual damages as that they could be called penalties."

The clause in the contract referred to by the court, fixing the measure of damages, read as follows:

"Clause 2d: As to any of above flour remaining unshipped by reason of buyer's breach seller shall recover damages as follows: (a) a sum equal to 4c multiplied by the number of bus of wheat required to make such unshipped flour, figuring 4¾ bus to the bbl of flour; plus, (b) a sum equal to 2c multiplied by the said number of bus, which sum shall be calculated for each 30 days, or fraction thereof, intervening between date hereof and date of breach; plus, (c) amount of decline, if any, per bu, from date hereof to date of breach, in highest closing price, at Minneapolis, of No. 1 northern spring wheat, multiplied by said number of bus.

"In case of a rise in such price of such wheat between said dates, instead of a decline, seller shall recover the sums at (a) and (b) above, less a sum determined by multiplying amount of such rise per bu by said number of bus, such prices on date hereof and date of breach being taken to ascertain amount of decline or rise per bu. Any carrying charges paid on such flour only shall also be deducted from seller's said recovery.

"If there is neither rise nor decline in such price, seller shall recover the sums of (a) and (b) above, less such carrying charges paid, if any. Such wheat prices as shown by Daily Market Record, of Minneapolis, or records of Minneapolis Chamber of Commerce shall be conclusive unless proven materially erroneous.

"As to feed, or other mill products, so remaining unshipped hereunder, if any, seller shall recover difference (less freight allowed thereon, if any) between purchase price thereof herein contracted and value thereof to seller, in carload lots, at said New Prague, based on its minimum selling price on date of breach, if latter be less than former."

* *

In an action for damages for breach of a contract to buy flour—Rock vs. Keton, 229 S. W. 362—the trial court instructed the jury to return a verdict in defendant's favor. Reversing the decision, the Texas court of civil appeals said:

"We do not understand upon what theory the court gave this instruction, except that it appears from the testimony that on account of government regulations there was no change in the market price of flour between the time when the contract was made and when it was breached. Such difference would ordinarily be the measure of damages, but it is permissible for parties to a contract to stipulate liquidated damages, and the same is binding upon the parties and will furnish the measure of damages, if it appears that it was fairly estimated between the parties, and was intended to be in lieu of such damages as might otherwise be shown. . . .

"The agreement as to payment of 25c per barrel as entry charges in all respects complies, under the facts of this case, with the requirements of law that such sum should be taken as liquidated damages and not as penalty. The case was fully developed as to the facts, and under such facts the court should have instructed a verdict for the plaintiff, and we here now enter the judgment which the lower court should have rendered."

* *

In the case of Russell-Miller Milling Co. vs. McLean, 203 N. W. 498, decided by the South Dakota supreme court, the mill was awarded damages for breach of a contract to buy flour.

The contract provided that on the buyer failing, within 15 days before expiration of the contract time for shipment, to file shipping instructions, the seller might cancel the contract, and that the buyer should pay an entry charge of 25c bbl, plus or minus the market difference between the date of contract and the date of cancellation.

The court holds that, as applied to South Dakota contracts, such a clause is invalid, as to the entry charge, under a section of the local statutes which de-

clares that "Every contract by which the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof, is to that extent void, except, that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." That is, the court treats the provision for assessment of an entry charge as providing for assessment of more than actual damages sustained.

But it was decided that the judgment in the mill's favor was not affected by invalidity of the contract in the respect referred to, because the judgment did not include an allowance on account of the entry charge. The invalid clause was held to fall without vitiating the remainder of the contract.

The mill was permitted to recover the difference in the price of the flour f.o.b. Minneapolis on the day of the expiration of the time for delivery—as of which day the mill declared a cancellation of the contract because of the buyer's refusal to give shipping instructions—and the contract price. The court added:

"As we view this matter, there were two provisions of the contract under either of which the plaintiff might declare it canceled and recover damages: first, if the buyer shall fail to file with the seller, 15 days before the expiration of the contract time for shipment, shipping instructions, then the seller may cancel the contract and recover the difference in the market price of flour at time of cancellation and the amount agreed to be paid in the contract; second, if the buyer refuses to accept any shipment that is made, then the seller may cancel this contract and recover such damages. It seems clear to us that one of these options or rights to cancel the contract is as binding as the other. . . .

"Much stress is laid on the fact that the seller did not deliver or offer the goods. It will be observed that a delivery by the seller to carrier at initial point is shipment. It is true that, if the plaintiff had delivered the goods . . . at Minneapolis for the seller, that would have been a delivery of the goods. But why require this useless act when the buyer had notified the seller that he would not receive the goods? . . . The repudiation of a contract before the time for performance relieves the other party from the obligation to offer to perform."

* *

Under a contract for a sale of goods, c.i.f., destination, and on breach of the contract through the buyer's refusal to accept the draft and shipping documents covering the goods, the seller's damages are to be measured on the basis of market value of the goods on their arrival, and not as of the time when the documents were tendered to the buyer and rejected; the goods then being on the high seas. It was so decided by the New York court of appeals in the case of Ruttonjee vs. Frame, 142 N. E. 437.

* *

Reversing a decision of a lower court, the Arkansas supreme court decided that a mill's complaint sufficiently alleged facts entitling it to recover damages for breach of contracts to buy flour. (Central Kansas Milling Co. vs. Patterson et al., 256 S. W. 847.)

The mill sued at Rogers, Ark., alleging breach by defendants of two flour contracts, under which the flour was to be shipped from the mill at Lyons, Kansas, to defendants at Rogers, at a certain price, f.o.b., Lyons, less freight to Rogers. It was further pleaded that after part of the flour was delivered defendants refused to receive the remainder. The complaint also showed the market price of the flour at Lyons, less freight charges to Rogers, on the respective dates when the contracts were broken.

The trial court ruled that the complaint did not state a cause of action, and the mill appealed. Reversing the decision, the supreme court said:

"The first ground on which counsel for appellees [the buyers] defend the ruling of the court in sustaining the demurrer is that the complaint contains no statement as to the market value of the flour at Rogers on the respective dates of the alleged breaches of the contracts, so as to show the difference between the contract price and the market price at the place of delivery. The contracts provided that the prices were fixed upon delivery on board cars at Lyons, Kansas, with deduction for freight to Rogers; but the shipment was to be to the shipper's own order, with draft attached to the bill of lading, and it may be an issue of fact in the trial, according to the evidence adduced, whether a delivery was intended to be consummated at Lyons, Kansas, or at Rogers, Ark. . . . Therefore the difference between the contract price and the market price at Lyons,

less freight to Rogers, on the day of the breach, is a sufficient allegation of damages. It is not essential that the different items of damages be set forth in the complaint with particularity. . . .

"It is next contended that the contract exhibited with the complaint shows that on the failure of appellees to accept the flour there were different options open to the seller, and that the failure to allege in the complaint the exercise of one of those options is fatal to the statement of a complete cause of action. This contention is unsound, for the complaint does contain a statement, in general terms, that appellant performed all the conditions imposed upon it by the terms of the contract."

* *

Although a contract buyer of flour wrongfully repudiated his agreement, he was not liable for more than a stipulated cancellation fee, if there was no decline in market price at the time of cancellation, held the appellate court in Indiana in the case of H. D. Lee Flour Mills Co. vs. Broadlick, 146 N. E. 848.

* *

In Rock vs. Keton, 229 S. W. 362, the Texas court of civil appeals held that a contract clause for a booking charge of 25c per bbl was recoverable on the buyer breaking his contract by failing to give shipping instructions.

SECTION 239. MARKET VALUE AT CONTRACT TIME AND PLACE FOR DELIVERY

In Maney Milling Co. vs. Baker-Wignall & Co., 181 Ill. App. 390, it was decided that where a buyer of flour broke a contract calling for deliveries in installments, the seller was entitled to damages based on the excess of the contract price above the market prices at the time and place agreed for delivery of the respective installments.

In S. & S. Flour Mills Co. vs. Morrison Milling Co., 174 S.W. 1160, plaintiff sued for breach of a contract to buy flour. The contract was for a sale of 2,000 bbls of flour, and contained clauses which provided that, on the seller failing to deliver, the buyer might buy in the open market and charge the seller with any resulting loss, and that the seller should have the reciprocal right of selling in the open market on the buyer's default and of holding the latter for the excess of the contract price.

The buyer having refused to receive part of the 2,000 bbls, the seller brought suit to recover the excess of the agreed price for the rejected portion of the flour above the amount received on a resale. The only proof made as to the price obtainable in the market for the flour on resale being a showing that it was sold for $3.70 per bbl, the Arkansas supreme court declared: "The records of the corporation were not sufficient to prove that the flour was only worth $3.70 in the open market; at most, the records only show that the flour was sold for that price. The plaintiff should have gone further, and proved that that was the highest price it could be sold for in the open market."

In Statesville Flour Mills Co. vs. Wayne Distributing Co., 88 S.E. 771, the North Carolina supreme court decided that where a mill sues for damages for a buyer's breach of agreement to receive flour, under a contract for delivery at destination, freight paid, the buyer is not entitled to deduction of freight from the seller's damages, there having been no shipment, and hence no freight; and that the measure of damages recoverable in such cases is the difference between the agreed price and the market price at the place of delivery.

* *

Charles F. Rock, for the Millers' Exchange, Kansas City, assignee of a claim of the Saxony Mills, St. Louis, won an appeal in a suit on the claim against the Petty Store Co., Senath, Mo. (224 S.W. 5.) The claim arose on the store company's refusal to accept delivery of a quantity of flour contracted for by the assistant manager of that company.

After the contract was entered into and before defendant buyer demanded its cancellation, market values declined, plaintiff claimed. It was insisted that the assistant manager unauthorizedly entered into the contract after the mill's salesman had been told by the president that the company was not in the market for flour.

Trial of suit for damages for breach of the contract ended in a verdict and judgment in plaintiff's favor for nominal damages only. This was set aside by the Springfield, Mo., court of appeals, at plaintiff's instance, on the ground that the trial judge committed error in instructing the jury on the subject of damages.

After correctly stating the measure of damages recoverable, if there had been a breach of contract, the trial judge told the jury in instruction No. 4 that the burden was on plaintiff to prove damage, and that if when defendant canceled the order the mill sustained no loss, no more than nominal damages could be recovered. No. 5 declared that

no more than nominal damages could be recovered if the mill's salesman induced the assistant manager of defendant company to place an order for flour in ignorance of the fact that the manager had just declined to book any flour, and if the order was canceled as soon as the company learned that it had been given.

"The jury's verdict for nominal damages," says the court of appeals, "may have been based on a finding as authorized in instruction four, that plaintiff was not damaged in excess of one dollar, or on instruction five on a finding that the order was taken under the circumstances there set out. If the verdict was based on number four, then there was no evidence to support it. All the evidence touching damages is that given by the president of plaintiff's assignee [assignor], and he places the difference in the market price of the flour on date of order and June 9 [date of breach] at $320. This witness names this date as a fair and reasonable date on which to terminate the difference in the market price of the flour, because of defendant's failure up to that date to positively cancel the order.

"But the only evidence touching the decline in the price of flour between the date of defendant's first letter and June 9 is to the effect that the price remained about the same. It is true that the seller in some of the letters spoke of wheat advancing, but it is not shown how much this affected the price of flour, and no attempt was made by defendant in any way to make an issue on the difference in the market value of Arbitrator flour on the date of the order and June 9, or any other date. So it appears that there was no fact or circumstance which could be called evidence tending to show that there was no substantial damage. It has been often ruled in this state that a jury cannot arbitrarily reject evidence as untrue. There must be some fact or circumstance making an issue. . . .

"If Arthur Petty had no authority to make this order, and defendant acted with reasonable promptness on ascertaining that the order had been given, that is, in no way ratified it, then plaintiff cannot recover. Instruction number five does not go, however, to the authority of the assistant manager, but to facts which amount to a deception and a fraud if true. If the salesman had been informed by the president and general manager that the defendant did not want or need any flour, and immediately after that, without informing the assistant manager of the president and manager's refusal to buy, secured the order from the assistant manager, then plaintiff cannot and ought not to recover anything. Yet under instruction number five the jury was told that under the facts there predicated plaintiff could recover, but for nominal damages only."

The decision of the higher court opened the way for a new trial in which defendant would be permitted to litigate the question whether the mill's salesman obtained the order fraudulently, and in which plaintiff would be permitted to establish the actual loss resulting from breach of the contract, on it appearing that defendant company either authorized or ratified the contract and then wrongfully broke it.

* *

A decision of the New Mexico supreme court draws attention to the importance of careful proof of the basis on which a judgment for substantial damages for breach of a contract to buy goods must rest. In this case—R. W. Rounsavall & Co. vs. H. Herstein Seed Co., 186 Pac. 1078—plaintiff sued to recover $1,670 as profits lost through defendant's breach of a contract to buy a car of beans. Trial of the suit was followed by judgment in plaintiff's favor for nominal damages only, and the supreme court affirmed the judgment on appeal.

Plaintiff, a merchandise broker at Lexington, Ky., quoted defendant, whose business was located at Clayton, N. M., a price of 15c on beans "f.o.b. Trinidad, Colo." Defendant accepted the offer "at fifteen cents Trinidad."

Defendant refusing to take the beans, plaintiff sold them to dealers in Kentucky and sued for loss of profits on the basis of what defendant had agreed to pay. No proof was made as to the value of the beans at Trinidad nor as to plaintiff's ability to sell them there. The trial court awarded nominal damages because of this failure of proof. Affirming the decision, the New Mexico supreme court said:

"Plaintiff contends, as we understand counsel, that Trinidad, Colo., was not the place of delivery, but simply a point of transit. We agree with the trial court, however, that under the evidence offered by plaintiff, Trinidad, Colo., was the point of delivery. Under the contract, title to the carload of beans would pass from the seller to the buyer at Trinidad, Colo. . . .

"Plaintiff argues that the measure of

damages was the difference between the sale price and the amount which the plaintiff was able to get for the beans after notice to the defendant of his intention to sell and after exercise of reasonable diligence to sell the beans at the best price obtainable. The general rule is well established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the contract price."

SECTION 240. WHEN DELIVERY TIME NOT SPECIFIED

In determining the measure of damages recoverable by plaintiff for breach of a contract to buy wheat, the Washington supreme court said in Jones-Scott Co. vs. Ellensburg Milling Co., 199 Pac. 238:

"That measure is the difference between the contract price and the market price at the date of the demand and refusal, there being no definite time fixed for the delivery. . . . The contract price was fixed at $2.44 per bu. The appellant's demand for performance was on Jan. 7, 1918, and the price at the Eureka Flat points at that date was testified to as being $2.00½ per bu. A computation based on these figures must result in a judgment for the appellant in the sum of $4,350."

SECTION 241. WHEN GOODS ARE LOST

Daniels & Cox, millers at Elizabeth City, N. C., sold the Southern Distributing Co., Norfolk, Va., 500 bags of meal for delivery, f.o.b., steamer, Elizabeth City. The sale having been made by sample, the buyer refused to accept the first installment delivered, and notified the mill that the meal did not come up to the sample. The mill replied, if this were true, to ship the goods back. The meal was returned by a steamer, but was lost in an explosion which destroyed the vessel before unloading.

The millers sued the buyer for the contract price, having ascertained that the meal did conform to the sample. Trial of the suit resulted in a judgment in favor of the plaintiffs, and the award was affirmed by the North Carolina supreme court on appeal. The higher court said:

"The meal was sold by sample, and when the first shipment [which alone is in controversy here] was received, the defendant wired plaintiffs that it was not according to sample. The plaintiffs contended that it was as represented, but wrote the defendant that 'if it was not up to sample, the defendant might ship it back, and the plaintiffs would pay the freight.' The meal was not shipped back until April 4 [nearly a month after it arrived at its original destination].

"The defendant had the right without plaintiffs' consent to ship it back if it did not come up to the sample, but not otherwise, and in that event should have done so promptly. . . .

"There was a conflict of evidence whether the meal came up to the sample or not, but the jury find upon the issues submitted that this meal 'in quality and fineness was as good as the sample,' and that the plaintiffs did not by consenting to its return waive their right to recover therefor, and that the defendant did not reship to plaintiffs in a reasonable time.

"The legal right of the defendant to reship depended upon whether the meal came up to the sample. The defendant's testimony is that it should be reshipped 'if it did not.' The jury having found upon the conflicting evidence that the meal did come up to the sample, the reshipment was made by the defendant in its own wrong, and the plaintiffs, not having received and accepted the same, are entitled to recover the purchase price." (100 S.E. 112.)

The question whether failure of a contract buyer to take up draft and order bill of lading will render him liable to the seller for loss of the goods while awaiting delivery is treated in section 199.

SECTION 242. WHEAT COST AS ELEMENT OF FLOUR CONTRACT DAMAGES

If it be mutually understood that the mill is to specially manufacture flour to fill the particular contract, specially buying the wheat necessary for that purpose, the buyer, on repudiating his contract after the mill has bought the wheat, but before grinding, may be held liable for any decline in the market value of the wheat as one of the elements of damage resulting from his breach of contract. Under such circumstances, the case is brought squarely within the rule that one breaking a contract is liable for all damages within the contemplation of the parties at the time of entering into the agreement.

But if there is a mere contract for sale of a specified quantity of flour, without any reference to whether delivery is to be made out of general stock on hand or is to be the subject of a special purchase of wheat or of special manufacture, the mill is not entitled to reimbursement for decline in the value of wheat bought on hedging account, on the buyer repudiating his contract before

manufacture of the quantity of flour called for by his agreement.

It is, in my judgment, on this question of contemplation of the parties at the making of the contract that apparent conflict in the two court decisions now to be mentioned may be explained away.

In the case of Erie Baking Co. vs. Hubbard Milling Co., 217 Fed. 759, a federal court in Pennsylvania decided that the baking company was properly charged with a decline in the market value of wheat bought to fill a 10,000-bbl flour contract, on repudiating the agreement before manufacture of all the flour. But the following language of the opinion shows that the decision was controlled by the fact that the contract was made with a view to the necessity of the mill buying in wheat specially:

"At the time the contract was made the milling company did not have the flour on hand, so that the parties agreed, not upon the sale of an article already made, but upon the manufacture and sale of an article not yet in being. For the breach of such a contract it is apparent that the measure of damages generally applied, namely, the difference between the price agreed upon and the market price at the time of the breach, may not properly compensate the manufacturer, and, in that event, another measure that will compensate him should be applied. What the measure is to be will depend on the facts of the particular case."

To the same effect see the decision of the Kansas supreme court in the case of Rock vs. Gaede, 207 Pac. 323.

* *

In the case of Russell-Miller Milling Co. vs. Bastasch, et al, 142 Pac. 352, there was a different result, but not necessarily an inconsistent decision as to the law of such cases. In that case the mill was denied the right to claim decline in the price of wheat as an element of damage recoverable for defendants' breach of a contract to buy flour, declared in advance of manufacture.

The mill relied upon its custom to set aside enough wheat to fill a flour order received, carrying the same in a hedge account, but apparently there was nothing to show that this custom was brought home to the buyers, or that they understood that any wheat would be set aside or specially purchased on account of their flour contract. The following language of the Oregon supreme court in this case distinguishes the facts from those involved in the federal case above mentioned:

"The decline in the price of wheat cannot be taken as an element of damages in this case, because there is nothing in the complaint indicating that any special article of merchandise was to be manufactured by plaintiff for defendants out of any particular material to be used for the purpose. It is a plain question of a breach of an executory contract for the sale of personal property at a price specified. The measure of damages for a breach of such a contract is the difference between the contract price and the lesser market price of the goods at the time of the breach of the contract. . . .

"For aught that appears in this case, plaintiff could have gone into the open market and purchased flour to fill its contract. All questions about the purchase of material and the decline in price thereof were foreign to the issues framed by the pleadings. . . . There was much in the testimony to the effect that plaintiff's practice was to not manufacture flour to fill an order, like the one here involved, until it received shipping directions, but it also appears that the brand of flour specified was one regularly made by the plaintiff in the usual course of business for indiscriminate sale to whomsoever would purchase. . . .

"The flour in this instance is shown by the testimony to be a staple article on the market, of an established standard in quality, and an agreement like the one in question, having as its subject merchandise of that kind, although yet to be manufactured, under the circumstances disclosed by the testimony, is still only an executory contract for the sale of personal property."

In other words, there was nothing in the facts of the case to show that when the contract was entered into the buyers were apprised of facts from which they could have foreseen that the mill would sustain loss in excess of the contract price above the market value of the flour. And there is no better settled principle of law than that, though guilty of breaking a contract, one is not liable for consequences not within the contemplation of the parties at the making of the agreement.

* *

Where a mill has a market for all of its product and a customer breaks an agreement to buy, the measure of damages recoverable by the mill is the difference between the contract price and any lower price at which the flour was resold to others, and not the difference between

the contract price and the cost of manufacture, held the Kansas City court of appeals in the case of Mound City Mill & Elevator Co. vs. Kennedy, 234 S. W. 374.

* * *

In a case before the Wisconsin supreme court on appeal, the Sheffield-King Milling Co. won a decision which is of much more than ordinary importance to the milling industry; the main point in issue relating to the validity of a clause in a flour sales contract, providing for the assessment of damages on the basis of wheat values on the buyer rejecting delivery. (175 N.W. 796.)

Defendant, F. S. Jacobs, Waupun, Wis., contracted on May 7, 1917, to buy 205 bbls of flour from plaintiff mill, and to furnish shipping instructions. Delivery was to have been made after Sept. 15 and before Jan. 1, 1918. The following is the substance of paragraphs in the contract relating to an agreed measure of damages for default on the part of the buyer:

The buyer's failure to furnish timely shipping instructions should give the selling mill the choice of remedies against him, including the right to "treat contract as broken and (as to such unshipped goods only) terminate contract . . . and . . . recover from buyer any sum paid by way of carrying charges (on such unshipped flour only), said sum to be calculated as follows: The difference between highest closing price, at Minneapolis, of No. 1 northern (cash) wheat (delivered) on date this contract bears and highest closing price, at Minneapolis . . . on date of such termination (if latter price be less than former), multiplied by the number of bushels of wheat required to manufacture such unshipped flour, figuring 4½ bushels to the barrel plus a sum equal to one cent multiplied by the number of bushels aforesaid (to be calculated for each 30 days, or fraction thereof, intervening between date of this contract and date of such termination); plus, also, a sum equal to four cents multiplied by the number of bushels aforesaid. And, if such price of such wheat on date of such termination is greater than price on date of this contract, seller's recovery shall be said one per cent per bushel for each 30 days, or fraction thereof, aforesaid, and such four cents per bushel aforesaid, less such carrying charges paid, and less the difference between said two wheat prices, on the number of bushels aforesaid."

Oct. 30, 1917, defendant wrote the mill: " . . . I will not remit you anything, but will cancel the contract. . . . I am satisfied to let the court decide what you are entitled to by my canceling this contract."

In reply, the mill gave notice of termination of the contract and demanded damages computed as follows under the contract—the basis on which the supreme court holds the mill was entitled to recover:

Highest closing price per bu of No. 1 northern cash wheat (delivered) at Minneapolis, Minn., on May 7, 1917 (date of contract)	$3.08
Highest closing price . . . on Nov. 2, 1917 (date of termination)	2.21
	$0.87
Number of barrels of flour unshipped under the contract—205×4½ bus wheat per bbl, 922½ bus.	
First item of authorized recovery under the contract is the sum of 87c per bu decline in price of wheat, multiplied by 922½ bus, or	$802.58
Number of periods of 30 days each or fraction thereof intervening, . . . six periods.	
Second item of authorized recovery is: 1c×922½×6	55.35
Third item of authorized recovery is: 4c×922½	36.90
Total authorized recovery	$894.83

When the mill brought suit to recover on this damage account, defendant admitted by his answer to the action that the foregoing stated facts existed, but denied that the mill sustained an actual loss, and assumed the position that the contract stipulation for assessment of damages was void as providing an unreasonable penalty for breach of the contract, disproportionate to any actual loss.

The circuit court in which the suit was brought decided that, on the face of the complaint and answer filed in the case, the mill was entitled to recover, and the supreme court affirmed the ruling on appeal, saying:

"The courts of this and other states have gone a long way in protecting parties from their own contracts, and this upon the theory that a harsh and unreasonable contract will not be enforced when a party may be relieved therefrom within the established rules of law; but a party asking relief from a contract freely entered into, in the absence of fraud or overreaching, must bring himself within the field of judicial relief, and the fact that, as in this case, the result is harsh and burdensome is not by itself sufficient to do that.

"Courts will ascertain for themselves the real intent of the parties to the contract, and are not bound by the asser-

tions of the parties as to that intent, and the stipulated damages must appear to be grossly in excess of the actual damages, or have no relation thereto, before the court can say within established principles that the damages stipulated are a [nonrecoverable] penalty."

And here is what the Wisconsin supreme court says on the much-debated question as to whether in a case of this kind a mill should be limited in its recovery to any excess in the market value of flour above what the defaulting contract buyer agreed to pay:

"The contract is not one for the sale and delivery of an article to be procured in the open market and delivered to the purchaser. It is a contract for the manufacture of a commodity from a basic raw material. Actual damages could not therefore be established by showing the difference between the contract price of Gold Mine flour and the market price, assuming that it had an established market price. The inquiry would therefore involve purchase and storage of wheat, cost of manufacture into flour, and many other subsidiary questions. . . .

"In a case such as this, which is clearly one where the damages are difficult, if not almost impossible, to ascertain, to require a party to establish the actual damages as a condition precedent to his right to recover stipulated damages is in practical effect to refuse legal effect to his contract."

Quoting from a decision of the United States Supreme Court, the court remarked that "the courts are now strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even where it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained."

Proceeding, the Wisconsin supreme court observed, in response to a contention made by defendant's attorneys that, in the absence of a showing that the mill had purchased No. 1 northern wheat, and that the flour to be delivered was to be manufactured from that grade of grain, the contract should be regarded as unenforceable as being speculative:

"Reference to the daily market reports, as well as to the proclamation of the President of the United States, issued Feb. 21, 1918, and Sept. 2, 1918, shows that No. 1 northern wheat is one of the standard grades of wheat, to which in the primary markets of the country the prices of other grades of wheat bear a direct relation, and the court may take judicial notice of the fact that the grade of wheat specified in the contract is one of the standard grades, and that the prices of other grades have a direct, although perhaps a varying, relation to it.

"The contract does not specify out of what particular grade of wheat the flour was to be manufactured. It is supposable at least that it might be made out of different grades purchased at different times, and depend to some extent upon the process of manufacture. It is certain that the flour was to be made out of wheat, and that the price of all wheat bears a definite relation to the price of No. 1 northern.

"It is because of the fact that a manufacturer may not be able to trace into the manufactured product agreed to be delivered specific purchases of material that proof of actual damages becomes difficult and the stipulation of parties as to damages is permitted to stand in cases of this kind. The difficulties of the situation are well illustrated in the case of Erie Baking Co. vs. Hubbard Milling Co., 217 Fed. 759, 133 C.C.A. 489; Russell-Miller Milling Co. vs. Bastach, 70 Or. 475, 142 Pac. 355. . . .

"While the complaint does not allege that the parties have purchased any particular lot of wheat for the manufacture of the flour agreed to be delivered to the defendant, it does allege that the plaintiff was ready, able and willing to perform and carry out its part of the contract, and that it had performed the same except in so far as performance thereof had been prevented by the conduct of the defendant. This must be taken to mean, as it certainly does mean, that the plaintiff had on hand the raw materials out of which the flour was to be manufactured and delivered.

"It will not do for the defendant to enter into a contract such as the one set out in the complaint, wait until time of delivery, and, when performance is tendered, refuse to accept it, and in the light of subsequent developments violate the terms of his contract and then take the position which is most advantageous to himself. The validity of a contract is to be determined as of the date of its execution, and a contract valid when made cannot be rendered invalid even by legislative action. . . .

"While the damages recoverable under the contract in this case are large, and appear grossly disproportionate to the actual damages which the plaintiff may have suffered, we cannot, especially upon

the facts set out in the record in this case, say that they are so as a matter of law. The contract was entered into on May 7, 1917, about one month after this country had declared war against the central empires. No one knew or could foresee what the condition of the grain market would be a month, much less six months, in the future. The general situation must have been in the contemplation of the parties at the time this contract was entered into. It was well known that wheat is a basic, essential commodity.

"The food and fuel control act was passed by Congress Aug. 10, 1917, and on Aug. 30, 1917, a little more than two weeks before the defendant had a right to require delivery under the contract, the President, by proclamation, fixed the price of the 1917 crop on the basis of $2.20 a bushel for No. 1 spring wheat at Chicago. No doubt this action of the government had a great influence, if it was not in fact directly controlling as to the price of wheat. . . . As was said in Sheffield-King Milling Co. vs. Domestic Science Baking Co., 95 Ohio St. 180, 115 N.E. 1014, having under consideration a contract similar to the contract involved here:

" 'The parties agreed that wheat, the thing from which the flour was to be made, should be the basis upon which to calculate damages. They could, of course, have agreed that the flour should be such basis, but they did not do so. That was a matter for them to agree about. They did not fix an arbitrary lump sum which might turn out to be wholly inequitable, but fixed a method, the chief element of which was the price of wheat from which the flour was to be made, a matter not within the control of either.'

"While in that case it was said that 'when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover,' we think the allegation in the complaint in this case, that the plaintiff was prepared, able, ready, and willing to perform the contract, is an allegation that it had on hand the materials out of which the flour to be delivered to the defendant in this case was to be manufactured. . . .

"The inherent difficulties of proving the actual damages in a case like this are such as in practical effect to preclude a manufacturer from recovering damages because of the consequent expense and the disorganization of his business. The removal of auditors, accountants, managers, and foremen from the business of a large, highly organized concern, during the time necessarily consumed in a trial, entails an expense, in excess of recoverable costs, so great as to prevent in many cases any reimbursement to a manufacturer. Any one who has attempted to establish the amount of actual damages in a case will fully realize this. . . .

"Modern business is so managed as to avoid litigation; the tendency is away from litigation, a tendency which should be encouraged in all fair and legitimate ways, because it is conducive to the general welfare. Time and effort consumed in litigating questions of damages generally result in substantial financial loss to both sides. Stipulations of parties, therefore, which establish a plain, simple rule of damages, having a just and fair relation to the subject matter of the contract, in cases where the ascertainment of actual damages is difficult, ought, in the public interest, to be given legal effect. . . .

"Where such contracts are entered into, which are fairly within established legal principles, it is not the business of the courts to interfere and attempt to set aside such stipulations, as has often been done, with the result that, while theoretical legal justice may be attained, as a practical matter justice is denied.

"There is no reason why courts should regard with paternalistic solicitude the situation of a party who has deliberately broken his contract. Contracts are not made to be broken, but to be lived up to, and the loss, if any, in the event of breach, ought to fall on the wrongdoer rather than upon the innocent party. A litigant who is compelled to expend $200 to recover $100 damage, no question of fundamental principles being involved, does not feel that he has received justice, but rather that an injustice has been done him.

"Parties to contracts are as a rule very much more familiar with the subject matter with which the contract deals, the conditions under which the contract is to be performed, than courts and juries can possibly be, and where they attempt in a fair way to agree upon a method of computing damages in case of breach by either party, they are much more likely to arrive at a just result than a court or jury upon a trial. . . ."

One of the justices of the Wisconsin supreme court, Justice Eschweiler, dis-

sented from the decisions reached, saying, in part:

"By the affirmance of the judgment of the court below, judicial sanction . . . is given to the allowance as stipulated damages of an amount not less than $4 per barrel for breach of a contract to buy such a staple necessary essential as flour, sold at the agreed price of $12.10 per barrel.

"This item of so-called damages necessarily includes the profits of the transaction, and under the facts here can be reasonably construed to include nothing but profits.

"If this is a legitimate, reasonable, and lawful profit between miller and wholesaler, it would have to be held to be such in a similar contract for the further sale of this same flour from the wholesaler to the retailer, and then again between the retailer and the consumer. It presents a vista of hope for him who wishes to profit in the necessaries of life, but a rather hopeless horizon for the producer and the consumer."

[We quote this as showing how illogical even an appellate judge may become in his "reasoning." Justice Eschweiler evidently overlooked the "vista of hope" that would be presented to the contract buyer of flour were the latter permitted to induce a miller to buy wheat at $3 to manufacture the quantity of flour called for by the contract, and then, on wheat falling to $1, cancel his contract and let the miller keep the wheat unground or grind it into flour as the miller might see fit. According to Justice Eschweiler's conclusions, in such case the miller's forbearance to claim recovery would be merely forbearance to claim an exorbitant profit.]

"In the absence of evidence showing such a state of facts or circumstances surrounding this particular contract as would overthrow the prima facie showing of grossness, exorbitance, and swollen profits, I think the court should declare that such a stipulation, resulting in such damages, whether it was therein definitely fixed at $4 per barrel, or the same result reached by the agreed application of the multiplication table, is prima facie for a penalty and not for legal recoverable damages, leaving open to the plaintiff, however, the right of showing the court upon evidence that the facts and circumstances in this case warrant the allowance of these amounts as within the field of reasonable damages."

In other words, Justice Eschweiler seems to demand specific proof that flour values are reflected in fluctuations of the market cost of the "makin's," whereas his associates seem to adopt the view that this result will be presumed to follow, especially when the parties have voluntarily contracted on that assumption.

Further unsoundness of the dissenting opinion appears in the following paragraph, especially when it is contrasted with what the majority opinion says on the same point:

"Furthermore, the provision of the contract now offered, fixing the measure of damages by the fluctuation in the price of No. 1 northern wheat on the Minneapolis market, is, from what appears in the record, a gamble, and therefore void."

In view of the fact that in future litigation this dissenting opinion no doubt will be frequently cited in the courts of other states in an effort to have it, and not the majority opinion, followed in similar cases, it is interesting to read the following further observations of Justice Eschweiler:

"Under the method of computation provided for of 4½ bushels of wheat to the barrel of flour, there is a resulting surplus of 74 pounds in weight, certainly of some value to plaintiff, but not accounted for to defendant in assessing damages, and yet upon which he is charged. If this contract contemplated the purchase for him of wheat, it is manifest that plaintiff has withheld items of value from defendant's wheat for which it should account.

"If, as a matter of fact, plaintiff bought no wheat for this particular sale of flour, or bought none until it was ready to deliver upon order of defendant pursuant to the contract, it could then have bought, to make good its depletion in its flour, wheat at the then market price, and there would have been no actual damage, and it would have paid no actual carrying charges, although it has been allowed that also as damages in this case, in addition to the $4 per barrel.

"If it did manufacture this order of flour it was its duty to minimize damages arising from the breach of defendant in refusing to buy, by disposing of this order at the best market price then obtainable, . . . and if such price was not below the contract price there was no recoverable damage; if less, the difference measured the legal damage and is the proper measure thereof. . . .

"This case was disposed of in the court below on the case quoted in the majority opinion of Sheffield-King Milling Co.,

this plaintiff, against the Domestic Science Baking Co. . . . There must be noted, however: The contract there was made in 1912, and the price was $4.75 per barrel as against the $12.05 here; there is nothing to show what proportion the amount recovered as damages bore to the contract price there, or that the question of grossness of profits was before the court. And there, by implication at least, the court recognized the necessity of plaintiff's doing in that case what, it appeals to me, the plaintiff should be required to do here, namely, show that it purchased the wheat for that contract if it desires to recover damages for any depreciation in wheat price, when that opinion says:

" 'In this situation, when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover.'

"Erie Baking Co. vs. Hubbard Milling Co., . . . also cited in the majority opinion and in the Ohio case, based the right to recover such a difference in wheat price upon an express showing made therein by plaintiff of an actual purchase of wheat made at the time of the making of the contract to meet the requirements."

* *

The Thomas Milling Co., Weatherford, Okla., held a claim against F. Ammerman, Dewar, Okla., for $1,121.85 on account of an asserted breach of contract to buy quantities of flour, meal and feed. The claim was assigned to Charles F. Rock, of the Millers' Exchange, Kansas City, and he brought suit on it in the superior court at Henryetta, Okla. After full hearing of the case, the court entered judgment for the full amount claimed.

The claim, as allowed, made allowance of the following items: excess of the value of wheat set apart to cover the contract when sale was made, on the basis of $2.68 wheat above the government fixed price of $1.99 applying when the contract was broken by the buyer; excess of the agreed price of the feed and meal bargained for over the market value at the time of the breach; selling costs on the items contracted to be sold, including 20c bbl on flour and 40c ton on feed; lost profits of 50c bbl on flour and 50c ton on feed.

See, also, the reference in section 238 to the Michigan case of New Prague Flouring Mill Co. vs. Hewett Grain & Provision Co., 196 N. W. 890.

* *

In the case of J. C. Lysle Milling Co. vs. North Alabama Grocery Co., 77 So. 748, a suit to recover the price of flour delivered, in which defendant counterclaimed damages for nondelivery of other flour, and in which the authority of the mill's agent to make a binding contract without the mill's approval thereof was questioned, the Alabama supreme court said:

"Throughout the correspondence relating to the contract in question there occur such expressions as 'guaranteed basis 70c,' and 'guaranteed against decline on basis of 72c wheat.' That the plaintiff was not a speculator in wheat, but was a miller engaged in converting that cereal into flour, made it competent to show that when sales of flour, or order therefor, were accepted by plaintiff for future delivery, plaintiff bought wheat to cover the sale or order.

"Testimony to this effect, offered by witnesses Lysle and Fitzhugh, should have been admitted by the trial court. Moreover, such evidence was material to a proper understanding of the contract, or of the expressions therein touching a guaranteed basis, and a guaranty against decline, etc., and also tended to aid the jury in drawing the reasonable conclusion as to the authority of the agent who took and transmitted defendant's order for the flour the purchase price of which is made the basis of the present suit."

* *

The measure of damages for breach of a contract to buy flour was involved in the case of Hogan Milling Co. vs. Weinberg, 299 Fed. 458, decided by the United States circuit court of appeals, eighth circuit. The court affirmed judgment in the mill's favor on account of breach of defendant's contract to buy flour.

Defendant sought to diminish his liability by showing that there was a profit in whole grain wheat during the time involved. It seems that he tried to show that the mill could have sold the wheat necessary to grind the contract flour and thereby derive a profit to be offset against the profit lost through defendant's failure to take the flour. But the court said:

"The evidence was not admissible. The contract was not for the sale of wheat nor to manufacture and deliver flour, but was a contract for the sale and delivery of a specified kind and quantity of flour, to be packed under a special brand, and the price of wheat did not

enter into the transaction. Plaintiff had the flour on hand ready to make delivery prior to the breach. Considering the measure of damages under such a state of facts, this court in Kingman & Co. vs. Western Mfg. Co., 92 Fed. 486, 488, . . . said:

"'The general and the just rule for measuring the damages for a breach of a contract for the sale of personal property is the difference between its market value and its contract price, because the vendor is presumed to have the property on hand; and his profits if the contract is performed, and his loss if it is broken, is the exact difference between the price he can sell the property for in the market and the price he is entitled to receive for it under the contract.'"

SECTION 243. MISCELLANEOUS INCIDENTAL EXPENSES

In the case of Maddox vs. Washburn-Crosby Co. (title reversed on appeal), 69 S.E. 821, the Georgia supreme court said:

"The suit was for a breach of contract on the part of the purchaser of flour to accept it. The seller elected to proceed for the difference between the contract price and the market price at the time and place for delivery. Civil Code, sec. 3551. In addition, it sought to recover certain storage charges.

"If the basis of the recovery sought was an amount chargeable against the purchaser under a custom of the trade so universal as to enter into the contract and amount to a promise by a purchaser of flour to pay storage in addition to purchase price, the allegations were insufficient. They did not show that it was the universal custom of the trade that the purchaser should pay storage charges until he should give shipping orders.

"It was alleged that 'Said defendant became liable for said carrying charge.' This was not such an allegation of a custom for him to pay the charge as to impliedly enter into the contract, and render him liable by virtue thereof, but the allegations were sufficient to set up a usual and necessary charge incurred by one of the parties in carrying out the contract, and known to be proper by both. Civil Code, sec. 3806."

Judgment in the mill's favor was affirmed.

* *

Warehouse charges were allowed by the California district court of appeal in the case of King vs. Globe Grain & Milling Co., 208 Pac. 166.

* *

In Kemper-Fair Milling Co. vs. Cotton Bros., 215 S.W. 705, a suit to recover damages for breach of a contract to buy flour and meal, the jury was instructed by the trial judge, in accordance with what seems to be sound law, that if the defendants notified the mill that they would not receive the flour and meal, the mill was not justified in incurring unnecessary expenses in an effort to make delivery nor in disposing of the flour and meal elsewhere at less than its true market value.

* *

Ordinarily, travelling expenses incurred by one aggrieved through breach of contract by another cannot be covered by an award of damages for such breach. The decision of the North Carolina supreme court in the case of Kerr Grain & Hay Co. vs. Marion Cash Feed Co., 103 S.E. 375, is therefore in line with this well-settled rule of law.

In this case plaintiff sued for damages for breach of defendant's contract to buy certain quantities of hay, and the supreme court affirmed judgment in plaintiff's favor, after modifying the judgment by striking out an item of recovery based on the following claim made by plaintiff:

"That by reason of the failure of the defendant to take out and receive the hay as it had agreed to do, the plaintiff was forced to send a representative to Marion, N. C., to pay the freight and demurrage and sell the hay," etc.

The supreme court said that this item of expense should be eliminated, "as there is no right, in law, to make such a charge against the defendant."

* *

In assessing the seller's damages he is not entitled to reimbursement for such expenses as the cost of sending a representative to see about the goods and to effect a resale, nor the cost of telegraphing, according to the decision of the Alabama court of appeals in Southern States Co. vs. Long, 73 So. 148.

* *

The Star Mill & Elevator Co., Amarillo, Texas, made various contracts for deliveries of wheat f.o.b. vessels to be furnished by the buyer at the Texas City Terminal Elevator Co.'s warehouse, and assigned to plaintiff a claim for storage charges covering the time of the buyer's delay in furnishing vessels, and for interest on the contract price, payment of which was deferred pending loading.

Suit was brought on the claim, and the Kansas City court of appeals affirmed judgment in plaintiff's favor in the case —Bird vs. Fox, 193 S.W. 941.

Defendant, the buyer, claimed that there was no right to recover storage charges, although he had failed to provide vessels for loading within the time specified, because the seller never made a formal tender of delivery, but the court holds that the seller did all that was required of it by having enough wheat in the warehouse ready for loading when the vessels should be supplied by defendant at the contract time for delivery, and that it was unnecessary to either give notice of such readiness to load or tender the grain or warehouse receipts covering it.

Another point decided in the case was that the seller did not waive his right to claim storage charges because on previous occasions it had failed to have wheat in the elevator in time for delivery as agreed, it appearing that in two instances the delay was due to inability of the elevator company to get the wheat from the railroad yards into the warehouse promptly, in one of which cases the seller paid damages for the delay; that on another occasion shortage in delivery was due to a telegraphic mistake for which the seller was not at fault, and that the seller had consistently insisted upon defendant's timely acceptance of deliveries.

The opinion of the court also held that, under a contract like the one involved in this case, the seller does not waive his claim for storage charges by making delivery on the buyer tardily supplying the necessary vessel. "After the vendee has failed to accept the goods on time, the vendor's delivery of the goods to him out of time waives only the right of the vendor to rescind the contract and not his right to claim damages, and the mere delivery of the goods without protest or objection is not a waiver of the breach committed by the failure to receive the goods according to the contract."

Defendant also denied that there was a right to recover storage charges, because the wheat in question was intermingled with other grain held for the seller, but the court finds that the charges against the particular wheat, as to quantity, were properly apportioned, and that it was proved that no charge for storage was made against defendant that was not actually incurred by the seller.

An allowance of 6 per cent interest on the contract price of the wheat covering the time that payment was deferred in consequence of defendant's delayed acceptance of delivery is sustained by the court, on evidence to the effect that that rate was generally charged for the use of money at Texas City.

* *

Where a broken contract required payment of the price of goods in foreign money, judgment rendered in the United States against the seller was properly entered for that sum in American dollars equivalent to the foreign money, at the rate of exchange current when the contract was broken, according to the decision of Judge Rose, of the United States district court for Maryland, in the case of Page vs. Levenson et al., 281 Fed. 555.

SECTION 244. REQUISITES OF RESALE

Passing upon a case in which the Southern States Co. sued one Long for breach of a contract to buy quantities of corn and oats, the Alabama court of appeals applied the following rule of law:

A contract seller having made proper tender of delivery, and the buyer having refused to accept it, by dishonoring draft to which the bill of lading was attached, the seller may resell the goods covered by the contract for the buyer's account. But the buyer is entitled to notice of the seller's intention to make such resale. Otherwise the amount realized on the resale affords no basis for fixing the amount of the seller's recovery. (73 So. 148.)

In Washburn-Crosby Co. vs. Antin, 188 N. W. 475, the Wisconsin supreme court decided that a resale was not shown to have been unduly delayed.

It was held by the Illinois appellate court that on breach of a contract by a buyer to furnish shipping instructions for delivery of grain the seller was not bound to give notice of intention to make a resale of the grain for the defaulting buyer's account. (194 Ill. App. 543.)

* *

Because he failed to show that flour resold for the account of a buyer who had broken his contract was of the kind bargained for, plaintiff in Rock vs. Farmers' Produce Co., 217 S.W. 635, was held by the Kansas City court of appeals to be entitled to nominal damages only.

The broken contract gave defendant buyer the privilege of selecting Havasak flour in 48-lb sacks at $13.30 bbl, or the same brand in 24-lb sacks at $13.40 bbl, or Kansas Beauty in 24-lb sacks at $13.10 bbl.

Disposing of the case, the court of appeals said:

"The evidence in plaintiff's behalf shows that his right to recover is based on the fact that after defendant refused to select or accept the flour, plaintiff sold it to a third party at the rate of $10.40 per bbl, and it is the difference between that price and the price plaintiff agreed to pay (after making certain allowances) that makes plaintiff's claim of damages. But the [trial] court, in its finding of facts, found that plaintiff did not sell the kind of flour and sizes of sacks specified in the contract; the invoice showing '500 packages, size 98, variety Havasak B, $10.40 per bbl.'

"It is clear that for a vendor to base his damages for breach of contract of sale by the purchaser on the difference in price he obtained at a resale on the market, he must resell the article the vendee failed to buy as he agreed to do. If a vendor seeks to hold a vendee for breach of contract, he must pursue the course that gives him that right."

* *

The Arkansas supreme court has decided that where a contract to sell flour provided that, on the buyer's default in accepting delivery, the seller might sell in the open market and hold the defaulting buyer for the excess of the contract price over the amount obtained on such sale, mere proof as to what price the mill resold at did not establish a basis for assessing damages under the contract; the mill was bound to prove what the market value was. (S. & S. Flour Mills Co. vs. Morrison Milling Co., 174 S.W. 1160.)

In a suit by the Hopkinsville (Ky.) Milling Co. against one Gwin to recover damages for breach of a contract to buy 1,000 bbls flour, the Alabama supreme court held that it was no complete defense to the action that the company had resold the flour to a third person, in the absence of any showing that the flour was so disposed of without loss on account of defendant's breach.

The court decided that in such case the seller need not make a resale, although disposal to a third person is the best means of showing the actual loss, if any, resulting from the buyer's default. (67 So. 382.)

* *

The measure of damages for breach of a contract to buy flour was involved in the case of Rick vs. Protzman & Co., 224 Pac. 495, decided by the Oklahoma supreme court. Plaintiff sued for breach of such a contract, and the defendants requested the trial court to instruct the jury that it was the duty of the seller to immediately resell the property on the nearest and quickest market obtainable and for the best price obtainable, and that the damage to the seller, under such circumstances, would be the difference between the price agreed to be paid and the fair cash value of the property on the earliest market obtainable therefor after such refusal to accept the property under the contract.

Disposing of the case on appeal, the supreme court said: "It was not the duty of the plaintiff to make a resale of the property at all. He could do so, and, if there was a resale, the price received would be regarded as the market value, in the absence of evidence as to conditions in the market nearest to the place at which it should have been accepted, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale. The price received on the resale does not conclusively determine the market value, but, where a resale is made, it is accepted as the market value, in absence of other proof. In the instant case there was no evidence introduced tending to prove that the market value at a place nearest the place at which the property should have been accepted, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale, was different from the amount received on the resale of the property. The requested instruction was properly refused, as there was no evidence to justify the giving of the same, and it also failed to correctly state the duty of the plaintiff."

* *

The case of Guthrie Mill & Elevator Co. vs. Thompson & Gibson, 214 Pac. 716, decided by the Oklahoma supreme court, involved questions concerning the measure of damages recoverable for breach of a contract to buy two cars of flour.

One point decided by the court was that where a seller, on the buyer's repudiation of the contract, elects to resell the goods, the resale need not ordinarily be made immediately, but that generally it should be made within a reasonable time. In the absence of any evidence as to the market value of the goods at the time of refusal to accept, the price received on the resale will be regarded as market value.

The court also applied the statutory rule in force in Oklahoma, that where

no resale is made the seller is entitled to recover "the excess, if any, of the amount due from the buyer, under the contract over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

* *

On a breach of a contract to buy wheat, a resale by the seller in the open market six days thereafter is sufficient to establish the market value of the wheat at the time of the breach, in the absence of proof as to the market value at that precise time, held the Oklahoma supreme court in the case of Miller vs. Amorita Milling Co., 225 Pac. 918.

* *

Laying down law for Georgia, the court of appeals of that state decided, in the case of Cartersville Grocery Co. vs. Taylor, 120 S. E. 447, that on a buyer's refusal to accept delivery of flour, and on the seller electing to sell for the buyer's account, it is indispensable that notice of intention to resell be given to the buyer.

SECTION 245. EVIDENCE AS TO VALUES

Trade journals and market reports are primary evidence tending to show market values at a given time, since, being based on a survey of the whole market, they afford more satisfactory proof than individual entries of sales and inquiries; and one who asserts that market reports were incorrect has the burden of amrmatively proving their inaccuracy. (194 Ill. App. 543.)

* *

In the case of Consolidated Flour Mills Co. vs. Miller, 238 S. W. 510, the Springfield, Mo., court of appeals held that plaintiff was not entitled to recover substantial damages for breach of a contract to buy flour and feed where there was no evidence as to the market value of the flour at the contract place for delivery.

* *

In the case of Weinberg vs. Hogan Milling Co., 299 Fed. 458, the United States circuit court of appeals, eighth circuit, ruled that on an issue as to the market value of flour at a certain time in an inland city, evidence of value at the seaboard and abroad was admissible where that had a bearing on the value of the flour in such city.

CHAPTER XXV

MISCELLANEOUS ASPECTS OF SALES

SECTION 246. NATURE OF TRANSACTION

THE Washington supreme court qualified the right of the Richardton (N. D.) Roller Mills to recover against two defendants comprising the firm of H. J. Miller Co., Seattle, on certain transactions between the parties. (170 Pac. 357.)

The mill sued to recover a balance due on the price of a car of flour delivered to defendants. One defense to the suit was that the transaction was not an outright sale, but merely a delivery of flour for sale on commission. It appeared that Miller was originally designated as the mill's state sales agent for Washington on the customary basis of a commission of 10c per bbl on flour shipped to his customers. Later there were somewhat confused negotiations looking to consignments to Miller so that he could make less than carload lot sales, and to independent purchases by him; it being understood that he should forward invoices to the mill on making sales for it, and would guarantee payment for such sales. Shipments were made to Miller and paid for by him without reference to resales.

DeWolf became a partner, and the first shipment involved in the suit was made to "H. J. Miller Co.," the firm name. The court found that, although the billing indicated an outright sale to the firm, it was mutually intended that the flour should be held for sale on commission and that, although resales were made by defendants, they were not reported. The mill, however, was paid $918.80 on the car, leaving a balance of $1,043.70, for which the mill sued, claiming the right to treat the transaction as a sale, even though it was not originally intended as such. Sustaining this claim, the supreme court said:

"We think that the jury could well have believed from the evidence that this car of flour was shipped to appellants, that they received it, and that they sold it and failed to furnish invoices or report the sale thereof as agreed. This would be such an appropriation of the flour as would entitle respondent to treat the transaction as a sale, though conceding that it was not intended as a sale when the shipment was made."

* *

E. F. Edwards, representing a mill, sold a carload of flour to Harris Bros. for delivery at Morrillton, Ark. On arrival of the flour and draft covering the price, Harris Bros. were unable to pay. Edwards gave his note for the amount, afterwards paying it to the mill, and holding the flour. Later the flour was sold by Edwards at a loss, and he sued one of the members of Harris Bros. on the theory that the transaction constituted a loan from him to Harris.

The trial before a justice of the peace and, on appeal, before the county circuit court, resulted in judgment in Edwards' favor for the excess of what Edwards advanced above what he received on the resale. But, on further appeal to the Arkansas supreme court, the judgment was reversed and a new trial ordered, on the ground that the circuit judge erroneously omitted to submit to the jury a question as to whether or not the evidence supported Harris' claim that the transaction did not constitute a loan, but rather an understanding that Edwards would buy the flour on his own account and sell to Harris when the latter should be able to buy, and that, he being unable to buy, Edwards sold the flour as his own property.

Furthermore, it was decided by the court that if it was understood that Harris would buy the flour from Edwards, the contract was invalid under the laws of Arkansas because it was not in writing, and hence within the statute which makes unenforceable a verbal agreement for a sale of goods at a price of $30 or more where there is no partial delivery or payment. (195 S.W. 1064.)

* *

There is a sale of grain, and not a mere warehousing of it for the benefit of the depositor, where it is deposited on a mutual understanding that it will be intermingled with other wheat in the warehouse, and that the depositor shall be merely entitled to payment of the prevailing market price, or to delivery of an

equal quantity of the same kind of grain, on demand. This well-settled rule of law was reaffirmed by the Kansas supreme court in the case of Bonnett vs. Farmers' & Growers' Shipping Association and certain of its stockholders and officers, 181 Pac. 634.

Plaintiff sued to hold the defendants jointly liable for the value of wheat stored with the association. The first branch of the suit proceeded upon a theory that the wheat deposit amounted to a mere delivery for the purpose of safekeeping, and that, therefore, when defendants disposed of the grain and the association became insolvent, defendants were liable as for misappropriating the wheat.

Holding the association liable for the value of the grain, but exonerating the other defendants from liability, the supreme court decided that there was a sale within the rule above stated—that the association was at liberty to sell the wheat, plaintiff being merely entitled to be paid for it according to market prices. As there was no unlawful disposal of the grain, the stockholders and officers could not be liable personally.

The second branch of the case involved a claim that the officers and stockholders had involved the association in unlawful grain speculations, of which plaintiff was unaware when he deposited his wheat with the association. But the court held that this claim was so far inconsistent with the first that plaintiff, failing to establish his claim of reservation of title to the wheat, could not fall back on the stockholders and officers in the same suit on a theory that he was prevented from collecting what the association owed as the price of the wheat by any unlawful practices in which the stockholders and officers may have involved the association.

SECTION 247. TITLE TO FLOUR SOLD CONDITIONALLY

Plaintiff sold a quantity of flour to a baker under a memorandum containing this clause: "It is strictly understood that all flour is delivered on consignment, and is not sold until paid for." After part of the flour had been used in the course of the buyer's business, the remainder while in his possession was seized by a third person under legal process as being the baker's property. Thereupon the seller brought suit to replevy the remaining flour on the theory that, the same not having been paid for, title remained in him. On this state of facts, the appellate term of the New York supreme court decided that the seller waived retention of title by permitting the buyer to continuously use the flour for baking purposes, and therefore the goods could not be recovered. (Di Toro vs. Horn, 153 N. Y. Supp. 93.)

The decision of the United States circuit court of appeals, second circuit, in the case of Taylor vs. Fram, 252 Fed. 465, deals with the right of a selling manufacturer or wholesaler to reclaim goods in the hands of a middleman at the time of his becoming bankrupt, on the theory of a reservation of title. The point specially pertains to cases where goods are intrusted to commission merchants under circumstances making it difficult to determine clearly whether it has been intended to pass title from the manufacturer without reservation, extending open credit, or whether there has been a valid reservation of title.

"The general rule, of course," says the court, "is that where a person receives property which he is not bound to return in the identical form in which he receives it, but may account therefor in money or other property or thing of value, the transaction amounts to a sale. But this rule is not applicable to consignments for sale; the law being that the owner of a chattel may consign it or deliver it to an agent for sale without creating the relation of vendor and vendee between the parties."

The decision recognizes the fact that omission by a middleman to advertise himself as a mere selling agent does not preclude his principal from recovering possession of goods remaining in the agent's hands at his bankruptcy. But it is also decided that, although there may exist in a particular case a written contract purporting to reserve to a manufacturer or wholesaler title to all unsold goods, the contract will not be given effect in the face of subsequent conduct of the parties indicating a mutual intention that the goods should become the middleman's property on credit.

See Chapter LX on Bankruptcy and Insolvency in Part III for cases involving a seller's right to reclaim goods on the theory of reservation of title. See, also, section 80.

SECTION 248. MODIFICATION AND CANCELLATION OF CONTRACTS

Where an existing contract for the sale of goods is modified or canceled by mutual agreement evidenced by an exchange of letters, the modification or cancellation becomes effective only from the date on which the letter consummating such agreement is mailed, decided the Georgia

court of appeals in the case of Emerick Candy Co. vs. C. E. Newton & Bro., 108 S.E. 831.

Defendants contracted to buy goods from plaintiff for semimonthly shipments. Before plaintiff made the first shipment, defendants wrote a letter requesting discontinuance of shipments; but this letter was not received until after the shipment had been made. On receipt of the letter, plaintiff replied that defendants' order had been canceled as requested. Afterwards the shipment arrived, and defendants accepted it, but wrote plaintiff that the same was being held subject to plaintiff's order.

The court held that the modification or cancellation of the contract did not become effective until plaintiff had mailed its letter agreeing to cancel, and that, the first shipment having been previously made to defendants and they having accepted it, they were bound to pay for it.

* *

In the case of Smith Bros. Grain Co. vs. Adluh Milling Co., 122 S. E. 868, the South Carolina supreme court applied the principle known in the law as the "novation" of contracts. It was decided that where a June contract provided for a sale of 6,000 bus oats, f.o.b., Fort Worth, Texas, and 1,500 bus were delivered, an agreement made in September to cancel 1,000 bus of the remaining 4,500 bus, under which the buyer agreed to accept 3,500 bus in storage in Columbia, S. C., discharged the original agreement and substituted the new one. The court said:

"The legal effect of this transaction, the September contract, was a novation of the June contract; 'a mutual agreement between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor.' . . . It created a new contractual relation, and the rights and obligations of the parties are to be determined by it, the original contract having been extinguished by the novation. The plaintiffs' cause of action must therefore be referred to the September contract, and the defendant's defense to an attack upon that contract."

* *

In the case of King vs. Globe Grain & Milling Co., 208 Pac. 166, the California district court of appeal ruled that a purported contract to sell grain did not supersede a preceding one for failure to provide quantity to be delivered.

* *

Where an agreement for a sale of goods has been definitely entered into through an exchange of telegrams, on insistence by one of the parties that a writing subsequently tendered the other confirms the agreement, whereas it materially changes the terms, such other party is entitled to treat the agreement as repudiated and to rescind the same. This important conclusion was reached by the United States circuit court of appeals, eighth circuit, in the case of Monte Vista Farmers' Co-operative Produce Co., 294 Fed. 8. The variance between the terms of the telegrams and the proposed formal contract tendered by the seller pertained to such vital matters as date for delivery, place for f.o.b. delivery, and the burden of any change in freight rates.

It is not to be inferred from the decision that the mere tender of a letter of confirmation or formal contract stating different terms from those already agreed upon will be regarded by the courts as a repudiation of the agreement. It is insistence that the letter or formal contract states the true understanding that gives the other party a loophole whereby he may escape from the agreement.

SECTION 249. PASSING OF TITLE

One of the leading decisions of courts of last resort bearing upon the ownership of mill products shipped under an order bill of lading is that handed down by the Maryland court of appeals in the case of Hopkins vs. Cowen et al., 90 Md. 152. Plaintiff brought replevin proceedings to secure possession of a flour shipment. The defense, successfully interposed, was that the flour belonged to a Minnesota mill which had shipped it to its own order, notifying plaintiff, but had later withdrawn the documents, on the draft remaining unpaid for some time.

Plaintiff attempted to prove that he had dealt with the mill for several years; that, although the mill customarily drew against the shipments, it always booked the transactions as absolute sales; and that when the particular flour was ordered it was "without any agreement as to the terms of payment." But the court of appeals held that this proof could not sustain plaintiff's right to secure possession of the shipment without paying for it; that ownership remained with the mill for want of payment of the draft.

* *

Every once in a while a creditor of the seller gets tripped up in the courts in an attempt to attach the goods at a time when title has passed from, or is not yet

ripe in, the defendant against whom attachment is levied. So it happened in the case of Murray vs. Morris, 102 Atl. 99, wherein the Vermont supreme court decided that where a contract seller of goods caused them to be shipped directly to the buyer under a straight bill of lading, and surrendered control over the goods to the carrier, they were no longer attachable as the property of the seller.

The court held that passing of title in such cases is conditional in the sense that the buyer may refuse to accept the goods if they are not of the kind ordered, and that the seller may stop actual delivery of the goods while they remain in transit, on discovering that the buyer has become insolvent; but that, so long as neither right is exercised, the goods must be deemed, as against third persons, to belong to the buyer, when shipped directly to him and when there is no agreement to the contrary on the point as to when title is to pass.

* *

A decision of the Iowa supreme court draws attention to the legal point that there may be a passing of title to personal property without any actual delivery of physical possession: for example, where corn or grain in crib or bins is sold on a distinct understanding that ownership shall immediately vest in the buyer, although he is not to assume actual possession until some future time. (Latta vs. Menching, 173 N.W. 229.) The test as to whether title passes without a present transfer of physical possession is mutual intention. This intention may be clearly expressed or may rest upon inference from the peculiar circumstances of the particular transaction.

In the Iowa case, it was decided that there was no transfer of title to corn in crib when the buyer agreed to buy, and paid the price, where there was no express agreement that title should pass then, and where mutual intention that title should pass then was negatived by the circumstances that it was understood that the buyer would not take possession until three months afterwards, and that there was no identification of the particular corn intended to be delivered out of the quantity in the crib.

* *

In the case of Davidhizar vs. Elgin Forwarding Co., 173 Pac. 893, decided by the Oregon supreme court, it appeared that one Simmons, a farmer, agreed to sell 3,000 bus of wheat f.o.b. defendant's warehouse, and defendant advanced $200 on the purchase price. While some of the grain was being hauled by the seller to the warehouse, it was attached on a claim held by a third person against Simmons' brother. The sheriff notified the defendant that, as the wheat was received, it should be held as under attachment and in the custody of the sheriff.

Simmons later obtained judgment against the sheriff as for improper attachment of his wheat on a claim against his brother. The sheriff paid the judgment with money furnished by plaintiff, and assigned the warehouse receipts to the latter, who sued to recover the wheat from defendant company, which refused to surrender the grain, on the ground that it held the wheat under purchase from Simmons.

In affirming judgment in favor of plaintiff, the supreme court held that the contract for the sale of the wheat did not vest title to the grain presently in the defendant company, although defendant had advanced money on the price; it being expressly agreed that delivery should be made f.o.b. the warehouse. Until such delivery, title did not pass. There was nothing to prevent Simmons from actually selling or delivering the wheat to some third person, subject to liability to the defendant for breach of the contract of sale.

Hence, when defendant accepted the wheat under the sheriff's direction, defendant became custodian for the sheriff, and when the sheriff paid off judgment obtained against him by Simmons on account of the wrongful attachment, title to the grain vested in the sheriff who, in turn, conveyed good title to plaintiff.

* *

In the case of Cronk & Carrier Mfg. Co. vs. Galbraith Milling Co., 188 N. Y. Supp. 484, plaintiff sued for the purchase price of an engine installed in defendant's mill. The defense unsuccessfully interposed was that the contract of sale contained a clause to the effect that payment should be made "30 days net," and that, if the engine should fail to meet the mill's requirements, defendant would ship it elsewhere after giving it a trial. It was further alleged that, without fault on the milling company's part, the engine exploded and was wrecked before it could be tested, although after it had been set up. Incidentally it appeared that the contract called for delivery f.o.b., cars, the shipping point. It was decided that the mill must bear the loss because it had become the owner subject to right to return the engine should it fail to meet the required test.

See, also, Chapters XIII and XX and

the chapter on Bankruptcy and Insolvency, Chapter LX.

SECTION 250. AGAINST WHOM CONTRACT IS ENFORCEABLE

A question relating to the right of a seller of flour to hold an estate liable for the price was considered in the case of F. Hattersley Brokerage & Commission Co. vs. Humes, 182 S.W. 93.

Defendant's husband before his death was president of a flour company bearing his name, and purchased flour from plaintiff, to recover the price for which suit was brought after his death against defendant as his executrix. She defended on the ground that the estate was not liable, that the sale was made to the corporation. On the other hand, plaintiff insisted that it had not known that the company was incorporated, and dealt with Humes wholly on his personal credit. Trial of the case resulted in judgment in favor of plaintiff, which was affirmed by the St. Louis court of appeals.

It was argued on appeal that plaintiff was estopped to assert a claim against the estate because the flour was charged on the plaintiff's books to the "Humes Flour Co.," because invoices were rendered to the company, and because partial payments were received through checks of the company.

The court of appeals decided that, standing alone, these facts would be strong evidence that the sales were made to the company and not to Humes individually, but held that this evidence was outweighed by the proven facts that, after having previously made numerous purchases of flour in his own name from plaintiff, dealings were suspended between the parties; that in the meantime Humes incorporated the company without plaintiff's knowledge; that Humes, on reopening the account, directed that charges be made to the company name, saying that he was the "company," and that plaintiff assumed that the company name was merely a trade name adopted by Humes.

"Obviously," said the court, "plaintiff is not, in such circumstances, to be regarded as estopped from asserting its claim against the estate of Humes if the credit was given in the first instance to Mr. Humes individually. The real question in such circumstances is rather one of fact as to whom credit was given."

Plaintiff was enabled to further fortify its case by showing that its correspondence with mills concerning deliveries to Humes manifested an intention that credit was being extended to him, and not to the company.

* *

The Michigan supreme court affirmed judgment in favor of plaintiff in the case of Commercial Milling Co. vs. Schiemann, 188 N.W. 355, on account of goods sold to a partnership to whose bakery business in Detroit defendant succeeded. The mill relied on an agreement on defendant's part to assume the firm's indebtedness, as evidenced by a bill of sale. The suit was defended on the ground that there had been no delivery of the bill of sale to defendant, but the court finds that, after the agreement was reduced to writing, defendant immediately assumed management and control of the business. This is held to have been sufficient to charge him with liability to the mill.

* *

The value of documentary proof of sales, as against delivery on mere verbal or telephonic orders, is illustrated by a case passed upon by the Mississippi supreme court in the case of Gulfport Grocery Co. vs. Brooks & Myers, 77 So. 657.

Plaintiff sued to recover the price of feedstuffs delivered by it to defendants. Defendants admitted the delivery, but insisted that they bought from another firm, which in turn bought from plaintiff, ordering delivery to be made to defendants. It was claimed that defendants were liable to the other firm only, and that plaintiff must look to that firm for payment.

The only written evidence bearing on the controversy was a letter written, after delivery, by defendants to plaintiff, stating that plaintiff "need not be afraid of getting the $92, but owing to slow collection have been unable to settle sooner, but will say this will be paid in the next few days."

The trial judge was so clearly convinced that this established liability against defendants that he ordered judgment in plaintiff's favor, refusing to permit the jury to pass upon the question whether the sale had been made by the other firm and not plaintiff, so far as defendants were concerned. This decision was reversed and a new trial ordered, the supreme court holding that it was for the jury to determine from the conflicting testimony as to who was really defendants' creditor.

At first blush, it may seem that the trial judge was right, but the view taken by the higher court accords with the well-settled rule of law that a promise made without consideration is not legally en-

forceable. In short, the letter was competent evidence against defendants as an admission that they bought directly from plaintiff, but was not conclusive on that point. It could not fix liability primarily, because liability had already accrued before the letter was written, and if liability was to the third party, there was no consideration to sustain the promise contained in the letter.

SECTION 250A. ASSIGNMENT OF CONTRACT RIGHTS

The interest of a contract seller of flour is assignable unless assignment be forbidden by express agreement. And even when there is a clause against assignment, it is subject to waiver by acts showing consent to a transfer of the contract. This is the nub of the decision handed down by the Arkansas supreme court in the case of William Kelly Milling Co. vs. Corning Roller Mills Co., 250 S. W. 895.

The Reno Flour Mills Co. contracted to sell flour to the Corning company. The Reno company sold its plant to the Kelly company, assigning the contract in question as part of the property transferred. On being informed by the Kelly company of the transfer, the Corning company wrote back that it did not see how it could use the flour "booked with you," and asked that the order be canceled. The Kelly company replied that it could not cancel, but would extend the shipping time. The buyer assented to such extension, but later refused to accept delivery. The Kelly company was awarded damages. The buyer appealed, and the supreme court affirmed the judgment, saying:

"The correspondence between the appellant and the appellee shows that appellant, with full knowledge that the assignment had been made, ratified the same by recognizing the binding effect of the contract and asking the appellee to cancel the same or, if it would not cancel the same, to indulge appellant in the matter of extending the time for shipment. . . .

"The contract was not of a special personal nature, and therefore unassignable. It was for the sale and purchase of 'Craftsman' flour, and the flour that was shipped was that kind of flour."

SECTION 251. PURCHASE FROM ONE HAVING NO TITLE

Whether a mill or grain merchant will be protected in the purchase in good faith of grain from one afterward shown to have no title to it was the sole question presented to the Kansas supreme court in the case of Leslie vs. Wm. Kelly Milling Co., 197 Pac. 1094.

Defendant mill bought a quantity of wheat from one who had taken it from another's granary, the mill innocently supposing that the seller had good title to the grain. Plaintiff, the owner, sued the mill for the value of the wheat and the supreme court has affirmed judgment in plaintiff's favor. Referring to an ancient English legal principle that one who bought goods in a public market in good faith took good title although it later developed that the seller had stolen the property, the supreme court remarked:

"It is said that the question is of great practical importance to the mills and elevators in this state, and that millers and others engaged in buying grain cannot in the hurry of business make extended inquiry and trace back to its source every bushel of wheat offered to them in the usual course of their business.

"Markets overt were a Saxon institution ingrafted on the common law in England. From that time a sale in market overt conferred a good title upon a bona fide buyer, though the seller had no title whatsoever, and even though he had acquired the property by theft.

" 'All contracts for anything vendible made in market overt shall be binding, and sales pass the property, though stolen, if it be an open and proper place for the kind of goods, there be an actual sale for valuable consideration, no notice of wrongful possession, no collusion, parties able to contract, a contract originally and wholly in the market overt, toll be paid, if requisite, by statute, and the contract be made between sun and sun.' 2 Bouv. Law Dict. (Rawle's 3d Rev.) 2096.

"By the English Sales of Goods Act of 1893, the common law rule is still in force.

"In this country the exception in favor of sales in market overt has never been recognized, because there are no such markets here. Dame vs. Baldwin, 8 Mass. 518. The institution of markets overt has never been recognized in any of the United States nor received here any judicial sanction. Ventress et al. vs. Smith, 10 Pet. 161, 9 L. Ed. 382.

"The plaintiff concedes this, but contends that, an exception to the general right of ownership in a thing when he has no right of property having been adopted in this country for the sake of commerce, in the cases of money, bank bills, and negotiable paper payable to bearer or transferable by delivery in the

due course of business (Murray vs. Lardner, 2 Wall. 110, 17 L. Ed. 857; 24 R.C.L. 377), a similar exception should be recognized in the case of sales of wheat and other grains of such character that they cannot be identified by even the most careful inspection.

"While it is doubtless true, as suggested, that in the hurry of business millers and elevator companies may find it difficult to trace back to its source every load of small grain offered to them in the usual course of business, yet similar risks are assumed every day in the purchase of all kinds of property in many other kinds of business. We see no reason for making an exception in favor of grain merchants."

SECTION 252. TESTIMONY AS TO DECEDENT'S DECLARATIONS

The value of preserving written records of business negotiations is illustrated by the decision of the Minnesota supreme court in the case of Caldwell Milling & Elevator Co. vs. L. L. May Co., 169 N.W. 797.

Ordinarily, when negotiations are purely verbal it is open to either party to subsequent litigation based upon them to testify fully as to what was said in those negotiations. But an important exception to the rule may arise when it is attempted to bind an adverse party by proving something said by a person who has since died.

Recognizing the opportunity for perjury which exists where a living and interested person is permitted to testify to a conversation with one since deceased, Minnesota, like other states, has enacted that a party to a suit, or one interested in its outcome, shall not be permitted to testify to such a conversation concerning a matter in litigation.

In the suit above referred to there was a dispute as to whether onion seed sold by the mill to defendant was sold merely by sample, as claimed by the salesman, or whether there was a verbal warranty of germinating power, as claimed by defendant.

The salesman, not being a party to the action and not being pecuniarily interested in the outcome, was held to have been properly permitted to testify that the sale was made to defendant through its former president, since deceased, on a verbal understanding that the seed should conform to a sample which was tested by defendant, and that the seed delivered conformed to that sample.

It was sought to contradict this version of the contract by testimony of the new president of the company that he heard the verbal negotiations, and that they were to the effect that the decedent exacted a warranty of the germinating power of the seed. This testimony the supreme court held was properly excluded at the trial, because this witness was presumptively interested pecuniarily in the outcome of the suit, within the meaning of the statute referred to. This presumption rested upon the fact that he was president of the company, and the further presumption that he qualified as such by being a director, and qualified as a director by being a stockholder, all as required by the Minnesota corporation laws.

In short, the mill's salesman could testify to what was said by the deceased representative of the defendant company, because the result of the suit could not affect his interests one way or the other, whereas the defendant's witness was disqualified to detail that conversation, because, as a stockholder, he was personally interested in the outcome of the suit.

SECTION 253. BURDEN OF PROOF IN LAWSUITS

Right to judgment in a lawsuit frequently turns upon the point as to which of the parties has the burden of establishing the existence or nonexistence of a particular fact. The point becomes vital when conflicting evidence is so evenly balanced that a court or jury is unable to determine what the facts actually are, or when there is a failure of proof of some material fact. The party who has failed to sustain the burden cast upon him by the law to prove his claim by a preponderance of the evidence must fail. It therefore becomes both interesting and important to understand what the courts hold on the question as to whether plaintiff or defendant has the burden to establish the facts in a given respect.

For example, a mill sells a customer a quantity of flour or feed and the buyer subsequently claims that it was damaged. Must the mill affirmatively establish the fact that the goods were in proper condition, or must the buyer prove that they were not? The law on this question has been summed up as follows by a standard legal authority:

"Where the purchaser refuses to accept the goods as being of a quality inferior to that contracted for, the burden is on the seller to show that the goods are of such quality, in an action for the price of the goods or for damages. After acceptance of the goods the presumption is that they are of the agreed quality, and the burden is on the buyer to show

that they were not of the agreed quality. So, too, in an action by the buyer to recover damages for defects in quality, the burden of proof is on the buyer. . . ." 35 Cyc. 230, 231.

Thus it will be seen that in the case we have supposed it is a material circumstance whether the buyer has accepted delivery or not. If he has rejected delivery and the seller sues to recover damages or the agreed purchase price, the mill would have the burden of proving, as part of its case, that the goods tendered were of the contract quality. But if the buyer has accepted them and later seeks to recover damages on a theory that the flour or feed was of inferior quality or damaged when delivered to him, the claim fails unless he affirmatively establishes the fact of such inferiority or damage.

In passing, it is worthy of note that the buyer's proof of damaged condition of the goods must relate to the time when they were delivered to him. "Testimony as to the defective condition of the goods some time after their delivery is not generally admissible." 35 Cyc. 231. If it is possible or probable that goods may have become damaged between the time of delivery and some later time when they are found to be injured, it is incumbent upon the buyer to prove that the deterioration did not arise in the meantime.

But, as decided by the Kansas supreme court, where a suit is brought by a contract buyer for nondelivery of corn or other commodity and is defended on the ground that the defendant seller offered to deliver merchantable goods complying with the contract, the burden is on the seller to affirmatively establish the fact that the goods offered for delivery were merchantable. This decision is in line with the holding of the Arkansas supreme court that, where a seller sues for the contract price of goods, it is not sufficient to merely show that a certain lot of goods was shipped; it must be proved that they answered the requirements of the contract.

On the other hand, as declared by the Washington supreme court, a buyer's acceptance of delivery and failure to complain of the quality of the goods within a reasonable time raises a presumption that his subsequent complaint is unfounded. This accords with the conclusion reached by the Delaware superior court that one asserting a breach of warranty of the soundness of goods must show that unsoundness existed at the time of sale and delivery.

It is also in line with the decision of the United States circuit court of appeals for the eighth circuit, in the case of Crescent Milling Co. vs. H. N. Strait Mfg. Co., 227 Fed. 804, holding that, where an engine had been installed in a mill for a buyer, the burden was on him to prove that the engine was not as it was represented to be.

An examination of the law reports discloses very numerous decisions of the appellate courts of the various states on the following points:

When a seller sues to recover the contract price of goods, it is incumbent upon him to prove the making of the contract relied on, its terms, and delivery made in compliance with the provisions of the agreement, but he need not affirmatively establish the fact that the buyer has not paid the price; payment being a defense which the buyer must prove. If the buyer relies upon a claim that the original contract has been canceled or modified, or that it is unenforceable against him as having been induced through fraud, he assumes the obligation of proving by the greater weight of the evidence that the contract was so canceled, modified or induced by fraud.

When a buyer seeks to recover or counterclaim damages on the ground that the condition or quality of goods was warranted by the seller and that there has been a breach of such warranty, the buyer assumes the burden of establishing both the facts that a warranty was actually made and that it has been broken. And, as held by the Illinois appellate court, proof by the buyer that the goods were not as represented must relate to the time when they were sold and delivered, as distinguished from their condition at some later time.

Furthermore, the buyer must prove that he has been damaged by the breach of warranty and the extent of the damage. That there has been a breach of warranty will not warrant a court in assessing damages without proof as to what loss was actually sustained.

* *

Claims for damages for breach of contracts to buy or sell goods often fail for want of proof as to the extent of the aggrieved party's actual loss as ascertained by reference to market values. For instance, in the case of Stephenson vs. Jebeles & Colias Confectionery Co., 65 So. 314, the Alabama court of appeals denied plaintiff's right to recover for defendant's refusal to accept flour bargained for, because there was no sufficient proof as to the market value of the flour at the contract time and place for delivery.

In the absence of such proof the court could not determine the extent of the loss within the rule that damages are to be assessed with regard to the excess of the contract price above the market value of the goods at the time and place when and where the buyer should have accepted delivery. In this case a witness testified to market values, but the court found that he did not possess such accurate information on the subject as to qualify him to give reliable evidence.

A similar question was presented to the Arkansas supreme court in the case of S. & S. Flour Mills Co. vs. Morrison Milling Co., 174 S.W. 1160. In that suit, which was brought to recover damages for breach of a contract to buy flour, plaintiff proved the contract and its breach, and also showed that the flour was resold for defendant's account at a certain price. The court held that the proof was insufficient; that "the plaintiff should have gone further and proved that that was the highest price it could be sold for in the open market."

However, since defendant had introduced evidence tending to show that the market value was 10c per bag higher than the price at which plaintiff resold, the court permitted plaintiff to recover the difference between this market value and the higher price which defendant had agreed to pay. Except for this proof on defendant's own part, plaintiff must have failed in its suit for failing to prove a proper basis for the assessment of damages.

Since the rule works both ways, it is the law, as decided by the Georgia supreme court, that where a seller inexcusably fails to deliver, the buyer has the burden of proving his loss based on increased cost of buying substitute goods in the open market.

There are numerous court decisions to the effect that where one party to a contract repudiates it before delivery is attempted the aggrieved party must not only prove the breach but must show that he was in a position to perform his part of the agreement. That is, if a buyer of flour definitely repudiates his undertaking before the flour is shipped, the seller should show his ability and willingness to deliver on the contract terms. Or if flour is contracted for sale for cash, and the seller refuses to deliver, the buyer should establish the fact that he had the means of paying cash on delivery.

Where a contract does not provide for delivery of a specific quantity of goods, stipulating that the seller will deliver all the requirements of the buyer's business for a stated period, and the buyer claims damages for nondelivery, it is incumbent upon him to prove that the goods ordered were necessary to supply the legitimate demands of his trade.

Other holdings of the courts are as follows:

When a buyer seeks to avoid liability for the agreed price of goods on the ground that they have been returned to the seller, the burden is on the buyer to prove that the goods have not only been returned, but also that they have been accepted and retained by the seller.

A party to a sales contract who relies upon a claimed agreement extending the time for delivery under that contract has the burden of establishing the fact that an extension was mutually agreed upon.

When it is established that a contract to sell goods has been broken, it is incumbent upon the seller to show that the buyer could have avoided loss by buying substitute goods elsewhere.

Where interlineation of a contract forms a material element of the agreement, the burden is on the person who relies upon it to show that the contract was not unauthorizedly altered, and not on the other party of the contract to affirmatively prove such alteration.

This rule was laid down by the appellate term of the New York supreme court in the case of Langenthal vs. Oberman, 171 N. Y. Supp. 144, wherein plaintiff sued to recover damages for breach of defendant's contract to sell a quantity of flour.

The written contract of sale involved in the suit contained the name of a milling company as seller, but there was a line drawn through the name and defendant's name appeared instead. On this fact defendant asserted that plaintiff was not entitled to recover damages against him; that the mill was the real contract seller, and that defendant had merely signed as an agent. But, after reviewing all the evidence in the case, the court determined that plaintiff had sufficiently proved that he did not alter the contract, and that the agreement was made with defendant personally.

PART II

Transportation of Goods

CHAPTER XXVI

DUTIES AS TO SHIPPING FACILITIES*

SECTION 254. GENERAL ASPECTS OF THE DUTY

THIS chapter is intended to define the general bounds of a railway company's obligations to furnish cars and other facilities for the transportation of freight, and to show what remedies are open to a shipper to whom such facilities are improperly refused.

A railway company, and particularly one which has a monopoly in the carriage of freight between given points, is bound to provide sufficient rolling stock to handle all shipments of commodities of the kind which it professes to carry and which it invites the public to tender for transportation.

A carrier's first duty is to provide for prompt delivery of freight originating on its own line. Ordinarily, the volume of such business can be foreseen with approximate accuracy. A railway company has no right to delay and injure local shippers, whose needs can be foreseen, in order to handle unexpectedly large shipments from other lines, even though in accommodating local shippers the company precludes itself from performing previously made contracts to receive shipments from foreign roads. (77 N.C. 347.)

As once stated by the Louisiana supreme court, a carrier's duty to afford shipping facilities is based on the principle that, in accepting a franchise to operate a railroad, it makes a continuing offer to the public to serve each and every person impartially. It cannot excuse failure to furnish cars on the mere ground that all its equipment is in use; it is legally bound to have sufficient cars and locomotives to handle all the traffic which it might reasonably foresee will be offered to it. Therefore, a carrier is just as much liable in damages for want of proper facilities as it is for arbitrary refusal to furnish them.

Since railway companies are legally bound to carry freight properly tendered for transportation, one suing a carrier for refusing to receive a shipment need not show any previous agreement on the part of the company to transport the freight. Nor is the duty confined to shipments destined to points on the carrier's line; the carrier is bound to receive freight billed to a station on a connecting line, and to deliver it to the connecting carrier. (54 S.W. 193.)

But, as decided by the Missouri supreme court, a railway company need not provide in advance for extraordinary occasions, nor for an influx of business which is not reasonably to be expected. When an emergency arises, and more business is suddenly and unexpectedly cast upon a carrier than it is able to accommodate, some shippers must necessarily be delayed. Yet, if the railway company does receive goods without notice to the shipper of the circumstances which are likely to occasion delay, or fails to obtain his assent, express or implied, to the delay, it will be bound to transport the freight within a reasonable time, notwithstanding such emergency. (79 Mo. 296.) See, also, Chapter XXXV.

Where transportation of a carload shipment had been completed by spotting the car on a delivery track in Utica, N. Y., and defendant railway company had no tariff to cover movement of the car from that point to the tracks of another railway company in the same city, it was decided by the New York court of appeals that plaintiff consignee had no valid claim for damages on account of defendant's refusal to so move the car that the goods might be shipped out on the other road.

"The consignee was entitled to but one delivery," said the court of appeals in this case—Anthony & Jones Co. vs. New York Central & Hudson River Railroad Co., 119 N.E. 90. "The defendant here might, as a private carrier, . . . with or without hire [pay], have switched the car, but it was not bound to do so."

SECTION 255. REASONABLE REGULATIONS MAY BE ENFORCED

The carrier may make and enforce any reasonable regulations as to the times and places when and where freight will be received (United States circuit court of appeals, 158 Fed. 723). And it may

*For discussion of principles relating to discrimination in furnishing shipping facilities, see the next chapter.

refuse to receive a shipment from a person other than the owner of the shipment, or his duly authorized agent (148 S.W. 214). It may, also, decline to receive a shipment not in fit condition to be carried (48 S.W. 210). Nor need a carrier hold cars for a shipper for a week, without knowing when any of them may be needed (Maryland court of appeals, 65 Atl. 425).

But a railway company is liable for refusing to receive freight from a shipper merely because he makes other shipments over a competing railroad (Illinois supreme court, 21 N.E. 284). Although a carrier may demand prepayment of freight charges and refuse to transport a shipment until the charges are paid, mere failure of a shipper to tender payment in advance will not excuse the carrier's refusal to receive the freight, especially if payment in advance is not customarily required; it is sufficient that the shipper be ready and able to prepay the freight charges when demanded (158 Fed. 923; Indiana supreme court, 39 N.E. 451).

The fact that a shipper is indebted for charges or previous shipments does not justify refusal to receive another shipment (4 Ky. Law Rep. 730); nor does the fact that he previously delayed unloading shipments (64 S.E. 578). The fact that a milling company refused to pay demurrage bills was held by the Kansas supreme court not to justify a railway company in refusing to continue switching service; it appearing that tne carrier was as much at fault as the shipper in regard to the detention under which the demurrage charges were claimed (88 Pac. 72).

But the Mississippi supreme court has held that, although a railway company cannot justify refusal to furnish cars merely because the shipper withholds charges claimed by the carrier on former shipments, the correctness of which is disputed by the shipper, the company may refuse to afford transportation facilities to one who arbitrarily has refused to pay demurrage charges, and who announces an intention to reject all future claims against him for demurrage (37 So. 939).

SECTION 256. VALIDITY OF EMBARGOES

"A railroad company must have reasonable ground for instituting an embargo, or it is illegal. The carrier cannot declare an embargo as a shield against its inexcusable fault, nor unreasonably continue it as such shield. If legal when instituted, its continuance is illegal when there is no basis for it other than its own culpable negligence or willful neglect."

So declared the Wisconsin supreme court in a decision handed down in the case of Berger-Crittenden Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 150 N.W. 496, showing that a common carrier may not lawfully cut off shipping facilities with the same coolness that an ancient king could cut off a subject's head. In this case defendant railway company was held responsible for loss of alfalfa meal which became worthless through unreasonable delay on the part of the defendant in accepting carload shipments from the Alton road at Chicago, the freight having been shipped from East St. Louis.

Notice of an embargo having been given to the Alton, the Milwaukee road claimed that it should not be held liable for damage to shipments received by the Alton after being notified of the embargo, but the Wisconsin court said:

"There is nothing to indicate that the Alton company had any reason to expect the necessities of the Milwaukee company would cause any considerable delay, certainly not that delay would be caused by its fault. Had the property accepted for transit after notice of the embargo reached the railroad at East St. Louis become worthless before termination of justifiable continuance of the embargo, it alone would be liable for the loss. . . .

"When the railroad company, from the reasonable necessities of the situation, having regard to self-protection and duty to the public, declares an embargo, in form, to continue until further notice, or by custom to so continue, it is up to the shipper and initial carrier by reasonable inquiry to find out whether there has been a change in the situation before sending forward freight.

"That would hold good until lapse of such time as to render further continuance of the embargo clearly unreasonable; but would not preclude a carrier, circumstanced as the Alton was in this instance, from accepting freight for transportation, as here, at its own risk of the embargo being actually lifted by the act of the connecting carrier, or constructively lifted because of the reasonable basis for it no longer existing, in time for through transit to be completed. . . .

"So the mere acceptance of the freight by the Alton company, and routing it at a through rate over its and the Milwaukee line before the latter terminated the embargo, cuts no figure in this case. It is sufficient that it ought to have terminated the interference and received the freight

at a time when the transit contemplated should have been successfully completed."

* *

The Interstate Commerce Commission, in the case of Missouri & Illinois Coal Co. vs. Illinois Central Railroad Co., declared the following rules: The railroads of the country are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other.

An embargo may be justifiable because of the physical inability of the carrier for some reason to deal with traffic which overwhelms it, but an embargo placed against connecting carriers because of their failure to promptly return cars is not consonant with the service which the carriers constituting the through route are required by law to give.

Where a notice of an embargo at a given terminal specifies that shipments billed up to a certain time will be accepted, there is no right to hold, at such terminal, shipments waybilled before that time, though arriving later, and hence demurrage is not collectable on freight while so held. This statement is supported by the decision of the Interstate Commerce Commission in New York Hay Exchange Association vs. Lehigh Valley Railroad Co.

As to the time and manner of giving notices of embargo, the Commission said in this case: "In cases where it is possible to do so, such notices should be posted in advance of the effective date of the embargo. In cases where, on account of physical conditions, advance notices of an embargo cannot be given, there would appear to be no reason why notice thereof may not be posted at the terminal at the same time that it is served upon defendant's connections."

* *

It has been declared by judicial authority that the inconveniences occasioned to shippers by an embargo must fall with equal force upon different shippers similarly situated. That is, the bars must not be let down to one shipper while kept up to another. And although a carrier is not bound, in the absence of custom or rule of business to the contrary, to give notice of the termination of an embargo declared for an indefinite period, it is unlawful discrimination to notify favored shippers and to withhold notice from others.

SECTION 257. ENFORCEMENT OF RIGHTS BY COURTS

Although a court has no right to manage a railroad, or to direct the details of its operation, or make contracts for a carrier, it has power to compel the railway company to perform its obligation to furnish shipping facilities (Louisiana supreme court, 28 So. 284). Thus, when a railway company wrongfully discontinued switching service which had been afforded a milling company, the Kansas supreme court granted the latter company an order compelling the carrier to resume the service (88 Pac. 72). On appeal by the railway company to the United States Supreme Court the judgment in the milling company's favor was affirmed.

SECTION 258. SPUR TRACK FACILITIES

A carrier is under the same duty to a milling company, whose mill and elevator is connected with the railway company's main track by a spur track, to furnish facilities at the mill or elevator as to an establishment situated immediately upon the main line (148 S.W. 26). But the United States circuit court of appeals and the Mississippi supreme court have held that when a carrier furnishes sufficient facilities of its own for the receipt and delivery of shipments, it is under no obligation, unless fixed by contract, to receive or deliver freight on a private switch track. (134 Fed. 64; 56 So. 666.)

A miller who has no property rights in a private switch track which crosses the land of another person cannot compel the latter to permit a connecting railway company to receive or deliver the miller's freight over that track, even though it appears that the switch was originally owned and operated by the railway company, and may have been sold merely to defeat the miller's right to have cars handled over it. But if he can show that the sale was merely pretended, and not actual, he may compel the railway company to serve him over the track. (United States circuit court of appeals, 134 Fed. 64.)

Railroad companies are required by law to furnish cars for the shipment of freight only at stations or points on their lines provided for the service of the public, or where they are in the habit of accepting freight from any person offering it for carriage. So, where a private switch track is constructed for special use of an industrial plant, such as a mill, the railroad company is under no obligation to furnish cars to a third person on this track, although they may be intended for loading of freight contracted to

be delivered f.o.b. cars for the concern for whose exclusive use the spur was constructed. (Texas court of civil appeals, 174 S.W. 844.)

The cost of constructing a switch and the income that will probably accrue to the railway company through its operation are proper subjects for consideration in determining whether the company may be compelled to construct a track to connect a mill or elevator (Maine supreme judicial court, 57 Atl. 1001).

A provision of the Illinois constitution requiring railway companies to permit connection to be made with their tracks, so that any consignee of grain, etc., may be reached by cars on the road, has been held by the Illinois supreme court to be absolute, and subject to enforcement in a mandamus suit. (21 N. E. 824.)

* *

In the important case of Henaghan vs. Hines, 265 Fed. 831, the United States circuit court of appeals, fourth circuit, ruled that it was beyond the power of a railroad arbitrarily to terminate a shipper's enjoyment of sidetrack facilities.

Plaintiff was afforded such facilities by the Baltimore & Ohio Railroad Co. under a contract which provided that if the business of the shipper should not justify continuance of the track, in the opinion of the chief operating officer of the railroad, or if, in his opinion, the service should be discontinued because of changes in the company's tracks or because of interference with proper operation of the road, then the track might be discontinued on 60 days' notice.

The court held that this provision did not preclude the shipper from having a judicial determination of the reasonableness of the railroad's action in threatening to discontinue the sidetrack facilities.

* *

In the case of Mount Franklin Fuel & Feed Co. vs. Payne, 234 S.W. 595, brought against the director general of railroads, the Texas court of civil appeals sustained an award of damages on account of wrongful removal of a spur track which had served plaintiff's premises for the receipt and shipment of freight. In 1907, a railroad company entered into a contract with plaintiff's predecessor for the construction and maintenance of the track.

On the first question raised in the case the court of civil appeals said: "We think it cannot be held as a matter of law, under the facts stated in the contract, that the contract was unenforceable for the reason solely that it did not state a period of time during which the spur track was to be maintained. Our interpretation of this contract is that it obligated the railway company to permanently operate the switch, and that it had no right to discontinue its operation unless the public interest so required."

See, also, section 263.

DUTIES AS TO FURNISHING CARS

SECTION 259. IN GENERAL

See, also, sections 265, 266.

In the absence of special contract to furnish cars on a particular date, a railroad company is bound to furnish suitable cars for shipments, upon reasonable notice, whenever it can do so by the exercise of reasonable diligence and without jeopardy to its business. To be reasonable, notice for such purpose must allow sufficient time to enable the railway company, by the exercise of reasonable diligence, under the existing circumstances, to furnish the cars, without interference with other orders previously given by others shippers at the same station, or jeopardy to its other business on other portions of the road.

The company owes the same duty to all shippers at any one station as it does to shippers at other stations of the same standing and rank, and the rights of all shippers applying for cars, under the same circumstances, are necessarily equal.

The making of a special contract of shipment, as one to expedite delivery or to furnish cars to a shipper on a particular day, is within the scope of a station agent's apparent authority, and a shipper, in the absence of knowledge of a limitation or restriction upon the agent's apparent authority, may make a binding contract with the company, through him, for the delivery of cars at his station, on a particular day, for the shipper's use.

The foregoing points were decided by the West Virginia supreme court of appeals in the case of McNeer, Talbott & Johnson vs. Chesapeake & Ohio Railway Co., 86 S.E. 887.

* *

A rule adopted by a railway company, with the approval of the Interstate Commerce Commission, requiring orders for cars to be placed in writing, is not subject to waiver, holds the Supreme Court

of the United States in the case of Davis vs. Henderson, 45 Sup. Ct. 24.

Plaintiff sued for failure to furnish him a car within a reasonable time after verbal notice, and defendant, representing the carrier, successfully pleaded noncompliance with a tariff rule requiring orders to be placed with the local agent in writing. Plaintiff relied on an oral agreement by a station agent to furnish a car, and the Arkansas supreme court ruled that the railway company thereby waived compliance with the rule referred to but, reversing the decision, the highest court of the land said:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be so. The transportation service to be performed was that of a common carrier under published tariffs. The rule was a part of the tariff."

* *

In a decision announced by the Georgia court of appeals, which appears to conform to the holdings of the appellate courts of other states, it was declared that a railway company's liability for failing to furnish cars is greater where the failure involves breach of a specific contract to supply cars than where there is merely a breach of the general duty of a carrier to afford shipping facilities on request.

For instance, it is to be inferred from the decision that where a railway company has not directly bound itself to provide cars for shipment of certain flour it could plead car shortage resulting from an unusual and unexpected pressure of business as an excuse for delay in furnishing the cars, whereas if its authorized agent has directly agreed to provide a certain number of cars at a fixed time and place, the shortage would afford no excuse for failure to live up to the contract.

It was further held that where a shipper bases claim for delay in furnishing cars on such a contract, seeking recovery of general damages, rather than a penalty under the reciprocal demurrage act, it is not necessary for him to show compliance on his part with the provisions of the act which are applicable only where the gist of the plaintiff's claim is based on violation of the carrier's duty irrespective of contract. (Snellgrove & Bozeman vs. Georgia Northern Railway Co., 85 S.E. 790.)

* *

In Udall Milling Co. vs. Santa Fe Railway Co., 108 Pac. 137, the Kansas supreme court decided that it is the duty of a railway company to provide such equipment and cars as will meet, not only ordinary and usual requirements of traffic, but, also, to provide for such increase of business and demands for cars as can reasonably be anticipated. If, however, there is a rush of business or a congestion of traffic which could not reasonably have been foreseen, and a delay results from circumstances beyond the control of the carrier, the court held that the rush will be deemed to be abnormal, and such an unavoidable accident as will excuse noncompliance with a demand for cars, and relieve the company from liability for the penalty provided for in the Kansas reciprocal demurrage act. But it added that, in its opinion, since the production of large crops in Kansas is not "unusual or phenomenal," that fact by itself does not afford a "very good excuse" for failure to furnish cars when demanded.

* *

A railway company cannot excuse failure to comply with a contract to supply cars at a certain time, on account of a shortage in cars, whether the shipper knew of the shortage or not when the contract was entered into (Delaware superior court, 79 Atl. 919); nor is unavoidable accident a valid excuse in such cases. But, if the contract does not specify when the cars shall be furnished, the carrier has a reasonable time in which to furnish the facilities (164 Ill. App. 310).

That a railway company may validly bind itself by an agreement to furnish a shipper with cars for loading at a point not on that company's line was recognized by the Kansas City court of appeals in the case of Kissell vs. Pittsburgh, Fort Wayne & Chicago Railroad Co., 188 S.W. 1118.

The court also held that it was within the implied authority of a travelling freight agent to make such an agreement on the part of his company, especially where other cars had been furnished under similar circumstances.

Existence of a strike, especially if it be not attributable to the carrier, will excuse failure to furnish cars resulting from the strike (Kentucky court of appeals, 35 S.W. 626). And if war exists along the route of shipment, making it unsafe to transport goods when they are offered for carriage, shipping facilities may be refused (94 Ill. 548).

SECTION 260. SUITABILITY OF CARS

It is uniformly held by the courts that the carrier's duty is not merely to fur-

nish cars; they must be suitable and safe for goods of the kind to be carried. As a general rule, it is decided that a shipper's acceptance of a defective car does not waive his right to damages resulting from failure to provide a suitable one, unless he expressly agrees to assume the risk involved in using the car. But the Michigan supreme court has held that, where a shipper selects a car, the carrier is not liable for apparent defects (101 N.W. 223).

* *

A railway company is liable for injury to a shipment caused by unfitness of the car for the transportation of the particular class of goods only in case it appears that, in the exercise of ordinary diligence, the company's employees should have discovered the unfit condition, declared the Minnesota supreme court in the case of Geo. B. Higgins Co. vs. Chicago, Burlington & Quincy Railroad Co., 161 N.W. 145.

In this lawsuit it appeared that a shipment of potatoes was injured by the presence of salt in a car placed in transit over the Great Northern line and transferred to the defendant road at St. Paul. Finding that the loaded condition of the car prevented discovery of the presence of the salt when the shipment was received by defendant, the court decided that the latter was not negligent in failing to observe and guard against the likelihood of injury to the goods.

"The duty of the carrier," said Mr. Justice Bunn, "is that of properly inspecting the cars of other roads that are received by it for transportation. If this duty is performed, or if the defect is one that a proper inspection will not disclose, there is no liability."

* *

In passing, it is worthy of being noted that there are numerous court decisions to the effect that a shipper has no valid claim for damages on account of injury to goods from a condition of a car apparent to him at the time of loading.

* *

Liability of a railway company for injury to a shipment of meal, resulting from leaky condition of a car, was affirmed by the Texas supreme court in the case of First Guaranty State Bank of Aubrey vs. Hines, Director General of Railroads (243 S. W. 972).

The bank sued as assignee of rights of the Aubrey Milling Co., which shipped the meal over the connecting lines of the Texas & Pacific and International & Great Northern roads. On arrival of the car at its destination the consignee neglected from March 19 to March 23 to remove the meal. On the night of March 22 rain fell on the car, and when the consignee opened it the next morning the meal was found to be soaked and fermenting. He rejected the shipment, immediately notifying the mill.

* *

A broad responsibility was laid upon railway companies in the matter of furnishing suitable cars for loading of bulk feed, in a decision handed down by the Illinois appellate court in the case of Grandt vs. Chicago, Burlington & Quincy Railroad Co., 195 Ill. App. 187.

The court held that if defendant carrier knew, or in the exercise of ordinary care should have known, that a car furnished to be loaded with feed contained, on the floors and sides, white lead, but failed to put the car in proper condition to avoid poisonous contamination of the feed, defendant became liable for loss sustained by an ultimate purchaser of the feed through death of his cattle from eating the poisoned stuff.

This purchaser, having no contractual relations with the carrier, could maintain no action against the latter on the theory of breach of any contractual obligation, but the facts stated show an actionable wrong under the general legal principle that one who negligently creates a dangerous condition is liable for all consequences which fairly could have been contemplated.

The court also decided that the fact that the shipper had undertaken to clean the car did not relieve the carrier's liability to third persons; the shipper being regarded as a mere agent of the carrier in placing the car in proper condition—a duty resting primarily on the carrier.

There is nothing in the opinion, however, which would entitle a shipper to recover damages for injury to a shipment from a condition of the car perfectly obvious at the time of loading; contributory negligence would bar recovery in such case.

* *

That a shipper undertakes to repair a defective freight car to make it suitable for transporting a shipment of grain, or other commodity, and fails properly to repair it, does not absolve the railway company from liability for loss resulting from that company's primary fault in failing to provide a suitable car. This is the substance of the conclusion reached by the Texas court of civil appeals in the case of Hunt vs. Fort Worth & Denver City Railway Co., 258 S. W. 953, involving intrastate shipments of grain, part

of which was lost in transit through defective condition of cars.

* *

The mere fact that a mill, or other shipper of flour or feed, inspects a freight car before loading it does not relieve the railroad company from liability for breach of its legal obligation to furnish suitable transportation facilities. And if flour or other mill products, or grain, be damaged in transit through the common carrier's failure to furnish a proper car, liability in damages to the shipper arises. These propositions of law were laid down by the Minnesota supreme court in the case of DeVita et al. vs. Payne, 184 N.W. 184.

Plaintiffs bought a carload of flour from a Minneapolis mill for shipment to them at Niagara Falls. The car used in conveying the flour had been inspected by the Minnesota Transfer Co., a terminal railroad, and marked on one side in chalk, "Leaky roof; no good for flour, O. K. for feed." Later, and before loading, the mill's inspector reported the car to be in good condition. The flour was damaged in transit, through rain leaking into the car, and plaintiffs sued the initial carrier for damages. A trial ended in verdict and judgment in plaintiffs' favor, and the supreme court affirmed it on appeal.

It was first held by the supreme court that, as the mill inspector's employment had ended and he was not available as a witness, the mill's record, made in the usual course of business, was properly received in evidence as showing the nature of the inspection report.

On the more important phases of the case, the court said: "It is the duty of a railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the shipper inspected and accepted the car before loading. It appears that the inspector of the transfer company, acting for appellant [railway company], inspected the car two days before it was loaded. He found the roof leaky, marked the car not suitable for flour, and so reported to his superiors.

"As soon as the car was loaded with flour, appellant accepted it and undertook to transport the same to its destination. When appellant received the bill of lading issued by the joint agent it had full notice that the car which the inspector had condemned two days before was loaded with flour and offered for shipment. In accepting the same under such circumstances it cannot be held that the carrier is not liable for damage to the shipment on account of the defective condition of the car. . . .

"Proof of the delivery of the shipment to the carrier in good condition and of its delivery at the end of the route in damaged condition is sufficient to sustain a recovery for damages against the initial carrier.

"The Carmack amendment to the Hepburn act, as enacted June 29, 1906 (U. S. Comp. St., sec. 8604a), provides, in effect, that any common carrier, railroad, or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability thereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"The general rule is that a common carrier of goods is an insurer of the safe transportation of the goods committed to it for that purpose, and it is responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes. These causes are the act of God, act of public enemy, the inherent quality or 'proper vice' of the articles themselves, or some act or omission of the shipper or owner.

"The case under consideration does not come within the exceptions. To relieve itself from liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent if the loss or damage would not have resulted except for the concurring fault of the carrier. . . . The damage was the direct result of the defective car. The loading was proper, and but for the leaky roof there would have been no damage from rain.

"Appellant's car inspector testified that on Nov. 1 the car was on the unloading track; that it had been formerly loaded with wheat; that he inspected it carefully, found a leaky roof, unfit for flour, and so marked and reported it; that his

attention was called to the leaky roof by water stains on the inside of the car.

"The Pillsbury company's inspector also inspected the car, but, as appears from his report contained in the record testimony offered, did not detect the leaky condition of the roof, and the trial court found that the Pillsbury company had no notice or knowledge either of the leaky roof or of the marking of the car by appellant's inspector.

"The finding, in our opinion, is justified by the testimony. It was a question of fact to be determined from the evidence."

* *

But that plaintiff mill was not entitled to recover damages on account of deterioration of feed shipped in a leaky freight car was decided by the Kansas City court of appeals in the case of Schreiber Milling & Grain Co. vs. Chicago Great Western Railroad Co., 246 S. W. 647. The decision was based on the ground that the mill was notified of the defective character of the car before the shipment was billed. There was evidence tending to show that when the car was loaded it had a conspicuous marking in yellow chalk, "leaky roof." The mill was liable, the opinion held, if the defect was not discovered, because of its omission to use ordinary care to observe the condition of the car.

* *

A railway company is liable for loss of goods in transit resulting from defects in a car furnished for the transportation, although the car belonged to another railway company, decided the Tennessee supreme court in the case of Hopper vs. Nashville, Chattanooga & St. Louis Railway, 217 S.W. 661. This decision, however, seems to assume that tne shipper has not loaded the car with knowledge of the defective condition, for it is to be doubted that a shipper may complain of losses which he must have foreseen would follow, especially where the expense of remedying the defect before loading would have been materially less than the amount of probable loss.

* *

The line between intrastate and interstate commerce was drawn in a case relating to the rights of shippers of grain and mill products against rail carriers. The decision was that of the North Dakota supreme court, handed down in the case of Midway Co-operative Elevator Co. vs. Great Northern Railway Co., 169 N.W. 494.

There was in force in North Dakota a statute which declared that every railway company shall, in furnishing facilities for transporting grain and mill products, supply cars properly lined or coopered. If this is not done, and the company fails after four hours' notice to put a car in proper condition, the shipper may make the necessary repairs and compel reimbursement by the company.

Relying upon this statute, plaintiff sued to recover a sum expended in lining and coopering cars for various interstate shipments of grain. The defendant replied that its interstate tariffs did not provide for such allowances, and that therefore none could lawfully be made.

The supreme court upheld this defense, although nothing was said in the opinion to deprive the statute of force as applied to North Dakota intrastate shipments. It was held that the exclusive authority of Congress over interstate commerce extends to every instrumentality or agency by which such commerce is carried on. It was unsuccessfully argued by counsel for plaintiff that cars ordered for loading of goods do not become agencies in interstate commerce until they have been loaded, billed and actually started in transit.

The opinion cited a holding by the United States Supreme Court that the character of equipment which an interstate carrier must provide and the allowances which it must make to a shipper for furnishing such instrumentalities as grain doors, bulkheads, etc., are problems directly concerning rate making, and are, therefore, within the control of the Interstate Commerce Commission; and that a state court has no jurisdiction of a suit of this kind where the duly filed interstate rate schedules make no reference to such allowances.

The North Dakota court also quoted at length from an opinion of the Interstate Commerce Commission (34 Interstate Commerce Reports, 60) a statement showing how the making of allowances for grain doors, etc., opened the way to abuses and discrimination, resulting in the discontinuances of flat allowances of $2 per car for grain doors furnished by terminal elevators and 80c per car for those furnished by country elevators. This decision of the Interstate Commerce Commission points out that if such slight repairs as a shipper can readily make do not serve to put a car in suitable condition, he should insist upon his right to have a proper car promptly furnished.

"We conclude," said the Interstate Commerce Commission, "that we may not with propriety fix by order a maximum amount that should be paid the shipper by

a carrier for labor performed and for materials furnished by him in installing grain doors or doing other incidental repair work on cars furnished for shipments of grain in bulk. If, however, a carrier makes any allowance to shippers at country stations for work done or materials furnished, the conditions and purposes, as well as the maximum allowance, must be stated in its tariff, and must be applied without discrimination. . . . Just what will be furnished should be clearly stated in tariffs."

See, also, sections 314, 329.

SECTION 261. ORDERS FOR CARS

Of course, demand must be made upon a carrier for cars before it can be deemed to be in default in failing to furnish them, but freight need not be actually tendered for carriage when it is clear that the carrier will refuse to receive it. Failure of a shipper to comply with a rule of a railway company requiring shippers to make written demand for cars was held no excuse for refusing to furnish them, if demand in writing was not insisted upon (Arkansas supreme court, 99 S. W. 375). But see section 259.

The demand must be made upon an employee or agent of the company who is authorized to receive it. Accordingly, demand on an agent at another station, or upon a local train crew, or a division trainmaster, has been declared to be insufficient to bind the carrier (86 S.W. 828). The rule in Minnesota is that where a railway company has customarily furnished cars at a warehouse maintained by a shipper, the latter is entitled to demand cars for its use there, and, if loss results because of a wrongful refusal or neglect to furnish cars there, the shipper may recover. In such cases the fact, particularly when communicated to the railway company, that the freight is ready for shipment is a sufficient tender to the carrier to sustain an action for damages for failure to furnish cars (125 N.W. 897). The Minnesota supreme court said in the cited case: "It is, of course, true that before one can claim damages from a carrier, either for refusing or delaying a shipment, it must appear that a tender was made of the articles to be shipped, and that the shipper was then ready and able to perform his part of the contract; but what constitutes such tender must depend upon all the circumstances."

SECTION 262. RECIPROCAL DEMURRAGE ACTS

The Minnesota supreme court has held that it is a good defense to a suit under the demurrage law of that state, for failure to furnish all the cars required by plaintiff, that there was an unusual demand for cars, that defendant carrier's equipment was equitably apportioned to the different parts of its road, and that plaintiff was furnished with cars at as early dates as was possible, consistent with the railway company's duty to serve all shippers impartially (124 N.W. 825). And, in apportioning cars for the carriage of grain during a car shortage, a railway company is entitled to take into consideration any difference in the volume of business of the several shippers (Nebraska supreme court, 99 N.W. 309).

As stated by the Minnesota supreme court, such laws are designed to insure prompt performance by carriers of their common law duty to furnish cars, and are not displaced by the provisions of the interstate commerce act which prohibit unjust discrimination (124 N.W. 819). But it has been declared by the United States Supreme Court that such an act, to be valid, must excuse a railway company from liability for the prescribed penalty where failure to furnish cars results from strikes, unavoidable accident, etc.

The Kansas law was considered by the Kansas supreme court in the case of Offerle Grain & Supply Co. vs. Atchison, Topeka & Santa Fe Railway Co. (182 Pac. 405), in which case the plaintiff sued to recover the statutory allowance of $5 per car per day for delays in furnishing cars for the shipping of grain.

The court upheld the validity of the statute, and also decided that a shipper's failure to make a partial deposit of freight charges at the time of applying for cars did not bar a recovery against the railway company for delay in furnishing the equipment, unless the company demanded that the deposit be made and the shipper declined to make it.

A reciprocal demurrage law does not apply to voluntary contracts between carriers and shippers, being merely intended to provide a method whereby a shipper may secure cars from a railway company within the time fixed by law, or become subject to the statutory penalty. Therefore, according to the Minnesota supreme court, it is only when a shipper seeks to recover that penalty that he need show a previous written demand for cars (136 N.W. 295). See, also, 181 S.W. 1032. But demand that cars be furnished within less time than that to which the carrier is entitled under the law will not support recovery of the penalty (North Carolina supreme court, 59 S.E. 122). However, the fact that a shipper has lost right to recover the penalty,

through failure to comply with the law in the matter of demand or otherwise, does not affect his right to recover damages actually sustained by him, in a suit brought independently of statute.

* *

The decision of the Washington supreme court in the case of State ex rel Chicago, Milwaukee & St. Paul Railway Co. vs. Public Service Commission of Washington, 162 Pac. 523, establishes the following points of law relative to state railroad regulations:

The provisions of a law enacted in 1911 by the state legislature, requiring railway companies to furnish cars promptly to shippers on request, and delegating to the Public Service Commission authority to regulate the time for furnishing cars and to prescribe compensation for delay in doing so; and the provisions of a rule adopted by the commission pursuant to this law, prescribing reciprocal demurrage charges, are valid.

But a rule adopted by the commission to provide for hearings by that body on claims by shippers for reparation under the demurrage regulations is void for want of legislative authority to adopt such a rule.

State regulations concerning demurrage can have no valid bearing upon cars involving interstate commerce.

* *

The Nebraska reciprocal demurrage act was upheld and applied by the supreme court of the state, as affecting delivery of cars for unloading intrastate shipments.

In the case in which the decision was announced—Sunderland Brothers Co. vs. Missouri Pacific Railway Co., 162 N.W. 494—the railway company asserted that the provision of the law which required freight to be moved not less than 50 miles in 24 hours, under a penalty of $1 for each day each car is delayed, excepting as to certain excusable delays, was invalid as unreasonably interfering with interstate commerce, on the theory that to move intrastate shipments at the statutory speed would retard delivery of interstate shipments. But the court refused to accede to this position, finding that, since interstate and intrastate freight are often moved in the same trains, expedition in moving intrastate freight, to avoid liability for the penalty, would tend to hasten delivery of interstate shipments.

Incidentally, the court referred to testimony tending to show that the average movement of a freight car in this country was only about 2½ miles per day, including equipment on sidetracks, in storage, and under repair, as well as those in actual transit.

The Nebraska act contained a clause reading: "Cars for unloading shall be considered placed when they are held awaiting orders from consignors or consignees." Interpreting this provision, the supreme court decided that, where cars have not been spotted for unloading, being on a "hold" track, the time allowed the carrier for delivery is merely suspended, so that the consignee is entitled to a penalty for failure of the carrier to make prompt delivery from the "hold" track on proper instructions being given.

SECTION 263. DAMAGES RECOVERABLE FOR BREACH OF DUTY

That the damages recoverable against a carrier for refusal to transport a shipment after agreeing to do so are to be measured by the difference between the market value at the proposed destination when they would have arrived in due course, and their value at the same time at the place where they were offered for transportation, less the amount of freight charges, has been decided by the courts of several states, including Iowa, New York, North Carolina, Pennsylvania, Minnesota and Texas. This rule is subject to this exception: if the shipper has another practicable means of conveyance to the destination, and by using it can reduce his damage, he must do so, in which case the measure of his damage is any increase in the cost of carriage.

The same principle applies to cases where a carrier refuses to transport a shipment unless an excessive freight rate is paid; in such case it is the shipper's duty to minimize his damage, by paying the higher rate, and rely on a claim for a refund of the excess (Missouri supreme court, 56 S.W. 1125). The fact that, after cars were refused, a shipper could have obtained them at a time when the market for the goods was as good as when cars were first demanded, does not limit the shipper's recovery to nominal damages (Arkansas supreme court, 112 S.W. 744). Nor is the right of recovery waived by the shipper's act in afterwards making a contract for transportation of the goods (112 S.W. 745).

When a carrier delays receiving a shipment the shipper must take reasonable precautions to avoid injury to it on account of exposure to the weather, etc. (19 S.W. 963). To be recoverable, however, damages must appear to have been directly caused by the carrier's refusal

to transport the shipment. Under this rule it has been held by the Indiana supreme court that in a suit against a railway company for refusing to carry grain properly stored for transportation, plaintiff could show that the grain became heated and spoiled, though the damage might have resulted from something inherent in the nature of the grain itself.

If expense is incurred in making a second tender of freight, on the carrier first refusing to receive it, the shipper is entitled to recover the amount of such expense (37 S.W. 37). If refusal to afford shipping facilities is malicious, the shipper can recover exemplary damages (29 S.C. 265).

As to the damages recoverable for breach of a contract to maintain a spur track, the Texas court of civil appeals stated that they were such as were incidental to and caused by the breach and within the contemplation of the parties when the contract was entered into. And since the railroad company knew the nature of the business to be conducted, it was held, in effect, that liability arose for the loss naturally ensuing from the wrongful removal of the track (234 S.W. 595).

CHAPTER XXVII

DISCRIMINATION AGAINST SHIPPERS

SECTION 264. IN GENERAL

THE opinion of the Georgia court of appeals in the case of Georgia, Florida & Alabama Railway Co. vs. Draper, 95 S. E. 16, constitutes an interesting sequel to litigation originally commenced by the Blish Milling Co., and involved a legal phase of general agreements between common carriers and particular shippers.

The mill shipped a carload of flour to its own order, with directions to notify the Draper-Garrett Grocery Co. at Bainbridge, Ga. Without demanding surrender of the bill of lading, which had been attached to draft drawn on the grocery company, and without payment of the draft, the railway company permitted the grocery company to unload the shipment.

When unloading was yet incomplete, some of the flour was discovered to be wet, and thereupon the grocery company refused the flour and turned the shipment back to the carrier, refusing to accept it. The mill also declined to accept a return of the flour, on the ground that the railway company had converted the shipment by making unauthorized delivery to the grocery company.

The carrier then disposed of the goods as perishable, and the mill sued to recover the full value of the flour. This suit went to the United States Supreme Court, and was decided in the mill's favor, letting it out of the controversy.

It appearing that the grocery company had previously executed a contract to the railway company, with H. C. Draper as surety, undertaking to indemnify the railway company against any loss through surrender of "order notify" shipments to the grocery company without production of the bills of lading, the carrier brought suit against Draper, the grocery corporation having been dissolved in the meantime, to compel him to indemnify on account of the carrier's established liability to the mill. This suit resulted in favor of the railway company.

The main ground on which Draper sought to defeat the suit was that the contract for indemnity was void and violative of the interstate commerce laws as involving the granting of a special privilege to the grocery company in that that company was enabled to obtain delivery of goods without taking up bills of lading, while other shippers were required to surrender the shipping documents. But the court, after pointing out that there was nothing to show that other equally responsible shippers were denied the same privilege on the same terms, said:

"The railway, in delivering 'order notify' shipments to the grocery company before obtaining from it bills of lading therefor, was in effect merely extending credit, and surely the equality of treatment and denial of preferences contemplated by the statute would not compel the carrier to extend the same credit to all others, some of whom might be less responsible commercially, and therefore not entitled to such indulgence, for sound business or financial reasons; and, as already suggested, it does not appear that other solvent and responsible parties were denied the same privilege."

See the decision of the Tennessee supreme court in Nashville, Chattanooga & St. Louis Railway vs. Tennessee Mill Co., 227 S. W. 443, referred to in section 294. It was there strongly intimated that a certain contract extending credit to defendant mill was invalid as being unjustly preferential.

SECTION 265. IN ALLOTMENT OF CARS

See, also, section 259.

Shortage of railway equipment, caused by unforeseen and unusually heavy traffic, will not excuse a railroad company from making a pro rata distribution of its cars to shippers similarly situated. This rule was applied by the Arkansas supreme court in Robertson vs. Dickinson, 223 S.W. 12, wherein plaintiff was awarded damages against railway receivers for failure to furnish more than 27 cars on orders for 125 to be used in the shipment of hay.

Finding that one Sims, another shipper similarly situated, had been fur-

nished more cars, the court said: "The testimony shows that appellants furnished from 40 to 75 per cent of the cars ordered. If Sims received 40 to 75 per cent of the cars ordered by him it certainly cannot be said as a matter of law that appellee, under similar circumstances, should not have received like treatment at the hands of appellants. We cannot discover any undisputed evidence in the record furnishing a conclusive and satisfactory reason for the seeming preference in favor of Sims in the matter of furnishing him cars. . . .

"In St. Louis Southwestern Ry. Co. vs. Clay County Gin Co., 77 Ark. 360, 92 S.W. 534, we said: 'But the liability of the carrier under the act of March 11, 1899 (Kirby's Digest, Sec. 6804), is founded, not so much on the inadequacy of the facilities at his command to supply the demands of shippers as on his refusal or failure to make the facilities, which he has, available to all who are similarly situated, without discrimination or delay, for the act makes it the duty to furnish without discrimination or delay. So if the carrier by reason of some unforeseen and unusual or unprecedented condition in the traffic is unable to furnish cars for the accommodation of all shippers, he must, in order to escape liability under this statute, furnish such as he has, to all shippers, without discrimination or delay.'" See, also, 165 Fed. 113.

That a railway company must treat all of its patrons impartially, was held by the Kansas supreme court in New Era Milling Co. vs. Missouri, Kansas & Texas Railway Co., 100 Pac. 273, based on a claim that the railway company exacted excessive freight charges. This duty to afford transportation facilities without discrimination exists independently of statute, although additional penalties for breach of the duty are prescribed by law in some states (117 S.E. 238).

But a railway company cannot avoid liability for breaking a contract with a shipper to furnish a specified number of cars at a certain time and place on the ground that the agreement is discriminatory against other shippers, unless the contract will operate to give him an undue preference (United States circuit court of appeals, 181 Fed. 781; Minnesota supreme court, 138 N.W. 284).

* *

One of the leading cases to be found in the law reports bearing upon a railroad company's duty in apportioning cars during a period of shortage appears in the case of State of Nebraska ex rel. Crandall vs. Chicago, Burlington & Quincy Railroad Co., 101 N. W. 23, decided by the Nebraska supreme court.

The suit was brought to compel defendant railroad to furnish Crandall more cars for shipment of grain and mill products handled at his mill and elevator. The complaint arose on a distribution of cars as between him and a farmers' elevator. At first the railroad company divided the car supply between the two shippers for the shipment of grain, in addition to furnishing cars to Crandall for shipment of mill products. Later, an order was made by the company for apportionment of cars by furnishing such as Crandall needed for shipping flour, bran, and corn meal, and by dividing the remaining cars evenly between the two shippers for handling grain.

Under this revised order, cars furnished Crandall for shipping chop and cracked corn were charged against his allotment of cars for grain shipments. He objected, claiming that they should be charged against his allotment for shipment of mill products. And thereupon arose a controversy as to whether "chop" or "cracked corn" should be treated as "grain" or "mill products." The supreme court, deciding against the miller's contention, held that it was grain, saying:

"A number of witnesses engaged in the elevator and grain dealing business testified that this article was what is known in the trade as 'cracked corn'; that it is manufactured simply by crushing the corn between rollers, and is not cleaned or bolted in any manner, the resulting product being the same as that produced by the ordinary farmers' feed mill; while Crandall testified that it is properly known as 'coarse corn meal,' though admitting that it is so produced. It seems also that in the southwestern tariff sheet a higher rate is charged for corn chop than for corn, and that on respondent's system 'chop' is classified as a separate item. It is therefore contended by Crandall that this product is not properly shipped as grain, but as a mill product.

"Should the 'chop,' 'cracked corn' or 'coarse meal,' as it is variously termed, be regarded in the distribution of cars as a grain or as a mill product? This question is not free from doubt. It is shown that a number of elevators in this state which do not do a milling business have had a demand from their customers for cracked corn for feeding purposes, and that to meet this demand they have installed roller machinery for the pur-

pose of cracking the corn, and that the article thus manufactured is handled and sold as other corn by grain dealers.

"On the other hand, it is shown that Mr. Crandall has installed expensive machinery at his mill for the purpose of manufacturing corn meal. But it is also shown that in the manufacture of corn meal for culinary purposes the corn is first kilndried, then cracked or ground between rollers and afterwards bolted, and that in the manufacture by him of this 'coarse meal' or 'cracked corn' the same rollers are used, but they are set farther apart so as not to crush the grain so finely; that the corn is not kilndried and the product is not bolted. The corn is merely passed between the rollers, and from there loaded into the car.

"After examining the sample attached to the bill of exceptions and considering the evidence in the case, we are convinced that this substance properly belongs under the head of 'cracked corn' or 'chop,' and is not in the ordinary acceptance of the term 'meal'; and we are further convinced from the testimony that under the usages of the trade the article is properly handled by grain dealers as well as millers. Taking this view of the facts proved, we are of the opinion that the distribution of cars as made by the respondent was not unfairly discriminative against the relator, but that, in view of all the circumstances, he has no reason to complain upon that ground. . . .

"The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities, and that such duties of common carriers are enforceable by mandamus. With this proposition we agree.

"Since the briefs in this case were filed, the case of State vs. Chicago, Burlington & Quincy Railroad Co., 71 Neb. 593, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may in the usual course of events be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily, or at long intervals of time."

SECTION 266. EXPEDITING SHIPMENTS

"Special privileges to none" is the motto of the courts in cases where a shipper of freight seeks redress under some special agreement purporting to give him accommodations not open to all shippers on like terms. So the St. Louis court of appeals decided that plaintiff in the case of Cicardi Bros. Fruit & Produce Co. vs. Pennsylvania Co., 213 S.W. 531, was not entitled to damages for defendant's failure to carry out an agreement to reconsign by wire and place in transit in a particular train three cars of potatoes.

The cars were in the Pittsburgh yards in course of movement from Cape Charles, Va., to St. Louis. Plaintiff, the owner, arranged with defendant for a diversion of the shipments to Chicago.

The circuit court in St. Louis awarded judgment in plaintiff's favor, but it was reversed by the court of appeals, the latter court saying:

"Plaintiff seeks to enforce a special agreement by which, according to plaintiff's interpretation thereof, the carrier guaranteed to cause plaintiff's cars to be immediately diverted by wire so that they would leave Pittsburgh by the evening train and arrive in Chicago Monday morning. This the defendant could not do; it was tantamount to an agreement (if made) on the part of the carrier 'to guarantee a particular connection and transportation by a particular train,' so as 'to give an advantage or preference not open to all and not provided for in the published tariffs.'

"Whether plaintiff could have recovered upon the carrier's contract to divert or reconsign with reasonable dispatch or within reasonable time is a matter not presented to us by this record."

* *

In the case of Emil Grossman Mfg. Co. vs. New York Central Railroad Co., the appellate division of the New York supreme court said, concerning the validity of special agreements by railway companies to expedite transportation of particular shipments:

"It has been held that a carrier who agrees to expedite a shipment in interstate commerce assumes a more burdensome liability and can exact a higher rate than where mere carrier liability exists; that an interstate carrier can assume an extra liability for expediting, provided it makes

and publishes a rate therefor open to all; and that an agreement with a particular shipper to expedite a shipment at regular rates, where no rates have been published for expediting, is a discrimination, and as such a violation of the interstate commerce act, and relief on the contract will be denied." (169 N.Y. Supp. 213.)

Decisions of the highest court of the land are cited by the New York court as upholding the statement of law quoted.

* *

But special agreement by a railway company to furnish cars by a fixed time for shipment of interstate freight is void unless covered by tariffs filed with the Interstate Commerce Commission, held the New York supreme court in the case of Saitta & Jones vs. Pennsylvania Railroad Co., 179 N. Y. S. 471.

Plaintiff sued for damages resulting from defendant's breach of agreement to furnish six cars for use the morning following the date of the agreement, but the court ruled against the right of recovery. It was held that the interstate commerce act prohibition against special contracts by interstate carriers relative to shipping facilities, when not covered by filed schedules, applies to cases of this kind. The opinion cites several decisions of the United States Supreme Court as supporting the conclusion reached.

* *

That a railway company may make a special delivery contract that will bind it, without impinging upon the rule that contracts to expedite movement of freight for the benefit of one shipper and to the disadvantage of other shippers are invalid, is shown in the opinion of the Ohio supreme court in the case of Armstrong, Lee & Co. vs. Baltimore & Ohio Railroad Co., 124 N.E. 186.

Plaintiff recovered damages for negligent failure of the defendant to move two cars of wheat which were caught in a flood at Zanesville. When the peril of loss was imminent, the railway company made a special contract to move the cars to higher ground. But when sued for breach of contract, it was contended that the agreement was invalid as being discriminatory under the Ohio statutes relating to intrastate shipments. However, the court overruled this contention, saying:

"These statutes relate to the duties of a common carrier, and their purpose is to prevent discrimination between different members of the public as to charges for services as a common carrier. The service in this case was not as a common carrier, but as an uncommon carrier, in an uncommon situation, an emergency under uncommon circumstances, for which the milling company [plaintiff] was liable for a reasonable and just charge.

"But, even as to a special contract between the carrier and the shipper, such special contract is not in itself void, unless it exhibits an unjust and unreasonable charge, discriminatory in its nature. No claim of this character is made in this case."

* *

A railway company may make a valid agreement to expedite delivery of a shipment of interstate commerce, by agreeing to complete transportation by a specified date, only when a special rate for such special service is set forth in the carrier's published tariffs, decided the Tennessee supreme court in a decision which follows a similar opinion handed down by the United States Supreme Court. The decisions are based on the provisions of the interstate commerce act which make it unlawful for an interstate carrier "to make or give any undue or unreasonable preference or advantage to any particular" shipper, locality or class of traffic.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs," said the highest court of the land in the decision cited by the Tennessee court. (Roberts vs. Nashville, Chattanooga & St. Louis Railway Co., 185 S.W. 69.)

SECTION 267. SWITCHING FACILITIES

The rule forbidding discrimination in affording facilities is not limited to the carriage of freight from one station to another. It was decided by the Kansas supreme court, in Larrabee Flour Mills vs. Missouri Pacific Railway Co., 88 Pac. 72, that when a railway company undertakes to switch cars over its own and another company's tracks at a certain station, it becomes a common carrier in such sense as to render it liable in damages for discrimination against a disfavored shipper in refusing to switch his cars. This decision was affirmed by the United States Supreme Court (29 Sup. Ct. 214). But ordinarily a railroad company cannot be required to transport freight from one point to another in its yards at the same station, for the convenience of shippers, according to a decision of the Kentucky court of appears (148 S. W. 26); affirmed by United States Supreme Court, 34 Sup. Ct. 948.

Where a mill maintains a system of private tracks, connecting its various buildings with the main line of a railroad, and operates private switch engines

to move cars from one place to another in such private yards, the mill is neither entitled to an allowance by the railroad company for distributing cars from general storage tracks of such yards to the several buildings of the plant, nor to require the railroad company to make such distribution, that being impracticable. This is the effect of the New York court of appeal's decision in the case of New York Central vs. General Electric Co., 114 N.E. 115.

The opinion recognized the points that for many purposes industrial spurs are to be regarded as extensions of a railroad company's terminals, and that where a delivering carrier intrusts to a consignee the completing of actual transportation by performing a service that the carrier is legally bound to perform, a reasonable allowance may be made therefor, but holds that where delivery is completed by placing cars on a manufacturer's own storage tracks, an allowance to him for moving the cars to other points in his own yards must be regarded as an unlawful rebate.

SECTION 268. MILLING-IN-TRANSIT PRIVILEGES

Finding that a contract between a shipper and a railway company for a milling-in-transit privilege was illegal under the interstate commerce act, the United States circuit court of appeals for the sixth circuit denied the right of the shipper to recover damages for its breach on the carrier's part (Lewis, Leonhardt & Co. vs. Southern Railway Co., 217 Fed. 321).

The discrimination declared by the court in this case consisted in permitting plaintiff to ship corn and oats into Knoxville, Tenn., at local inbound rates; to ship out a manufactured feed of which the corn and oats comprised only one half the ingredients at outbound proportional rates on the feed; and to receive a refund on a hypothesis that the ingredients were all transit articles like the corn and oats, and so entitled, when milled, to the transit rate.

See, also, the chapter on Milling-in-Transit Privileges, Chapter XXX.

SECTION 269. RESHIPPING PRIVILEGES

A decision of the United States district court for the northern district of Georgia throws light on the power of the Interstate Commerce Commission to control reshipping privileges when it is asserted that a railroad grants discriminatory privileges to one point.

The decision was handed down in a suit brought by the Nashville Grain Exchange to enjoin enforcement of an order of the commission which required carriers to suspend a practice of granting to Nashville dealers in grain, grain products and hay rebilling and reshipping privileges, unless the same privileges should be granted to Atlanta, Macon and other Georgia points. In dismissing the suit, the court said:

"We understand that the attack made upon the Commission's order is based upon the contention that the privilege formerly allowed at Nashville, while it was withheld from the other localities mentioned in the order, was not subject to be changed by the Commission unless, upon investigation, it was disclosed by evidence that it operated to give Nashville an undue preference or advantage, and that there was an entire absence of evidence tending to prove that such was its operation and effect.

"It may be assumed, without being decided, that Nashville grain dealers, or an association of them, have such an interest in the continuance of the practice as it formerly existed as to have a standing in court to complain of an invalid order of the Commission which enabled the carriers to discontinue the practice altogether or partially, and that such a complaint would have to be sustained, if it was made to appear that the Commission's order was made in the absence of any evidence to support a finding that the practice operated to the undue or unreasonable preference or advantage to Nashville. But we are not of the opinion that the charge of arbitrariness, or that the action taken, was unsupported by the evidence, is sustainable.

"The tariffs which were in evidence before the Commission show that under them dealers at Nashville in grain, grain products, and hay could bring those commodities from the Ohio River crossings to Nashville, unload, treat, and store them, and ship them on to points of final destination further south, at the through rates from the river crossings to points of final destination, while dealers or jobbers in the same things at the other places named in the order had to pay the through rates to those places on such commodities shipped from the river crossings, and, to get them to other points, had to pay also local freight rates to such points of final destination,—the through rate to the jobbing and the local rate to a near-by point of final destination frequently amounting to considerably more than the through rate from the river crossings to the point of final destination.

"The Commission had before it much evidence to illustrate how this rate situation operated in building up a grain, grain products, and hay business at Nashville, and to circumscribe and obstruct the carrying on of a jobbing business in those commodities in the other places named in the order. The question whether the resulting advantage to Nashville was or was not undue or unreasonable was one of fact peculiarly appropriate for the determination of the interstate Commerce Commission." (234 Fed. 699.)

SECTION 270. AS TO CHARGES

A shipper, on showing that a railway company has charged him $2 per car for reconsigning interstate shipments at division points, without regard to the time within which reconsignment was made, whereas shipments were reconsigned at another point under similar circumstances without charge, if reconsignment was made within 24 hours, is entitled to recover damages against the carrier on account of such discrimination.

Usually, damages for discrimination against shippers are measured by the amount of the excess of rates charged the aggrieved shipper over those charged the favored persons, but, in suing to recover such damages, it is incumbent upon plaintiff to show that the loss actually fell upon him, and not his consignee. (American Hay Co. vs. Lehigh Valley R. Co., 219 Fed. 539, decided by the United States circuit court of appeals for the second circuit.)

A contract calling for special privileges of two stops in transit at the through rate to the destination was so far invalid as to entitle the carrier to transport the shipment to the destination without stoppage. (Iowa supreme court, Sheldon vs. Chicago, Burlington & Quincy Railroad Co., 169 N.W. 189.)

See, also, Chapter XXIX.

SECTION 271. HAULAGE ALLOWANCES

The question as to whether it was lawful for a railway company to allow a shipper of grain five cents a bushel for hauling it across a lake to the place of loading on cars was decided in the affirmative by the North Dakota supreme court in the case of Knapp vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 159 N.W. 81.

Under published tariffs, the rate on wheat shipments from Kenmare, N. D., to Minnesota points was 17c per 100 lbs, and from points across a lake west of Kenmare, 22c. Normally, shipments from such lake points were carried across the lake to Kenmare on barges by an independent company. In reliance upon these rates and circumstances, plaintiff established grain elevators across the lake from Kenmare.

Through freezing of the lake it became impossible to move wheat by barges, and defendant railway company's general agent agreed to pay plaintiff five cents a bushel for hauling shipments over the ice to Kenmare. It was upon this agreement that plaintiff sued, defendant resisting liability on the ground that the allowance would constitute an unlawful rebate.

Deciding the case in plaintiff's favor, the supreme court held that it was within the ostensible authority of the general agent to make the agreement, and that the agreement is not to be regarded as an unreasonable discrimination, in the absence of proof or of a ruling of the Interstate Commerce Commission to that effect.

SECTION 272. PAYMENT OF CLAIMS

The policy of the courts to declare void agreements of railroad companies to extend their liabilities concerning interstate shipments in particular instances, where that gives a shipper an advantage not shared by shippers in general, was applied by the Tennessee supreme court in the case of Lewis & Adcock Co. vs. Southern Railway Co., 201 S.W. 131.

A grain company in Cincinnati shipped a carload of oats to the plaintiff at Knoxville, Tenn., under a uniform through bill of lading involving carriage over the initial carrier's and the defendant's lines as connecting carriers, defendant making delivery.

The oats were damaged on the initial line, and defendant's claim agent agreed to pay $150 in settlement, but the company refused finally to pay anything and resisted suit brought on the agreement, successfully asserting that the contract was at variance with the familiar provision in the bill of lading, to the effect that a connecting carrier is liable for loss only when occurring on its line.

In sustaining this position, the court recognized the well-settled rule that under the Carmack amendment an initial carrier of an interstate shipment is liable for losses on connecting lines, and that this liability cannot be avoided by contract provision, but that a connecting carrier may validly limit its responsibility to its own tracks.

Also, having adopted a uniform provision disclaiming liability for losses occurring on another line, it was held that

to permit a connecting carrier to pay a claim for such loss in a particular instance would necessarily have the effect of giving a preference to the shipper or consignee in that case over other shippers or consignees.

"Recent decisions of the Supreme Court of the United States construing the acts of Congress," says the Tennessee court, "declare that there must be uniformity in rates, uniformity in service, and uniformity of responsibility on the part of all carriers engaged in interstate commerce. The duties and responsibilities of such carriers are defined in the contracts or bills of lading filed with the Interstate Commerce Commission, and the acts of Congress, and these duties and liabilities may not be varied either by the act of the carrier or the shipper, or indeed by state laws."

See, also, Chapter XL.

SECTION 273. LEASE OF INDUSTRIAL SITES

The prohibitions of the interstate commerce act against unjust discrimination between shippers was held by the United States circuit court of appeals, fifth circuit, to be violated by an agreement under which a railway company leases a factory site to a manufacturer, adjacent to the company's right of way, without any other substantial consideration than the manufacturer's agreement to ship all freight over the particular road when possible, although the fair annual rental value of the premises is considerable.

In holding this point in the case of Central of Georgia Railway Co. vs. Blount, 238 Fed. 292, where plaintiff sued to cancel a 20-year lease on a factory site, or to require defendant to pay a fair rental value, the court declared that, since an agreement of the kind mentioned is directly violative of law, neither party can be deemed to be estopped to assert its invalidity by reason of previous recognition of the contract as being binding.

CHAPTER XXVIII

INTERSTATE COMMERCE*

SECTION 274. POWER OF CONGRESS

"THE Congress shall have power . . . to regulate commerce . . . among the several states."

Perhaps the framers of the Federal Constitution did not foresee what broad authority would be claimed under this brief provision of the national bulwark. Certain it is that the full scope of the clause has not yet been definitely fixed, for it was as recently as 1918 that four of the nine justices of the highest court of the land dissented from a majority holding that this clause was not broad enough to support the child labor act of Sept. 1, 1916.

This law, which would have applied theoretically to the milling industry, although probably not to any great extent in actual practice, purported to prohibit the transportation in interstate commerce of the products of any mill, factory or mine in which, within 30 days prior to removal, children under the age of 14 were employed, or children under 16 were employed more than eight hours a day or more than six days in any week. In the case of Hammer vs. Dagenhart, 38 Sup. Ct. 529, it is held by the United States Supreme Court that the act was unconstitutional, as an invasion of the police powers of the several states.

The majority opinion pointed out that the acts of Congress forbidding interstate commerce in impure food and drugs and lottery tickets, the transportation of women for immoral purposes, and other similar measures, all of which have been sustained as valid exercise of the powers of the Congress under the Constitution, apply where "the use of interstate transportation was necessary to the accomplishment of harmful results."

Distinguishing the child labor act, the court adds: "The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are themselves harmless. . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce. . . . Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation."

Argument advanced in support of the law, that it would protect the products of a state which has recognized the evils of child labor against competition with goods produced in another state which permits child labor, was disposed of on the ground that there is no constitutional power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition.

"Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others," said the court. "The commerce clause was not intended to give Congress a general authority to equalize such conditions. . . . The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce; and not to give it authority to control the states in their exercise of the police power over local trade and manufacture."

SECTION 275. WHEN COMMERCE COMMENCES

Since the federal government has the right to control interstate commerce to the exclusion of conflicting state laws, it follows that it is often an important matter to determine just when interstate commerce begins in the production of flour or other manufactured commodities.

In the case of Kidd vs. Pearson, 128 U. S. 1, the United States Supreme Court said:

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is

*Other phases of interstate commerce are discussed in other chapters of this book dealing with Taxation, Corporations, Connecting Carriers, etc. See, also, section 348.

a matter of local regulation. 'When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.' Mr. Justice Jackson, In re Greene, 52 Fed. 113. This principle has been recognized often in this court. Coe vs. Errol, 116 U.S. 517; Bacon vs. Illinois, 227 U.S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control, to the practical exclusion of the authority of the states—a result certainly not contemplated by the framers of the Constitution, when they vested in Congress authority to regulate commerce among the states."

See, also, 265 U. S. 457.

SECTION 276. RELATION TO FOREIGN COMMERCE

A shipment from a point in this country to a point abroad, or the reverse, is controlled, so far as concerns that portion of the transportation which is interstate, by the interstate commerce law, and the rules, forms of contract, and classifications established in pursuance of that law, according to a holding made by the appellate division of the New York supreme court in the case of Burke vs. Union Pacific Railroad Co., 166 N. Y. Supp. 100.

SECTION 277. EFFECT OF STOPPAGE IN TRANSIT

The interstate character of a shipment is fixed by the making of a contract for transportation from a point in one state to a point in another, and is not changed by the fact that the goods may be stopped in transit by the shipper and unloaded before leaving the state where the shipment originated. (Farmers' Grain Co. vs. Illinois Central Railroad Co., 201 Ill. App. 261.)

SECTION 278. EXTENDING INTRASTATE SHIPMENTS

A shipment of grain from a Nebraska point to a Kansas point for delivery to the order of the shippers, with directions to "notify C. V. Fisher Grain Co., care of Santa Fe, for shipment," under which the grain company, doing business in Kansas City, Mo., there obtained an exchange bill of lading calling for delivery by the Santa Fe at a second Kansas point, must be regarded as a continuous interstate shipment from the point of origin by the Carmack amendment to the interstate commerce act, and is not affected by a rule of law in force in Kansas under which an innocent holder of a bill of lading is accorded broader rights than the shipper could assert.

In other words, the exchange bill of lading extending the transportation between the two Kansas points did not involve a distinct shipment in intrastate commerce. This is the gist of the decision announced by the United States Supreme Court in the case of Harold vs. Atchison, Topeka & Santa Fe Railway Co., wherein a decision of the Kansas supreme court was reversed. (36 Sup. Ct. 665.)

Plaintiff bought the shipment from the grain company after that company took up the original bill of lading, assuming, as the exchange bill of lading indicated, that the shipment was in transit from Kansas City, whereas it was several days before the car arrived at Topeka from Nebraska and was forwarded from there, resulting in plaintiff's customer refusing to receive the grain. It was then that plaintiff sued the Santa Fe for damages on account of the delay, but that road pleaded that, under the terms of the substitute bill of lading, it was not liable for the delay which occurred on the line of the first carrier.

On the other hand, the Kansas supreme court upheld plaintiff's contention that, as a purchaser of the bill of lading for value, he was entitled to rely upon an assumption that the shipment had been received by the defendant at the date the bill of lading was issued, and, therefore, to recover for the unreasonable delay in delivery resulting from concealment of the fact that the car was still in transit in Nebraska.

But the United States Supreme Court held, as above indicated, that the shipment must be regarded as a through one, and that the state court's ruling was at variance with the rule governing interstate shipments: that plaintiff could claim no rights as an innocent holder of the exchange bill of lading not available to the original shipper, who would have had no claim against the delivering carrier for delay caused solely on the line of the initial carrier.

* *

The Union Pacific Railroad Co. won a new trial in a suit brought by the Farmers' Grain & Mercantile Co., Gorham, Kansas, to recover penalties under the Kansas statutes for delay in furnishing cars for grain shipments. The Kansas supreme court reversed a judgment

for $2,035 in favor of the plaintiff, on the ground that errors were committed by the trial judge in submitting the case to the jury. (175 Pac. 599.)

The principal questions in the case pertained to a dispute as to whether the cars were ordered for interstate shipments; the Kansas reciprocal demurrage law having no application, of course, to interstate transportation. On a point as to whether the milling-in-transit privilege under which the shipments were made converted the transactions into interstate commerce, the court said:

"The evidence tended to show that the plaintiff's shipments were made to a milling point; that the plaintiff's connection with the shipments ceased at that point; that the privilege was given to the customer, or the shipper from the milling point, and not to the plaintiff; that it received no direct benefit from that privilege; and that the plaintiff did not know where any of the shipments finally went. A shipment from a point in Kansas to a milling point in Kansas, where the connection of the shipper with the shipment absolutely ceases, is not any part of interstate commerce, although the consignee may take advantage of the milling-in-transit privilege."

The errors on which a new trial was awarded consisted in the trial judge's exclusion of evidence tending to show that some of the cars in question were actually ordered for interstate shipments, and in refusing to instruct the jury concerning the interstate features of the case.

SECTION 279. STATE INTERFERENCE

The Oklahoma supreme court has denied the power of the state corporation commission to require a railway company to designate a point on its right of way for the location of a portable grain elevator by a particular shipper and to spot cars there for loading of outbound shipments, when the effect of the order would be to obstruct interstate commerce by interfering with the movement of cars to and from elevators permanently near the right of way, and with the loading of cars by track shippers.

CHAPTER XXIX

CHARGES AND TARIFF RULES*

SECTION 280. IN GENERAL

CARRIERS subject to the interstate commerce act cannot make a joint rate with an ocean carrier. Transportation within the United States must be treated as separate transportation, as to which the regular rates must be charged and collected. (Wisconsin supreme court in Waters vs. Pfister & Vogel Leather Co., 186 N. W. 173.)

Regularly published interstate freight rates are binding upon both shipper and carrier, although excessive in fact, until changed by action of the Interstate Commerce Commission. (Iowa supreme court, Sheldon vs. Chicago, Burlington & Quincy Railroad Co., 169 N.W. 189.)

See, also, section 270.

SECTION 281. CONFLICTING RATES

There can be but one legal rate on a given commodity between two points, and if tariffs contain two distinct and conflicting rates for the same shipment, the shipper is entitled to the benefit of the lower of these rates. These points were declared by the United States circuit court of appeals, eighth circuit, in the case of National Elevator Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 246 Fed. 588, wherein, however, plaintiff unsuccessfully sought to recover a supposed overcharge on grain shipments made from a South Dakota station to Duluth.

A short branch line, extending from Andover, S. D., to Harlem, N. D., feeds the defendant's Pacific Coast line. Cogswell, N. D., on this branch and served also by the Soo Line, had a rate of 14c on flaxseed, wheat, barley and oats shipped to Duluth. The same rates applied to Brampton, N. D., seven or eight miles south of Cogswell. But the same tariff showed the higher rates of 19½c on flaxseed, and 15c on wheat, barley and oats from Newark, S. D., nearer the junction point on defendant's main line than Brampton or Cogswell. Attached to the tariff was the clause:

"Between stations on the C., M. & St. P. Ry. rates to or from intermediate stations shall be the same as shown to or from the next more distant station to or from which rates are named."

In suing to recover $601.99, claimed to have been extorted from plaintiff elevator company by defendant on shipments made from Newark to Duluth and charged for at the rates of 19½c and 15c, respectively, above mentioned, plaintiff asserted that the quoted clause entitled it to the same rates applying to Brampton, "the next more distant station."

In defense it was first contended by the railway company that the United States district court, in which the suit was brought, had no jurisdiction over the controversy; that the case should have been brought before the Interstate Commerce Commission for reparation. But the circuit court of appeals, reviewing a judgment of the district court, decided that where, as in this case, there was no question raised as to the reasonableness of a rate, and the controversy involved a mere interpretation of schedules, the jurisdiction of the Interstate Commerce Commission is not exclusive, and an action may be maintained in the United States district court.

On the main point the court concluded that the general provision in the tariff for applying to intermediate stations rates to or from the next more distant stations must be interpreted as being limited to stations not expressly named in the schedules. Accordingly it was decided that defendant properly collected the rates published to cover shipments from the station in question, although such rates were higher than those applying to the next more distant station. The court said, as showing that distance does not necessarily control the interrelation of rates:

"It is notorious that the rates from the Pacific Coast to Chicago are many of them much lower than the rates over the same road from the intermountain country to Chicago."

For another decision holding that, if a railway company's published tariffs provide conflicting freight rates for a given shipment, a shipper is entitled to the

*See, also, chapters on Discrimination and Milling-in-Transit Privileges.

benefit of the lower rate, see 153 N. Y. Supp. 966.

* *

But when a railroad company has two lines between two given stations, one interstate and one intrastate, and the interstate line is the shorter and has easier grades, and a shipper gives no routing, the railroad company is entitled to route over the interstate line and to recover interstate freight charges, although those charges are higher than the ones applicable to the intrastate line. This is the gist of the decision handed down by the Minnesota supreme court in the case of Comstock Farmers' Elevator Co. vs. Great Northern Railway Co., 163 N.W. 280.

Plaintiff failed in an effort to secure a refund of the difference between interstate and intrastate charges on 111 cars of grain shipped from Comstock, Minn., to Minneapolis. Comstock is 15 miles south of Moorhead, and intrastate transportation would require a back haul. By using another of defendant's lines, the shipments were carried for seven miles through North Dakota territory, and the railroad company proved that that was the easier as well as shorter route over which the freight could be moved.

"The carrier, in the absence of shipping directions, is not bound to do the unreasonable thing in order to secure an anticipated cheaper rate for the shipper," says the supreme court. "Not only the easier grade and shorter distance called for the interstate route for these cars, but, what is more persuasive, the intrastate route would have involved a back haul of 15 miles. This cannot in reason be demanded."

* *

How the freight charges on a shipment of flour from Coffeyville, Kansas, to Smithland, Texas, should be computed was the question before the United States circuit court of appeals, eighth circuit, in the case of Missouri Pacific Railroad Co. vs. Rea-Patterson Milling Co., 273 Fed. 518. A decision which had been made by Judge Pollock, of the United States district court for Kansas, in favor of the mill, was reversed.

The shipment traversed three railroads in reaching its destination. There was no established through rate applying, and it was agreed that the proper charge was to be made up by combining the lowest intermediate rates applicable.

The Kansas City Southern hauled the car into, through and to a point beyond Texarkana, and the sole question presented was what rate between that station and the destination should be applied in making the computation. This road had in force a rate of 8c on shipments from Texarkana to Smithland, but a rate of 18c on shipments moving into Texarkana from other points and thence to Smithland.

"We do not doubt that the 8c rate applied only to shipments originating at Texarkana," says the higher court, "and that the 18c rate applied to through shipments, such as this. We cannot consider the question as to whether the 18c rate was unreasonable."

The last sentence of the opinion alludes to the point that the reasonableness of an interstate freight rate is a question to be determined by the Interstate Commerce Commission.

* *

In Port Arthur Milling Co. vs. Texarkana & Fort Smith Railway Co., 28 Interstate Commerce Commission Reports, 697, it was held that, where there was a lower rate on export shipments to Port Arthur than on domestic shipments to the same point, a shipper was not entitled to the lower rate on shipments intended for export but not covered by a notation "For Export" on the shipping documents. The Commission cited a declaration of the United States Supreme Court in Coe vs. Errol, 116 U. S. 517, that a shipper's state of mind cannot control outward indications.

SECTION 282. CHANGES IN RATES

Giving effect to the settled public policy to prevent railway companies from charging excessive rates, or discriminating between different shippers, different localities and different commodities, it was decided by the Minnesota supreme court in the case of National Elevator Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 173 N. W. 418, that a railway company doing an intrastate business in Minnesota might reduce its rates to all shippers on all commodities and at all stations in the state, without obtaining the consent of the Railroad and Warehouse Commission. But it was held that the original rates could not afterwards be restored without the consent of the commission after a hearing upon the fairness and reasonableness of the proposed change.

SECTION 283. SWITCHING CHARGES

Speaking of the right of a railway company to make charges for delivering carload shipments on private tracks, the Florida supreme court says:

"It does not necessarily follow that, because a carrier delivers freight in carloads to consignees on private sidetracks,

such service was made in substitution of a delivery which might otherwise have been made on the free or station sidetracks. The service of delivering freight to consignees in carloads on private or industrial sidings is a service which may not in the present state of the law be required of the railroads, but, on the other hand, it is not a service which is forbidden.

"It would seem, therefore, to lie more within the field of contract than in the domain of the duties to the public of a public service corporation. If the service is of some benefit to the patron of the road, and involves some service by and expense to the railway company, and is no part of the transportation, but in addition thereto, the company is entitled to charge for the service, and in such charge is not confined to the actual cost of it." (State vs. Florida East Coast Railway Co., 68 So. 761.)

* *

In holding that the Minnesota distance tariff law covering intrastate shipments did not apply to switching operations nor to movements from place to place within a city or district constituting a single shipping point, the Minnesota supreme court pointed out, in the case of Commercial Club of City of Duluth vs. Northern Pacific Railway Co., 165 N. W. 270, how switching service is to be distinguished from actual transportation for the purpose of applying proper freight rates.

In this suit the commercial club established the point that the railway company was merely entitled to switching charges on the movement of freight between Duluth and certain suburbs, and not to maintain a distance tariff to cover such service. Speaking for the court, Mr. Justice Hallam said:

"The limits of a shipping point are not necessarily coincident with the limits of a city. They may be more extensive. Perhaps they may be less extensive, but usually not. The important question is whether the district is a single industrial center. This is usually a question of fact. . . .

"In determining that question, the extent of the district, the industrial relation of one part to another, the nature of the traffic, are things to be considered. Whether the traffic is handled by train crews or switching crews, and whether on waybills or switching orders, are matters to be considered, but the manner of handling is not decisive. The fact that the railroad and the public have acquiesced in applying a switching tariff is important when that fact appears, as it does here."

SECTION 284. STOPPING CARS IN TRANSIT

In the case of United States vs. Swift, 255 Fed. 291, the United States circuit court of appeals had occasion to decide the following points of law relating to transportation of freight:

A published tariff containing a clause permitting stopping in transit of freight billed at carload rates for partial loading or unloading, and a clause fixing $3 as the charge per car for each "stop" where a car is "stopped off," do not make the extra charge of $3 applicable to unloading of freight in transit, where the car is not taken from the train.

A shipper is entitled to rely upon a fair and reasonable construction of tariff rules as published, unaffected by any contrary interpretation placed on such rules by tariff experts. "The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of a general freight office. A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what can be lawfully charged for transportation."

"A shipper making shipments in carload lots has the right to bill to a single consignee, though the contents of the car may be intended for different individuals."

* *

Where an interstate car is to be stopped in transit at two intermediate points for partial unloading, and the rates to each of these points are the same as to the destination, the carrier is entitled and required to collect the rate to the first point, plus the local rate to the second stop from the first stop, and plus the local rate from the second stop to the destination. (Iowa supreme court, Sheldon vs. Chicago, Burlington & Quincy Railroad Co., 169 N. W. 189.)

DEMURRAGE AND STORAGE CHARGES

SECTION 285. IN GENERAL

"Inasmuch as the primary duty of a carrier in carrying goods includes delivery of the goods to the consignee at destination, it is in no event entitled to charge demurrage until such duty is performed. And this duty is not performed so as to authorize it to charge demurrage unless

it delivers the goods at such point and in such manner as to enable the consignee to receive them without inconvenience, delay, or interruption; but if a car is placed and kept in a suitable place for unloading for the free time prescribed by the rule, and the consignee fails to unload it, he will be liable for car service thereafter, although the car may not at all times be in a convenient place for unloading, provided he is not thereafter unreasonably hindered and delayed in unloading. Where consignees refuse to accept delivery, except on a designated track where delivery could not be made, the carrier is not bound to make delivery elsewhere before the commencement of the running of full time." 10 Corpus Juris, 467.

* *

A novel demurrage question was decided by the Wisconsin supreme court in favor of a shipper in the case of Chicago & North Western Railway Co. vs. Pulp Wood Co., 159 N.W. 734. Defendant ordered cars for shipment of a commodity upon which there was no railway embargo, but loaded them with tabooed goods. The carrier refused to move the shipment, and the shipper refused to unload the freight. Several weeks later the embargo was lifted and the cars went forward, but the carrier claimed demurrage for the previous detention of the cars. In affirming a judgment adverse to the claim, the supreme court, after noting that the carrier could have unloaded the freight and thus released the cars, said:

"The refusal by the railroad company to accept the shipment and its refusal to unload the cars necessarily implies that it did not devote the cars to a transportation of this shipment during the time that they stood at Mellen prior to Aug. 17, when the company accepted the shipment for transportation. Under these conditions the cars were not used in transportation until acceptance of the shipment for transportation, and hence were not subject to a demurrage charge in connection therewith for the period prior to the two days' free time for loading them under the car service rules."

* *

One section of the Missouri statutes prescribed a penalty against a railway company for neglect to place carload shipments on delivery tracks within 24 hours after their arrival (12 hours at stations having but one delivery track). Another section made a shipper or consignee liable for $1 daily demurrage on each car spotted for loading or unloading, after the expiration of 48 hours on all cars of less than 60,000 lbs capacity, and after 72 hours on cars of greater capacity.

Under these provisions it was held by the Missouri supreme court, in the case of State ex rel. Kansas City Southern Railway Co. vs. Public Service Commission, 178 S. W. 55, that a railway company was not entitled to make an additional charge for "track storage," which was included in the statutory charge for detention of cars. The supreme court aptly stated that it was just as absurd to permit a railway company to impose an additional charge for use of the track when demurrage is charged for detention of a car standing on that track as it would be to permit a landlord to collect ground rent in addition to an agreed rental for a building standing on the particular ground.

* *

The Boston & Maine Railroad filed an interstate tariff providing for storage charges against goods not unloaded within free time. The Oceanic Steam Navigation Co. afterwards notified the railroad company that on account of a longshoremen's strike it was prevented from forwarding traffic required to be loaded within 30 days after arrival in Boston, and would not accept responsibility for accruing storage charges.

The railroad company replied that, under the established tariffs, storage charges must be collected, and that the steamship company would be held liable for such charges accrued against freight forwarded by it. The steamship company requested a copy of the tariffs, which was sent, and shipments were received by that company, apparently without further negotiations on the point; the shipments being made under single bills of lading for carriage by both companies.

Under these circumstances, the Massachusetts supreme judicial court held, in a case brought by the railroad company against the steamship company to recover storage charges:

(1) That an interstate carrier is bound to collect established storage charges due it; (2) that it possesses a lien against the goods to secure payment of such charges; (3) that the steamship company impliedly assumed responsibility for storage charges accrued against goods received by it; (4) that a clause in the through bills of lading entitling the railroad company, "in case of physical necessity," "to forward said goods by any railway or route between the point of shipment and the point of destination" did not require the railroad company to forward the goods from the seaboard by another steamship

line when the longshoremen's strike obstructed the particular steamship company, such clause being properly interpreted as limited to the railroad terminus; and (5) that stipulations between the shipper and the railroad and steamship companies, severally, that the carriers should not be liable for delays caused by strikes, did not release the railroad company's right and duty to recover storage charges accruing under the facts above stated. (116 N.E. 260.)

* *

A terminal carrier of interstate shipments of flour for export was not entitled to collect storage charges at the seaboard not provided for by its published tariff schedules, according to the decision of the appellate division of the New York court of appeals, announced in the case of Raymond Hadley Corporation vs. Boston & Maine Railroad Co., 227 N. Y. 648, affirming a decision of the appellate division of the New York supreme court (186 App. Div. 341).

The plaintiff, engaged in buying flour in carload lots at the mills and shipping it to the Atlantic seaboard, shipped 109 cars from western points and Canada over defendant's road on local bills of lading consigned to Mystic Wharf, Boston, with the notation: "For export under terms of the Order in Council No. 1950-B, September 20, 1915."

The cars arrived at the port of Boston between December, 1915, and February, 1916, and because of delay in exporting, defendant assessed $4,965.31 storage charges, which, being paid under protest, plaintiff sued to recover, on the ground that they were not authorized by the defendant's tariffs. The salient parts of the court's opinion are as follows:

"The bills of lading contained a provision for 'a reasonable charge for storage' in the cars or at a warehouse after the expiration of two days' notice of arrival, exclusive of legal holidays. This was all interstate commerce, however, and by virtue of the provisions of . . . the interstate commerce act . . . the carrier was prohibited from making any storage charge, or charge for any service connected with the transportation and delivery of freight, other than those authorized by the tariff schedule filed. . . .

"Since the carrier prepared the tariff schedules, it is not entitled to have them liberally construed in its favor, and the rule of fair and reasonable construction applies. . . . By the tariff schedule of the defendant in force at the times in question, for part of the period free storage for 30 days was allowed on export freight on Mystic Wharf, and later this period was reduced to 15 days, and after the lapse of the free period a storage charge on tonnage basis was prescribed."

Referring to the fact that after some of the flour had remained for some time on the wharf it was removed by defendant carrier to other storage, the court remarks that while the convenience of the carrier in transacting its general business warranted it in removing the goods on the plaintiff's failure to provide for prompt export, the railway company was not entitled to collect anything for the cost of removal or storage elsewhere, because there was no provision therefor in its published schedules.

But Mr. Justice Laughlin, speaking for the court, said that it seemed to him that the defendant should be permitted, under the circumstances, to recover storage charges, in accordance with the tariffs, as if the goods had remained on the wharf, and this allowance was made a part of the judgment.

* *

Where a demurrage rule provides that loaded cars shall be deemed to have been delivered to the consignee when they would have been placed on his switch track except for the fact that the track was full, the track is to be deemed to be "full," although it would have actually held more cars, if there were so many cars on the track that no more could be accommodated without interfering with unloading operations.

This rule was announced by the Wisconsin supreme court in a case in which it was also decided that it constitutes an unlawful discrimination for a railway company to agree with a particular shipper that until further notice no cars will be furnished to others for shipment of certain commodities. (149 N. W. 751, affirmed by the United States Court, 36 Sup. Ct. 501.)

See, also, a Massachusetts decision cited in section 293, on the question as to when charges are earned.

SECTION 286. FAULT AS AN ELEMENT OF DEMURRAGE LIABILITY

No demurrage can be exacted from the consignee of a shipment unless delay in unloading is clearly attributable to his fault, held the Alabama supreme court in the case of Camody vs. Louisville & Nashville Railroad Co., 84 So. 824. In this case it appeared that, before delivery of a shipment was made to plaintiff, some controversy arose concerning ownership of the freight, and plaintiff refused to give defendant carrier a bond

indemnifying it against liability in making delivery. Delay in unloading ensued. Under these circumstances the court said:

"This means, of course, that the carrier, in the circumstances named, may retain possession unless the consignee will make a bond indemnifying him against loss that may arise out of the delivery of property to which another may have a superior title; but it does not mean that the failure or refusal of the consignee to make such a bond can be attributed to him as a fault.

"We do not think that a shipper or consignee can be held for demurrage for the sole reason that he fails or refuses to make such a bond. His right in and to the property shipped cannot be made to depend upon his ability, or even his willingness, to indemnify the carrier, and so, for that reason, he cannot be adjudged in default for his lack of ability or willingness to indemnify."

SECTION 287. WHO IS ENTITLED TO DEMURRAGE?

A decision reached by the Arkansas supreme court on the effect of the Arkansas demurrage act will doubtless be found to be a pertinent precedent in interpreting similar statutes in other states, on the right of a railway company to collect demurrage charges when the only service rendered by it is switching.

The decision, which was announced in the case of Chicago, Rock Island & Pacific Railway Co. vs. Ball & Philpot, 203 S.W. 284, is to the effect that the provision of the act for a charge of $5 per day for detention of each car by a shipper beyond 48 hours allowed for loading must be read as entitling only the railway company from which the car was ordered, and not another company switching the car as agent for the first carrier, to collect such demurrage.

In this case it appeared that the plaintiff, at a particular point in Arkansas, switched cars to and from an industrial track for the St. Louis, Iron Mountain & Southern Railway Co. at a stipulated charge. The demurrage charges involved in the controversy covered cars ordered by defendants from the Iron Mountain for transportation of freight over that line, it issuing bills of lading after switching of the cars to an interchange track.

It was held that the mere fact that the Rock Island receipted to the Iron Mountain for cars received for switching for loading and return, and was charged 55c per day for each day cars should be held, did not entitle it to collect demurrage from shippers.

"There is nothing in the statute authorizing the transfer of the right to collect demurrage charges," said the supreme court. "This right under the statute is personal to the shipping carrier."

SECTION 288. UNDERCHARGES

It will be remembered that when the wife-dominated Mr. Bumble in "Oliver Twist" was informed that the law presumed that an offense committed by Mrs. Bumble in his presence was committed under his influence, rendering him legally responsible, he said: "If the law supposes that, . . . the law is a ass—a idiot."

At first blush the layman may feel inclined to an opinion that the same criticism applies to the now well-settled legal principle that every shipper is conclusively presumed to know what interstate freight rates have become effective through filing with the Interstate Commerce Commission.

But the justness of the presumption becomes manifest when it is seen that such a rule is necessary in order to promote the intention of Congress to prevent unjust discrimination between shippers, for to permit a shipper to plead ignorance as to the lawful rate on a particular shipment as a basis for enforcing a right to a low rate quoted through the carrier's agent's mistake would open the door to fraudulent practices.

So the South Carolina supreme court decided, in the case of Southern Railway Co. vs. Wilmont Oil Mills, 89 S.E. 476, that interstate freight schedules governing a particular shipment were legal, although not posted in the office from which the shipment was made, they having been duly filed with the Interstate Commerce Commission and in a division freight office, and notice having been posted in the shipping office that the schedules were on file in the division office.

Quoting an earlier decision, the court said: "No liability of a carrier can be predicated upon the misrepresentations or mistakes of its agents as to the rates. . . . Passengers and shippers are conclusively presumed to know them, as well as the agents of the carriers."

* *

The North Carolina supreme court has laid down the following legal propositions:

"A carrier cannot, directly or indirectly, contract for a rate different from that specified in its schedules. . . . A carrier may recover from a shipper, who has paid the legal rate, a refund made to the shipper by carrier's agent, either by mistake of carrier or through agent's illegal

act. . . . The carrier is bound to collect and the shipper to pay the published rates, even though the agent of the carrier has by his conduct caused the shipper to pay a lower rate to his prejudice in fixing the price of his goods, or in any other way. . . . Ignorance of a shipper as to correct rates will not excuse him, and he should not rely on representations of the carrier or his agent as to them." (100 S.E. 341.)

* *

An instructive court decision on the right of an interstate carrier of freight to recover undercharges appears in the case of Nashville, Chattanooga & St. Louis Railway Co. vs. Gilliam et al. (101 So. 889), decided by the Alabama supreme court.

The defendants had bought through a brokerage firm a carload of shorts at $69 per ton, delivered, f.o.b., Gadsden, Ala., terms "arrival draft." The car was shipped to Gadsden under a bill of lading, wherein the Nellis-Witter Grain & Milling Co. was named both as consignee and consignor, order "notify Gilliam & Jordan, at Gadsden, Ala.," and containing the usual provision that the owner or consignee shall pay the freight. This bill of lading, duly indorsed, was attached to a draft on defendants for the price, forwarded to a bank at Gadsden, where the defendants paid the amount thereof and received the bill of lading, which was surrendered to the railway company upon delivery of the shorts, defendants paying to the railroad company $80, the amount demanded as due freight.

Subsequently it was discovered that the railway company had incorrectly estimated the amount of freight due, and that there remained an undercharge of $237, plus war tax, and demanded of defendants the amount of this undercharge. Defendants refused to pay, stating they had merely paid the freight as a convenience to shipper, as they purchased the goods delivered in Gadsden, and referred the railway company to the shipper and broker, both being solvent. The railway company did call upon the shipper and broker, but without result, and it further appears that defendants, acting under the belief that the broker had paid this undercharge, had refunded the same to them.

Affirming judgment in favor of the railway company, the supreme court said, in part:

"This was an interstate shipment, and —'under the interstate commerce act, the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate, or whether it had posted the lawful rate as required by the statute: hence the carrier cannot, by any act, estop itself from demanding the lawful rate. . . . A carrier may recover the legal rate due it on an interstate shipment, although an agent may make a mistake as to the amount due under the legal rate, and through such mistake deliver the freight to the consignee upon the payment of a less sum than the legal rate. . . . The liability of a consignee for freight charges is not affected by the carrier's waiving or losing its lien on the goods by delivery without first collecting the freight.' . . .

"When the defendants paid the tariff and received the duly indorsed bill of lading, they became in law the consignee[s] and owner[s] of the goods shipped. They surrendered this bill of lading to the railroad company and accepted the shipment. The effect of the federal decision above cited is that, under these circumstances, the defendants became liable for the full amount of the lawful freight rate, and are not relieved from this liability by virtue of any understanding with the shipper or any conduct on the part of the railway which might otherwise, in the absence of the interstate commerce act, be invoked as an equitable estoppel."

* *

Where wheat milled in transit was reconsigned and the last consignee settled with the carrier and the party from whom he bought on the basis of freight charges having been paid, as represented by the carrier's agent, such consignee was not liable for an additional amount of freight charges on it appearing that the carrier's agent made a mistake. That was what was decided by the United States circuit of appeals, sixth circuit, in the case of Davis vs. Akron Feed & Milling Co., 296 Fed. 675. But the court carefully notes a material difference between the right to recover in a case of that kind and right to recover where a railway agent has, through mistake, erroneously quoted a rate.

From the court's statement of the case it appears that shipments of wheat originated at Kansas points and were milled in transit at Hutchinson. Reshipment was made to the order of Larabee Flour Mills, Kansas City, Kansas. A reconsignment was made to E.

P. Mueller, Chicago, and he reconsigned to the defendant at Akron, Ohio.

Defendant bought the goods at a stated price f.o.b. Akron, and settled for the same by deducting from that price the amount of freight charges paid to the delivering carrier on a representation that all other freight charges had been paid. It was not disputed that the full scheduled charges from Chicago to Akron were paid, but later it was discovered that the charges from Kansas City to Chicago had not been paid, and the director general of railroads sued to recover that sum. Affirming a judgment dismissing the suit, the court of appeals said:

"The law is well settled that representations or claims made by the carrier as to the correct amount of freight to be charged will not relieve a consignee from the payment of the scheduled rate, for the reason that the shipper or consignee has equal opportunity with a carrier to know the published rate, and he is conclusively presumed to have such knowledge. . . . It is apparent that any other construction would defeat the purpose of the act, requiring full and exact payment of the published scheduled tariff upon every shipment of freight, and would afford opportunity for collusion and fraud between the carrier and favored shippers, to the injury and prejudice of the public.

"The question here presented, in the absence of any claim or proof of fraud and collusion, must be determined upon wholly different considerations. The consignee in this case had no knowledge, nor had it equal means with the railway company of acquiring knowledge, that the freight from Kansas City to Chicago had not been paid. No circumstance whatever is suggested . . . that would put the consignee upon inquiry. The railway company knew, or ought to have known, that this freight was not paid, and when it expressly stated that it had been paid the consignee relied upon that representation, instead of refusing to accept the consignment until he had made full inquiry with reference to that fact, which inquiry would involve, not only delay, but expense, including demurrage. Nor had the consignee any more reliable source of information than the railway company itself.

"The consignee, at the time these representations were made to it, was in position to protect itself fully in the payment of all freight charges. It was wholly a matter of indifference to it whether these charges were $100 or $200. Whatever freight charges it was required to pay it could deduct from the purchase price of the merchandise. It is admitted that, if it is now compelled to pay this freight, it cannot recover the same from the consignor and must suffer the loss. If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published schedule rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected.

"Counsel has not directed our attention to any case in which this exact question has been presented to the Supreme Court, nor does it appear from the investigation we have been able to make that the Supreme Court has held a shipper or consignee of freight liable for the payment of the full published scheduled rate, regardless of misrepresentations by the railway company, upon any theory other than that the shipper and consignee are conclusively presumed to know the published scheduled rate, and therefore may not rely upon the representations made by the carrier. . . . While the question of legal liability is not free from doubt, the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence, and misrepresentations of the carrier."

In recent years there have been frequent adjudications to the effect that where an agent of a railway company makes a mistake in quoting or collecting a freight rate on an interstate shipment, thereby resulting in a charge of less than published rates, the company is nevertheless entitled to collect the full published rate.

A decision of the Alabama supreme court in the case of Western Railway of Alabama vs. Collins, 78 So. 833, follows this general rule, but adds an important qualification, by holding that, where goods are shipped to a seller's order for the sole purpose of securing payment of draft attached to the bill of lading and drawn on the buyer, and where the latter takes up the bill and the shipment, paying the rate actually charged, the shipper cannot be held liable for the excess of the lawful rate above the charges actually

made in the first instance and collected from the buyer. The court made these concise statements broadly covering the question of liability for freight charges:

"The liability of a consignee for freight charges is not affected by the carrier's waiving or losing its lien on the goods by delivery without first collecting the freight. . . .

"Under the interstate commerce act, the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate, or whether it had posted the lawful rate as required by the statute; hence the carrier cannot, by any act, estop itself from demanding the lawful rate.

And it was held that, in the first instance, the carrier under an interstate order bill of lading could hold either the shipper or the buyer, even on the latter becoming vested with ownership of the goods by taking up the bill of lading; but that where the carrier chooses to collect from the buyer, it must collect all from him. The charges specified in the bill of lading cannot be collected from him, and the excess necessary to make up the lawful rate be enforced against the shipper.

* *

Another case in point was presented to the Wisconsin supreme court. A consignee settled with a shipping seller on the strength of having received from the delivering railway company an expense bill stating that all freight charges had been paid. The statement was a mistake, and the railway company afterwards sued to recover the charges due. Upholding the right to recover, the supreme court said:

"It is manifest that the negligent presentation by plaintiff's [a railway company's] agent of an erroneous expense bill to defendant for the shipment in question could be made the means of avoiding the legal tariffs for its service as carrier if it should be held to be estopped from collecting the freight charges when demanded of defendant as consignee. The right to private contract between shipper and carrier is wholly abrogated by the interstate commerce act, and the rates fixed by law are enforcible by the carrier by force of law. Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation cannot be made the foundation of an estoppel to prevent the carrier from enforcing the legal rate against those liable therefor." (180 N. W. 846.)

See, also, section 290.

SECTION 289. WHO ARE LIABLE FOR CHARGES?

As noted in a decision of the Illinois supreme court, a shipper of freight is primarily liable to the railway company for proper freight charges incident to the transportation, although, as between the shipper and the consignee, the latter may have undertaken to make the payment, and although the railway company may have extended credit to the consignee. (121 N. E. 581.)

It is also held in the same case that, under the provisions of the interstate commerce act, the railway company cannot validly release a particular shipper from that liability, as that would involve an unjust discrimination against other shippers.

And, finally, it was decided that a shipper's primary liability, enforceable on the consignee's failure to pay, is not affected by the fact that the railway company may have neglected promptly to notify him that, by reason of the consignee's insolvency, accrued charges have not been paid.

The fact that the consignee of an interstate shipment accepted delivery and paid the charges demanded did not show such treatment by the carrying railway company of the consignee as owner of the goods as precludes that company from proceeding against the shipping seller to recover the excess of the lawful freight charge above the amount so collected from the consignee. This conclusion was reached by the New Hampshire supreme court in the case of New York, New Haven & Hartford Railroad vs. Tonella, 111 Atl. 341.

The decision in this case rested on the two important legal principles that a mistake in collecting less than regular interstate freight charges does not preclude recovery of the excess due, and that a shipper is liable to the carrier for freight charges, regardless of ownership of the goods in transit, in the absence of agreement to the contrary.

* *

"The consignee of freight on an 'order notify shipment,' who has paid the draft attached to the bill of lading and owns the goods shipped, cannot, by refusing to accept the goods, avoid the payment of freight and demurrage charges due to the carrier." In these few words the Georgia court of appeals disposed of a controversy between the Southern Flour

& Grain Co. and the Seaboard Air Line Railway, 95 S.E. 997.

* *

Prepayment of freight charges by a shipper does not exonerate the consignee from liability for the excess of the lawful charges above those prepaid, where the consignee accepts delivery. Acceptance of the shipment is all that is required to so connect the consignee with the transportation contract as to make him liable to the carrier for the full amount of the regular freight charges on an interstate shipment. (Wisconsin supreme court in Waters vs. Pfister & Vogel Leather Co., 186 N.W. 173.)

* *

One who has but brief and intermediate ownership of a shipment of grain or flour while it is in transit is not liable to the carrying railway company for freight charges, held the United States circuit court of appeals, eighth circuit, in the case of Bush vs. Wallingford Bros., 255 Fed. 949.

Plaintiff sued as receiver of the Missouri Pacific Railway Co. to recover the amount of an inadvertent undercharge on a shipment of grain from Green Mountain, Iowa, to Cedarvale, Kansas.

The Farmers' Elevator Co. at Green Mountain sold defendants a carload of corn, attaching draft to bill of lading, which was drawn to the company's order with instructions to notify defendants. The draft was paid while the car was in transit, and defendants, having, in turn, sold the car to a mercantile company at Cedarvale, attached the bill of lading to a draft drawn on that company. This draft was paid and the bill of lading surrendered on arrival and receipt of the corn.

Reversing a judgment in favor of the railway receiver, and holding that defendants were not liable for freight charges, the circuit court of appeals said:

"It is true, as claimed by defendants, that they were not nominal parties to the contract of shipment. However, plaintiff insists that they were the real owners of the corn at the time the corn was shipped and the shipment contract made, and also were such when the shipment was delivered; that the elevator company was their agent in making the contract of shipment, and the mercantile company in the receipt of the corn; that they are liable as undisclosed shippers, or as consignee taking delivery, or as owner of the shipment.

"In our judgment they were not undisclosed shippers (consignors), nor undisclosed consignees taking delivery, nor owners at the time either of the shipment or of the delivery. Their sole connection with the shipment was that they owned it for the brief period between the payment by them of the draft with bill of lading attached and the payment to them of a similar draft by the mercantile company. This ownership began and ended while the shipment was in transit. Only during that period had they any manner of control over the shipment. At any other time their wishes regarding the shipment could have been ignored by the railway, and they could have been treated by it as strangers to the shipment. Does such a brief ownership while the shipment is in transit give rise to any obligation to pay the charges after delivery?

"Such an obligation must be contractual. No express contract here involved carries such duty. There seems to be no reason for the law to raise such by implication. It is common knowledge that some commodities, particularly grain, are sold several times while in transit. It would be startling and upsetting to dealers in such commodities to ascertain that a fleeting, temporary ownership of the grain in transit had cast upon each such owner a liability, which endured long after such ownership, to the railway to pay the freight charges.

"There is no counterbalancing consideration in favor of the railway. It need not take the shipment until it has received the freight charge. It need not deliver until its charge is paid. If it chooses to rely upon credit, it is given that of the parties to the shipping contract, of the consignee to whom delivery is made, or of his assignee to whom delivery is made, and of the undisclosed principals (including owner) of any of the above. . . . Thus the carrier is given every reasonable means of securing the payment of its charges.

"It certainly is not necessary to extend the field for the protection of the carrier. To do so would interfere with the present orderly business methods worked out by practical business men and generally employed in a very large and important trade."

* *

When a railway company, in delivering goods to a commission merchant, is not informed that he is not the owner of the shipment, the company is entitled to assume that he is, since every consignee of freight is presumed to be the owner, in the absence of showing to the contrary.

Accordingly, the Alabama court of appeals decided that where goods were consigned to a commission merchant on an

understanding with the consignor, not known to the railway company, that the merchant would remit the proceeds of the goods, less his commission and freight charges, and the railroad company, through mistake, made an undercharge on the freight, it was entitled to recover from the commission merchant the balance due on the proper rate, although he had already made settlement with the shipper on the basis of the undercharge.

The court ruled that his failure to disclose to the railway company that he was a mere agent resulted in an implied promise on his part to pay the lawful freight charges. (Central of Georgia Railroad Co. vs. S. F. Cornelius & Co., 69 So. 331.)

* *

A commission merchant who has established a credit with a railway company for freight charges on shipments received by him cannot avoid liability for a proper charge so made against his account, on the ground that he merely acted as agent in receiving the shipment involved, and that he settled with the shipper before knowing of the charge. It was so held by the United States circuit court of appeals in the case of Louisville & Nashville Railroad Co. vs. Rice, 264 Fed. 427.

* *

An opinion as to liability for freight charges under the following stated circumstances was requested by a feed merchant:

A car was shipped by a mill to the order of A, who was to be notified, at a certain destination. The shipment was reconsigned by him in transit, to a point on another line not enjoying a through rate when consigned over the route given in the bill of lading. A heavy freight charge resulted. Who is responsible for it? The railroad company reconsigned the car without giving notice that there would be additional charges. Can A be held liable when he did not receive the car, and did not hold the bill of lading more than one hour?

It seems that, under well-established legal principles, A is liable to the carrier for the charge referred to if that was the established charge.

On shipments which proceed to their originally contemplated destination, the consignor is primarily liable for the freight charge (10 Corpus Juris, 445). The owner or an assignee of a bill of lading becomes liable to the carrier for unpaid transportation charges, on receiving the goods (447).

When A took up the original bill of lading he became owner of the feed, and he was owner of it when he reconsigned it to a new destination. In legal effect he became the consignor of a new shipment.

When A reconsigned the car he was legally presumed to have known what the established charge for the transportation service would be, and to have assented to it. He was not entitled to "notice that there would be additional charges."

True, he did not actually receive the car, and he may not have been in possession of the bill of lading for more than one hour. But it seems that he did own the feed when he reconsigned it, and that was all that was necessary to charge him with implied agreement to pay the transportation charges involved in the reconsignment if some one else should not pay them.

SECTION 290. NO LIABILITY FOR MISQUOTING RATE

Inasmuch as interstate freight rates are a matter of public record, and shippers are presumed to know what they are, one is not entitled to recover against a railway company for damages sustained through negligence of its agent in quoting the wrong rate on a shipment, or in showing the shipper the wrong rate sheet, according to the decision of the Kansas City Court of Appeals in the case of Sloop vs. Delano, 170 S.W. 385.

See, also, section 288, and the Minnesota supreme court's opinion in Duholm vs. Chicago, Milwaukee & St. Paul Railway Co., 177 N. W. 772, referred to in section 303, in connection with the court's holding that a carrier is liable for failing to issue a bill of lading of the kind ordered.

SECTION 291. OVERCHARGES

The Big Diamond Milling Co. won a suit before the Minnesota supreme court involving the right of shippers to recover freight overcharges on Minnesota intrastate shipments between May 31, 1907, and July 21, 1913. (171 N.W. 799.)

During this period maximum freight rates established by the state legislature in 1907 were suspended in their operation, pending a judicial determination as to their reasonableness and validity. The rates were sustained by the United States Supreme Court in June, 1913, and on the 24th day of that month the railway companies issued a statement to the public announcing readiness to "immediately entertain properly supported claims for the period during which the rates were enjoined, and to make prompt payment thereof," etc.

Sept. 10, 1917, the milling company

sued to recover overcharges made in 1907, 1908 and 1909, and the defendant railway company, the Chicago, Milwaukee & St. Paul, resisted liability on the ground that the claim was barred by the Minnesota six-year statute of limitations. The district court in St. Paul sustained this defense, but the supreme court reversed the decision, holding that the public statement above referred to constituted such new promise in writing to pay all valid claims as set the statute of limitations running anew from the date of the issuance of such statement.

The higher court applied the general rule of law that a new promise in writing made either before or after a debt is outlawed starts a new period of limitation within which suit may be brought. It was further held that the new promise need not specifically refer to the debt; it being sufficient that the promise identify the claim as one of a certain class.

SECTION 292. FALSE BILLING, ETC.

A section of the interstate commerce act makes it an offense for a shipper or consignee of an interstate shipment to obtain or attempt to obtain transportation at less than regular rates, by false billing, false classification, false representations of the contents of packages or of the character of the goods, or by false report of weight, the false statement being knowingly made.

This statute has been interpreted by the United States Supreme Court as reaching a case where a consignee makes misrepresentations after delivery of a shipment, but before adjustment of the freight charges. The court construes the law as regarding "not merely the physical transportation of the property, but the entire transaction through which the consignor or consignee might seek to evade the policy of the act to subject all interstate shipments to uniform rates of charge prescribed in published tariffs.

"In a case where, for any reason, the payment of the freight is not paid prior to the delivery of the goods to the consignee, but remains to be afterwards adjusted, the effort to obtain an advantage not permitted by the schedules may still be exerted through fraudulent representations influencing the adjustment of the freight, with precisely the same effect as if the representations had preceded the delivery of the goods." (United States of America vs. Union Mfg. Co., 36 Sup. Ct. 420.)

SECTION 293. WHEN ARE CHARGES EARNED?

When a railway company receives a shipment under a contract for through transportation to a point beyond its line, neither that company nor any connecting carrier can recover any part of the freight charges, unless the contract has been fully performed, although the claiming carrier may have safely carried the shipment to the end of its line.

This rule was applied by the United States district court for the eastern district of Pennsylvania in a case where freight was shipped from Augusta, Ga., to Liverpool, Eng., and was damaged by fire in transit to such an extent that the last carrier refused to receive it. The court qualified this rule, however, as applied to cases where the shipper voluntarily dispenses with further transportation by accepting the freight at an intermediate point.

* *

When freight is shipped for delivery to the consignee on his private switch track, the delivering railway company is not entitled to collect freight charges, nor do demurrage charges accrue, until the cars have been placed on that track, according to the holding of the Massachusetts supreme judicial court. Placing the cars on the railway company's public delivery tracks at the destination and notifying the consignee of their arrival is insufficient tender of delivery. (N. Y., N. H. & H. R. R. Co. vs. Porter, 108 N.E. 499.)

SECTION 294. RUNNING FREIGHT CHARGE ACCOUNTS

What the Tennessee supreme court said in Nashville, Chattanooga & St. Louis Railway vs. Tennessee Mill Co., 227 S.W. 443, applied specifically to an adjustment, between the railway company and the shipper, of mutual accounts for freight charges and overcharges. But much of it applies with equal force to adjustment of any other mutual accounts, particularly what is said about the outlawing of balances due under running accounts.

Plaintiff railway company sued to recover a balance claimed to be due as freight charges. Several of the items were defended against on the ground that they were not sued on within the six-year period allowed in Tennessee—in other words, that they were outlawed. As to the balance of the claim, an offset was pleaded to cover overcharges on various shipments.

The chancellor who tried the case gave judgment in favor of the railway company, and the defendant appealed. On this appeal the supreme court affirmed the chancellor's ruling that the defense under the statute of limitations was not good, but held that the chancellor erred

in holding that defendant could not offset overcharges.

The defendant, owner of a large flouring mill at Estill Springs, Tenn., on the line of complainant railway, received much grain and shipped large quantities of flour and meal. Defendant, in respect to his business with the railway company, was accorded the familiar milling-in-transit rates at that time permitted by the Interstate Commerce Commission. It was the custom of defendant to make monthly settlements with the railway company.

In the fall of 1908 the defendant procured an arrangement with the railway company whereby credit was to be extended to him on this basis. The defendant, being a large shipper, at all times had on file with the railway company many claims for overcharge on freight, and for loss and damage to shipments. Instead of settling the railway's claims against him monthly, he got the railway company to agree that it would carry these claims against him to the amount of $5,000 as long as his claims against the railway company ran between $5,000 and $10,000, and when defendant's claims against the railway exceeded $10,000 it agreed to extend to him a credit of 50 per cent of the amount of said claims.

The parties worked under this agreement for several years. Upon the bringing of this suit by the railway company, the defendant insisted that the contract between him and the railway was invalid as an unlawful concession or discrimination within the Elkins act, that it at no time prevented the railway from suing for its freight charges, and he accordingly pleaded the six-year statute of limitations. With the exception of a small item the amount of charges sued for by the railway accrued more than six years prior to this suit.

The supreme court said: "The chancellor held that the statute of limitations was not available to the defendant, and we think he was right. We are inclined to the opinion that the contract for the indefinite extension of credit to the defendant was unlawful under the acts of Congress referred to. Such a conclusion respecting a contract for credit, hardly so objectionable in its terms, was reached by the circuit court of appeals for this circuit in Hocking Valley Ry. Co. vs. U. S., 210 Fed. 735, 127 C.C.A. 285. In that case Judge Denison carefully distinguished the cases which the complainant here relies on to support the validity of this contract.

"Notwithstanding the contract, in our opinion, was invalid, and did not prevent the complainant at any time from suing for its freight charges, it does not follow that the statute of limitations is now available to the defendant.

"The illegality of the agreement for delay between the parties in no way affected the mutuality of their accounts. The credit extended by the railway company was based on the claims filed against it by the complainant. This credit was to be indefinitely enjoyed as long as claims were on file in the stipulated proportion, and really amounted to an agreement to offset mutual claims as far as it went.

"In the ordinary case of mutual demands, either party may sue at any time, subject to the set-off of the other party. The circumstance that the agreement between the railway and the defendant did not prevent the railway from suing is, therefore, of no weight in determining whether the accounts of the parties were mutual.

"Having concluded that these accounts were mutual, according to the course of dealing between the complainant and defendant, it follows that the statute of limitations began to run from the date of the last item in such accounts. . . . The last items of both accounts were within six years of the bringing of this suit.

"Aside from the section of the code quoted, we think that an equitable estoppel may be invoked here to prevent a plea of set-off by the defendant. . . .

"This contract for an extension of credit was obtained at the solicitation of the defendant. The defendant accepted the benefit of the contract, pleading for its continuation from time to time when the complainant threatened to collect its charges, and at one time, within the statute, defendant virtually made his promise to settle if he was granted some further extension. Having procured this contract for his own benefit and all the while enjoyed such benefit, the defendant should not now be heard to insist that the contract is invalid and base a plea of the statute of limitations on such a ground. . . .

"Furthermore, by his cross bill herein the defendant is asserting many claims barred by the statute of limitations. It has been held that, if a defendant gives in evidence stale demands on his part and insists upon their being allowed, he shall not at the same time set up the statute of limitations against similar demands on the part of the plaintiff. . . . For the reasons stated, we agree with the

chancellor that defendant is not entitled to rely on the statute of limitations herein.

"The chancellor, however, held that defendant was not entitled to offset his claims against the railway company, as we have previously noted, and in this we think his honor was in error."

The supreme court then proceeded to discuss two lines of judicial decisions—one taking the view that public policy forbids permitting a shipper to file counterclaims in such suits, since that practice might be made a cover for allowance of illegal rebates; and another line of decisions taking the view that claims between carrier and shipper should be subject to the general rule that all germane disputes should be settled in one suit. The Tennessee court found the second line of authorities sounder in reasoning, and therefore followed that trend.

SECTION 295. CARRIER'S LIEN

Although the carrier's lien covers all proper transportation and storage charges, including charges paid by a delivering carrier to prior connecting lines, there is no right to a lien for any balance due from the shipper or consignee on account of independent shipments, in the absence of express agreement or general usage of trade giving that right.

The lien is lost by the carrier surrendering possession to the consignee without payment of the lienable charges, but it seems that delivery of part of a carload shipment would not estop the carrier to claim a lien against the remaining portion still in its possession.

When the consignee of a shipment of a nonperishable character refuses to pay a freight bill because of a mistake in the rate charged, and a corrected bill is presented by the carrier, two days is not a reasonable time for the carrier to wait before selling the shipment to cover the charge due.

CHAPTER XXX

MILLING-IN-TRANSIT PRIVILEGES

SECTION 296. NATURE OF PRIVILEGE

IN a suit to recover against a railway company on a contract by it to make certain refunds to plaintiff shipper on account of corn ground into meal in transit (Priebe vs. Southern Railway Co., 66 So. 573, the Alabama supreme court said:

"Shippers are not entitled, as matter of right, to mill grain in transit, and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; on the contrary, milling in transit is a special privilege allowed at designated points, and for which extra compensation is usually exacted by carriers under the control and direction, in the case of interstate shipments, of the Interstate Commerce Commission."

* *

"The first transit privilege in the United States was inaugurated by the Nashville & Chattanooga Railroad about 1870 at Nashville, Tenn., to meet the competition of boats plying on the Cumberland River. . . . Since that time the growth of privileges of this character has been very extensive. Such privileges are of benefit to the carriers, dealers, and the public, and this is particularly true of corn, the article composing the shipment here involved. . . . And it is a fact that the commercial operations of the country have in many instances grown up upon the exercise of transit privileges where same could not have been developed in any other way." (Oklahoma supreme court, Wm. Bondies & Co. vs. St. Louis & San Francisco Railroad Co., 166 Pac. 179.)

SECTION 297. STATE POWER TO FIX MILLING-IN-TRANSIT POINTS

That a state railroad commission has power to order railway companies to establish a through route for the transportation of grain to be milled in transit, subject to milling-in-transit charge at a given point, to avoid unjust discrimination against that point in favor of other milling points, was affirmed by the Washington supreme court in the case of State vs. Public Service Commission of Washington, 166 Pac. 793.

Upon complaint made by Taylor & Kemp, millers at Prosser, Wash., the commission made an order requiring the Northern Pacific Railway Co. and the Oregon-Washington Railroad & Navigation Co. to establish a joint through rate from eastern Washington points on their lines, with milling-in-transit privilege at Prosser. Proceedings were then brought by the carriers for review of the order, and the supreme court approved findings of the superior court that the order was valid.

It was objected by the railway companies that only Taylor & Kemp had asked for the order and that, therefore, there was no showing of public necessity for it, but the supreme court found that a question of public necessity is not necessarily to be determined by the number of persons asserting it.

It was also urged on the part of the carriers that "milling-in-transit privileges cannot be claimed by shippers as a matter of right, and that they are no more than privileges granted at the option of the carrier." But the court refused to unqualifiedly assent to this view of the law, holding that states have the same power to regulate milling-in-transit privileges as to intrastate shipments that the Interstate Commerce Commission possesses as to interstate freight. Reference was made to the following language of the federal commission:

"Shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination (Diamond Mills Co. vs. B. & M. R. R., 9 I. C. C. 311), but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line. . . . This Commission cannot, as tariffs are now constructed and as railroad business is now conducted, properly supervise and regulate the interstate rates and

practices of this country without authority over transit."

Answering a further suggestion made by the railroad companies that the Washington commissioner's order involved in this case was unconstitutional as an abuse of the state police power and as an invasion of the companies' property right for the benefit of a small group of shippers, the court found that the order did not discriminate in favor of the complaining millers, but simply gave them the same privileges they previously enjoyed and the same privileges enjoyed by mills at a near-by point.

Incidentally, the opinion declared that the commission, in passing upon proceedings before it, is not, like a court, bound to consider only such facts as are specially put in evidence, but may act on general information acquired by the commission in discharging its duties.

* *

A later opinion of the same court in the case of State vs. Public Service Commission, 192 Pac. 1075, presents a comprehensive view of the law as to the validity of traffic rules which operate to give one milling center more favorable milling-in-transit privileges than another.

The nub of the decision, which follows numerous cited conclusions by other tribunals, is that it is not the province of a public service commission to equalize economic conditions between different industrial centers nor to prevent advantages in favor of given points which do not rest upon unreasonableness or unjustness.

The Sperry Flour Co., operating a mill at Tacoma, applied to the public service commission of Washington to compel the Great Northern Railway to extend to the milling company at Tacoma the transit privileges in effect in Seattle, on wheat shipped from Great Northern points in eastern Washington and milled for ultimate delivery on the same road at points north and east of Seattle. The privileges were limited to milling in transit at Seattle and Everett, so far as concerns the Great Northern lines in western Washington. Among other facts bearing on the case, the opinion refers to the circumstance that extending the privilege to Tacoma would involve a materially greater back haul than applies to shipments milled in transit at Seattle.

The public service commission, and, on appeal, the superior court, decided in favor of complainant, but, on further appeal, the supreme court reversed the order, holding that no unreasonable discrimination was established. The salient parts of the opinion of the supreme court are as follows:

"The statutes forbid those discriminations and preferences which give an undue and unreasonable preference or advantage to traffic under the same or substantially similar circumstances and conditions. The prohibitions of the state law are identical with those of the federal act. It must be borne in mind throughout this discussion that back-haul privileges are not extended by carriers unless some peculiar condition requires it, and that, in order to furnish back-haul privileges to the complainant, it would be necessary for the shipments of wheat to pass through the Seattle terminal twice.

"The federal act has been under consideration by the Supreme Court of the United States and by the Interstate Commerce Commission many times. Those considerations have resulted in the establishment of the principle that preferences or advantages may be granted that are not undue or unjust or unreasonable. In Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, the Supreme Court said:

" 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' . . .

"Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, holds:

" 'The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. . . . It is not all discriminations or preferences that fall within the inhibition of

the statute; only such as are unjust or unreasonable.' . . .

" 'It is not within the power of this Commission to equalize economic conditions, or to place one market in a position to compete on equal terms with another market as against natural advantages. . . .' Royal Milling Co. vs. G. N. Ry. Co., 52 Interstate Commerce Commission Reports, 151.

" 'It is well settled that it is not the province of the Commission to make adjustments which will offset the natural advantages or disadvantages of one locality as compared with another.' Harrisonburg Milling Co. vs. A. A. R. Co., 52 Interstate Commerce Commission Reports, 63.

" 'An arrangement of the kind here sought would undoubtedly be of considerable value to complainants, but upon this record we cannot find that the refusal of defendants to provide therefore is unreasonable, unjustly discriminatory, or unduly prejudicial and, consequently, there is no justification for our requiring its establishment. The complaint in this case must therefore be dismissed.' Grain & Hay Exchange vs. Pennsylvania Co., 32 Interstate Commerce Commission Reports, 409.

" 'When rates are attacked as unduly prejudicial and an equalization of rates is requested, it should be shown that the transportation conditions existing in the localities under comparison are substantially similar. In the absence of such proof a finding of discrimination cannot be predicated solely on a disparity in rates. . . .' Chamber of Commerce of Houston vs. International & G. N. Ry. Co., 32 Interstate Commerce Commission Reports, 247.

"The complainant places a great reliance upon the decision of this court in the case of State ex rel. Northern Pacific R. Co. vs. Public Service Commission, 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793. That case determined that the commission had a right to hear a complaint such as is presented in this case, but does not sustain the result arrived at by the commission in this case. The Prosser Case involved the milling-in-transit privileges, but no question of back haul was involved. The court held that Prosser, being an intermediate point, was entitled to the same milling-in-transit privileges as was North Yakima, a point beyond Prosser, and that both Prosser and North Yakima were similarly situated. The fact that it was a milling-in-transit case has nothing to do with the decision of that case. Prosser, on account of its location between the point of origin and the point of discharge of the shipment, and being similarly situated as was Yakima, was entitled to the same rights. In the case before us Tacoma is not an intermediate point, and is only entitled, if at all, to the extension of the milling-in-transit tariff as a privilege and not as a right, on the ground that it would be unjust and unfair not to accord it to Tacoma when it has been granted to Seattle. Nor are the Seattle mills entitled to the tariff as a matter of right, and it might be that the privilege would be withdrawn on the complaint of some one adversely affected; but that matter is not before us, and the fact that the privilege has been extended to Seattle does not authorize its compulsory extension to other localities as matters of right, where such other localities are not similarly situated, or where the extension would be unfair or unjust to the railway company, but only where the refusal of such extension would be unfair or unjust to the unfavored locality. . . .

"As a matter of fact, the instant case is quite the contrary to the Prosser Case. In the Prosser Case an intermediate point was seeking the same privileges which had been granted to a point further along the line. In the instant case, Seattle is the intermediate point, and Tacoma, the point further along the line, is asserting it must have the same privileges as the intermediate point has, although it involves an additional haul of 44 miles to Tacoma and 44 miles back to Seattle. The refusal of this privilege cannot be said to be unjust or unfair. If the privilege had been granted by the railroad company to the mill at Tacoma and the privilege was being attacked by some shipper along the line, the court might hold it was not unjust and unfair to the other shipper; the railroad having granted it. But here the complainant is seeking to compel the railroad company to grant the privilege, which will not be done unless the privilege already granted to Seattle results in unfair, unjust, and unreasonable discrimination.

"The court recognizes that the prohibition is against discrimination where conditions are like or similar, and that facts in this case show that conditions are not like or similar, and that to compel the railroad company to furnish free transportation on a great many cars annually from Tacoma to Everett would entail a haul of 150 miles on each car taken to Tacoma, the contents of which would be milled and shipped back to points north of Everett. This unequal length in haul

is a natural disadvantage, so far as Tacoma is concerned, with reference to the Great Northern Railway Co., and under the Tacoma rate case the company is not compelled to eliminate all consideration of that natural disadvantage. . . .

"The complainant further contends that this back haul from Tacoma is not unreasonable, for the reason that the appellant voluntarily created a back haul of the same distance on wheat shipped from Montana. In the first place, the complainant is not in position to complain of this discrimination as being unfair; for the discrimination, if any, is against the eastern Washington shippers, who are not before the court, and, in the second, it may be that, on account of extra compensation received by the railroad company by virtue of the longer haul, it was fair to grant a privilege which it would not be compelled to grant on a shorter haul for which it receives less compensation. . . .

"Upon the whole record we are not satisfied that the complainant has established that the preference given to Seattle millers is an unreasonable one, or the discrimination unjust. Therefore the tariff is not unlawful, and the order of the public service commission will be vacated, and the judgment of the superior court reversed."

* *

The Louisiana supreme court denied an application by the Empire Rice Milling Co. and other New Orleans rice millers and merchants to set aside an order of the railroad commission of Louisiana, establishing increased intrastate tariffs on dressed and undressed rice, and ordering all railroads in the state to establish milling-in-transit privileges. As noted by the court, the contest appeared to be between the rice millers and merchants of New Orleans and rice producers and millers outside that city benefited by extension of the milling-in-transit privilege; the railroads not being parties to the proceedings. (79 So. 833.)

The contention made by the plaintiffs and the reasons assigned by the court for overruling that contention appear in the following excerpts from the supreme court's opinion:

"The rice mills of New Orleans, simply as millers of rice, and not as owners and shippers, would not be interested in the freight rates; but they, together with the other plaintiffs, allege that they are buyers and sellers of rice, and, as owners and shippers, they are required to pay the increased freight rates on rough rice; and they are therefore injured by the adoption of the milling-in-transit rule, and the increase in the tariff.

"Order 2116 [the order objected to] is really in two parts, with the two depending upon one another. It orders the railroads to grant the privilege of milling rice in transit; and it increases the tariffs on rice, because of the increased burden of milling in transit placed on the railroads. That is just, and not unjust. It is fair, and not discriminatory. . . .

"The nature and character of the order of the commission was to obtain from the railroads the greatest good for the public, or that portion of the public composed of rice growers and rice millers who are near the rice fields. That was within the power delegated to it. . . . And, in considering and determining the matter, the commission has not interfered with any legal right of plaintiffs.

"Milling in transit has long been a privilege accorded the producers of agricultural products in this and in other states. It has long been established by railroads and by railroad commissions. The privilege is given to shippers of corn and other cereals, and it has been stated that the lumber industry in this state could not exist without it. So, in ordering that rice be milled in transit it would seem that the commission did not act arbitrarily, or in an unreasonable way.

"The rice milling privilege as established by the commission is general in its terms and application. It may be availed of by every one shipping rough rice. It may be availed of by the plaintiff in this case, if, instead of shipping rough rice to the mills in New Orleans, they would ship to the nearer mills from places where they buy rice, and have it milled there. But plaintiffs, apparently, prefer to do their own milling. That is, of course, their privilege, which order 2116 does not take away from them.

"It is doubtless of great advantage to establish rice mills in New Orleans, which city is the primary rice market of the country; and these advantages must be taken together with the disadvantages of being far removed from the rice fields, or points where plaintiffs buy rough rice. It is also their privilege to have their rice milled nearer to points of production, and receive the benefits of milling in transit. . . .

"The presumption is that the commission has acted with justice to all parties concerned in adopting order 2116; and the courts will not undertake to interfere

with the commission, in the absence of clear evidence that the plaintiffs' legal rights have been invaded, or that the rates fixed are unreasonable, unjust, discriminatory, or extortionate. The evidence offered by the plaintiffs has no such tendency."

SECTION 298. EFFECT OF TARIFF REGULATIONS

When the language of a milling-in-transit tariff plainly excludes a given station as one of the destinations to which the through rate shall apply, a shipper can base no right to a refund on an erroneous interpretation given by the railroad company in question to another tariff containing identical terms. So decided the supreme court of Alabama in the case of Priebe vs. Southern Railway Co., 75 So. 409.

Plaintiff sued to recover refunds claimed to be due him by virtue of a tariff permitting shipments of wheat or corn from or through Louisville or Cincinnati to Jenifer, Ala., for milling and reshipment to stations within prescribed limits, not embracing Talladega, the destination on which plaintiff's claim was based. Deciding the case against plaintiff, the supreme court said:

"Talladega is shown not to be within the termini of the lines defined by terminals, and not to be on any of the branches mentioned in the tariff. Our conclusion therefore accords with the construction given the tariff by the court below.

"If, as the appellant contends, a different interpretation and administration was given by the defendant to another tariff containing identical terms for defining or prescribing the points on, or sectors of, lines of this railway whereto the reshipments might be made under the milling-in-transit privilege from Jenifer, that fact, while quite strange, cannot justify another construction of the tariff here under consideration. . . . What the tariff says must control. The court is not at liberty to exercise its judgment, even though an apparent invidious discrimination with respect to this privilege is brought to its attention."

* *

A shipper of grain under milling-in-transit privileges is not entitled to recover against the carrier on account of unused transit credits where there has not been compliance with the tariff regulations under which the privileges were granted, according to the holding of the Nebraska supreme court in the case of Fremont Milling Co. vs. Chicago & North Western Railway Co., 163 N.W. 331.

The mill billed various carload lots of grain over the railroad's lines, with milling-in-transit privileges at Fremont, Neb., paying the through charges. Through failure to forward all the grain from Fremont, the mill had unused transit credits, to recover on account of which the suit was brought. The claim was based on the excess of freight charges paid on the unforwarded grain above local rates from the points of origin to Fremont.

It appearing that the mill had failed to tender all the mill products within the times fixed by the tariff regulations involved, only part of each car being forwarded, the supreme court decided that the mill could not recover, saying:

"The transit credit in the case cannot be treated as if it represented a single shipment of grain to Fremont. Being made up of parts of carload shipments to Fremont, the remaining portion of which was forwarded to points of destination, it must be treated as a part of shipments made with milling-in-transit privileges, under the published tariff rates, rules and regulations for interstate shipments, and, the same not having been complied with, the plaintiff is not entitled to any relief in courts of law."

The court pointed out that this holding was compelled in order that opportunity may not be afforded for discriminatory rebating. For this reason, the law requires every shipper to know just what the tariff rates, rules and regulations are, and forbids an allowance to a shipper not authorized by such tariffs.

* *

In the case of McCullough Grain Co. vs. Missouri Pacific Railway Co., 160 Pac. 214, it was decided that plaintiff could not recover on account of loss of a milling-in-transit privilege, due to misrouting of a shipment of wheat by the carrier, where there was no notation on the shipping documents, "for milling or malting purposes," as required by the published tariffs.

See, also, sections 268, 325.

CHAPTER XXXI

BILLS OF LADING*

SECTION 299. INTERPRETATION

IF a bill of lading be regarded as ambiguous in its provisions it must be interpreted most liberally in favor of the shipper or consignee, according to a decision of the Illinois supreme court in Mark Owen & Co. vs. Michigan Central Railroad Co., 125 N. E. 767, affirmed by United States Supreme Court, 41 Sup. Ct. 554.

SECTION 300. AS EVIDENCE OF OWNERSHIP OF GOODS

That the same person is named in a bill of lading as both consignor and consignee creates a mere presumption of ownership of the goods by such person; the presumption may be rebutted by evidence showing actual ownership in some other person. It was so decided by the United States circuit court of appeals, sixth circuit, in Barbarin & Beach vs. Pere Marquette Railroad Co., 249 Fed. 303.

The fact that one holds a bill of lading is presumptive evidence of his ownership of grain covered by it, making him the proper party to sue for loss of or injury to the shipment, occurring while he held the bill of lading, but this presumption may be overcome by proof that another person was the actual owner of the goods, and hence the proper person to sue. (Farmers' Grain Co. vs. Illinois Central Railroad Co., 201 Ill. App. 261.)

SECTION 301. VALIDITY

See, also, section 304.

In the case of Commercial National Bank vs. Seaboard Air Line Railway, 95 S.E. 777, the bank sued to recover on account of shipping documents bought by it on the faith of apparent shipments made by the Raleigh Grain & Milling Co; it being claimed that the defendant's agents issued bills of lading without receiving goods for shipment, and that the milling company was insolvent.

The suit was decided by the North Carolina supreme court in favor of the railway company, that court adhering to the rule that a carrier is not bound by the act of its agent in issuing a bill of lading without actual receipt of goods, because a bill of lading is not negotiable in the broad sense in which notes are negotiable, because a bill of lading is a mere receipt susceptible to explanation or contradiction, the same as any other receipt, and because persons dealing in bills of lading are fairly chargeable with notice of the fact, generally known in the commercial world, that the employees of a railway company are not empowered to issue such documents for goods not actually received.

* *

Legal aspects of bills of lading were considered by the Nebraska supreme court in the case of Omaha Elevator Co. vs. Chicago, Burlington & Quincy Railroad Co., 178 N.W. 211. The case involved a conflict of rights arising from the fact that after defendant railway company had delivered a shipment of corn without surrender of the bill of lading, it was induced to issue a new bill of lading on later surrender of the original document; the fact that delivery had been made being overlooked.

"A bill of lading is a carrier's receipt for property and a contract to carry and deliver it," declared the supreme court. "It is not the consigned property, nor the title thereto, nor a negotiable instrument. It is evidence of ownership in the hands of the holder, but does not preclude inquiry into the circumstances under which it is transferred or surrendered. Without the receipt or possession of property to transport, or to divert beyond the original destination, there can be no valid bill of lading.

"The liability of a carrier for the transportation and delivery of property does not attach until it receives the property. . . . It follows that, after a carrier has transported property and permanently lost possession and control of it by delivery under the original bill of lading, a subsequent bill of lading, issued by the same carrier for the purpose of diverting the original consignment to a different

*Specific provisions of bills of lading are elsewhere discussed under appropriate headings.

destination, is void. 'The receipt of the goods,' said the Supreme Court of the United States, 'lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.'"

SECTION 301A. MISRECITAL OF QUANTITY SHIPPED

A mill buying grain had no valid claim against a railway company for falsely certifying the quantity contained in a shipment, nor for neglecting to notify the mill of a shortage in the quantity on discovering the same, holds the Texas court of civil appeals in the case of Paris Milling Co. vs. Houston & Texas Central Railroad Co., 240 S. W. 638. The decision, however, rests on a finding that the mill understood that the carrier relied on the shipper's report of weight and that the mill omitted to avail itself of the privilege of withholding payment until the weight had been verified at the destination.

The Thomas Grain, Mill & Elevator Co., Waxahachie, Texas, sold the plaintiff, a milling company at Paris, Texas, a car of corn at destination weights and grades. The elevator company shipped a car to its own order, notify the buyer. Although the car had not been weighed, the quantity stated in the bill of lading was 85,000 lbs. The railway agent at the shipping point signed the bill of lading, without verifying this quantity as stated by the shipping seller's agents, but before the car was put in transit the railway agent did weigh the car, discovering a shortage of 26,000 lbs. He did not attempt to notify any of the interested parties. On issue of the bill of lading the seller had in the meantime drawn on plaintiff for the price on the basis of delivery of 85,000 lbs. The draft was made payable on demand, and was paid and the attached bill of lading taken up, two days before the car arrived. When plaintiff discovered the shortage, suit was brought against the railway company to recover its value.

Reversing judgment in favor of the mill, the court of civil appeals holds that any liability of the railway company must depend, not upon any breach of contract, but upon the false statement of the quantity of corn it undertook to transport. It is also noted that "in a controversy between the carrier and the shipper, or one who has purchased the goods before shipment, the quantity stated in the bill of lading would be subject to correction. That would be the rule, even though the carrier's agents had done the weighing and the billing."

Responding to the mill's contention that the carrier should be estopped to deny that it had received the quantity of corn stated in the bill of lading, because that statement had induced the purchaser to pay more than it would have paid for the car, the court adds:

"While the courts have differed about holding a carrier liable upon its bill of lading issued by its agents when no goods had been received for transportation, the weight of authority is against such liability. . . . The immunity accorded is justified upon the ground that the agent of the carrier has no authority to issue a bill of lading for goods not received for carriage, and therefore even an innocent purchaser cannot in such cases invoke the rule of estoppel. But in this instance the carrier's agent received the goods for shipment, and did have authority to issue a bill of lading therefor. He also had the right, and it was his duty, when he undertook to do so, to correctly state the quantity of goods received, subject to such qualifications as were proper to protect the carrier against the varying standards of measure and weight. Hence, the basis of the rule in the cases above referred to being absent, the rule itself should not be applied in controversies of this character."

Turning, then, to the question whether the circumstances of the case showed that the railway company had misled the mill to the latter's prejudice, the court declares, in substance, that if, as the evidence tended to show, the mill's manager paid the draft, knowing or having good reason to suppose that the bill of lading had been prepared by the seller and that the railway agent would sign it without verifying the weights, the reliance must be deemed to be on the accuracy of the seller's representation, rather than that of the carrier. And the opinion says:

"It should also be borne in mind that, by the terms of the written contract previously quoted, weights at destination . . . were to control in the payment of the purchase price. Although the draft was payable on demand and was presented for payment two days before the arrival of the corn, the contract of purchase gave the appellee [the mill] the right to delay payment till the weights at the destination were ascertained. Payment prior to that time and without reweighing the car was purely voluntary, and cannot in fairness be made the basis of an estoppel. . . .

"The finding of the jury that the ap-

pellant [the railway company] failed to exercise proper diligence to notify the appellee after the shortage was ascertained on the following day is urged as an additional reason for the estoppel. That failure is of no importance, if there was no culpable deception in the issuance of the bill of lading. The fact that the carrier later discovered the mistake did not relieve the appellee from the legal consequences of the notice it had of the conditions under which the bill of lading was probably issued, and of the failure to exercise its rights as purchaser to verify the weights at destination before payment of the price. With a contract allowing a verification of weights, as well as quality, before payment, the appellee cannot hold the carrier liable for the consequences of an injury which might have been evaded by requiring the seller to abide by the terms of its agreement."

SECTION 302. DUTY TO ASCERTAIN GENUINENESS

A railway company in delivering a shipment on surrender of a bill of lading must ascertain at its peril that the document is genuine, so far as concerns the right of the shipper to recover against the carrier, on it appearing that the bill of lading surrendered was a false one.

This point was incidentally declared by the Tennessee supreme court in the case of Louisville & Nashville Railroad Co. vs. McKay & Morgan, 182 S.W. 585, in which case plaintiff was upheld in its right to recover from defendants the value of a carload shipment which it delivered to defendants under such a bill of lading, thereby being compelled to afterwards indemnify the shipper.

It was not claimed that defendants were parties to the fabrication of the false bill of lading, and it appears that they acted innocently and as agents for the guilty parties in presenting it, but the court decided that the plaintiff carrier was entitled to recover under either or both of the legal principles that, where one of two innocent persons must suffer loss, he by whose act the loss was occasioned must bear it, and that one who deals with a carrier or other party ostensibly on his own account is personally liable, although in fact he may have been acting as agent for an undisclosed principal.

* *

Provision in an order bill of lading to "notify" does not mean that the shipment may be delivered without the order of the lawful holder of the bill of lading; and an actual indorsement by the consignee of a forged bill of lading affords the carrier no more protection than would be given by a delivery directly to the consignee without production of the original bill.

It was so decided by the United States circuit court of appeals, sixth circuit, in Barbarin & Beach vs. Pere Marquette Railroad Co., 249 Fed. 303.

* *

One who makes advances upon grain bills of lading, in the face of information putting him on inquiry as to whether or not the documents are genuine and represent grain actually received by the carrier issuing the bills of lading, can have no valid cause of action against the carrier on account of the fact that the documents were fraudulently issued without receipt of grain, according to the holding of the appellate division of the New York supreme court in the case of Knight vs. Delaware & Hudson Co., 165 N. Y. Supp. 583. In other words, it was held that, before there can be recovery in such a case, it must appear that the plaintiff made his advances in good faith and in innocent reliance upon the bills of lading.

But the court decided that a railway company cannot avoid liability to the holder of a bill of lading for diverting an actual shipment to his loss, on the ground that earlier shipments under other bills of lading on which plaintiff had made advances had been diverted under similar circumstances. The opinion said on this point:

"The most that can be said is that there were certain circumstances relating to earlier transactions which should have aroused plaintiffs' suspicions, and that as prudent men they should have refrained from dealing with bills of lading issued by defendant to Durant & Elmore, from whom plaintiffs received them. To uphold this defense would be equivalent to permitting a tort-feasor [wrongdoer] to escape the consequences of his wrongdoing by pleading that his reputation was so bad that no one was justified in relying upon his representations. This is not the law."

SECTION 303. CARRIER'S LIABILITY FOR ISSUING WRONG KIND

A shipper may not rely upon a railway company's freight agent's statement as to what rate applies on transportation between certain interstate points, but if the agent, through mistake or fraud, delivers the wrong kind of bill of lading, the shipper may be entitled to recover consequential damages. This is the gist of the decision handed down by the Min-

nesota supreme court in the case of Duholm vs. Chicago, Milwaukee & St. Paul Railway Co., 177 N.W. 772.

Plaintiff, desiring to retain control over a shipment to Montana, to secure payment of the price by the buyer to whom the goods were to be delivered, was assured by defendant's agent at the shipping point that the bill of lading issued was an order bill of lading, wherein in fact it was a straight bill of lading running direct to the buyer. This document was attached to draft drawn on the buyer, but the draft was rejected and the shipment taken up by the consignee without surrendering the bill of lading. Attempts to collect from the consignee proving fruitless, plaintiff sued defendant railway company, and the supreme court upheld the right to recover.

The court noted that it is well-established law that as to interstate shipments "there is no such thing as actionable misrepresentation as to rates, for every person is bound to know the lawful rate, and since the amount of liability for loss of goods transported depends upon the rate, the liability incident to a particular rate attaches automatically to the contract."

But it was held that the same reasoning does not apply to defeat a railway company's liability for deception as to the character of a shipping document delivered, regardless of whether the deception was willful or not. And it was decided that the mere fact that the shipper may have opportunity to discover the falsity of the agent's representation by examining the paper for himself does not necessarily preclude recovery by the shipper.

* *

In the suit of Brunswig vs. Bush, 221 S.W. 760, the Kansas City court of appeals affirmed judgment against defendant, receiver of a railway company, for damages for nonfulfillment of a contract to transport corn through from St. Joseph, Mo., to points in Mexico, without change of cars. The substance of the decision was as follows:

Where a railway company's authorized representative makes a valid freight transportation contract, but, through mistake, draws a bill of lading not conforming to the mutual understanding, the shipper is entitled to have the written agreement judicially reformed to state the true contract.

So, where it was understood that shipments were to be through to Mexican points, mistake of the initial carrier's agent in naming a border point as the destination, for export to the Mexican points, may be corrected by a court in a suit for damages for breach of the true agreement. Whenever any contract, as written, fails to state the true agreement, whether through fraud of one of the parties, mistake of the person drawing up the instrument, or mutual mistake of the parties, a court will so reform the agreement as to make it read as it should.

Overruling defendant's contention that the contract was void as being discriminatory, the court of appeals said:

"We cannot see any element of favor or preference for plaintiff that could not be obtained for any other shipper wanting like service. There is no suggestion that any other person could not have had an agreement with defendant for a through shipment into Mexico without unloading the corn from the car in which it was loaded and accepted by defendant at the original point of shipment.

"But, as just stated, if it should be conceded that the contract was discriminatory, it would not avail defendant as a defense, unless such discrimination was unjust."

SECTION 304. RIGHTS OF INNOCENT HOLDERS

"A carrier, by delivering goods to the consignee without the production of the bill of lading, is liable to a bona fide holder of the bill for value—whether by way of purchase or as security for advances—before delivery of the goods at the destination." (United States circuit court of appeals, sixth circuit, in Barbarin & Beach vs. Pere Marquette Railroad Co., 249 Fed. 303.)

* *

Where grain was shipped to the shipper's order, and the bill of lading was transferred in usual course of business to an innocent purchaser, the Kansas supreme court held that he was entitled to recover damages for delay in delivery and loss of grain in transit, arising from the facts that the grain was not shipped at the time or from the point indicated by the bill of lading, and that the car was in bad order. (Harold vs. Atchison, Topeka & Santa Fe Railway Co., 144 Pac. 823.) But this decision was reversed by the United States Supreme Court, as applied to interstate commerce (36 Sup. Ct. 665).

* *

If a grain dealer procures a bill of lading which calls for more wheat than is actually shipped, and then negotiates the same to an innocent purchaser, he renders himself jointly liable with the

railway company for the loss sustained by the buyer in consequence of the shortage of the shipment, and may be compelled to indemnify the railway company on account of its liability. (E. G. Rall Grain Co. vs. Missouri Pacific Railway Co., 146 Pac. 1180.)

See, also, section 301, and Chapters XXXV and XXXVIII.

SECTION 305. BONDS FOR SURRENDER

A grain company shipped several cars of grain to its own order at Little Rock, Ark., with directions to notify a milling company, but afterwards notified the delivering railway company that the shipments were intended for an elevator company, which was closely allied with the milling company.

Pending indorsement of an order for delivery to the elevator company on the bills of lading, and drawing of drafts on that company with the bills of lading attached, delivery was made to it. But the company refused to pay the drafts, whereupon the railway company paid the value of the grain to the consigning grain company, and sued the elevator company on a bond given by it under the statutes of Arkansas, conditioned to deliver original bills of lading to the railway company covering shipments consigned to it but delivered without surrender of such bills of lading.

It was held that the elevator company was a "consignee" within the meaning of the bond, and therefore liable. (Arkansas supreme court, Chicago, Rock Island & Pacific Railway Co. vs. Title Guaranty & Surety Co., 172 S.W. 262.)

* *

In the case of Chicago, Rock Island & Pacific Railway Co. vs. Theobald Flour Mills Co., 191 N. W. 920, the Minnesota supreme court affirmed judgment in favor of plaintiff on a bond given by defendant to secure surrender to the railway company of bills of lading covering shipments of grain, etc., made to the mill.

A casualty company which was surety on the bond pleaded that the bond covered only cases where bills of lading did not arrive until after the shipments. But the court said:

"None of the cars delivered during the course of the transaction under consideration arrived prior to the bills of lading. The language of the bond indicates no purpose to restrict liability to such unanticipated occurrences. It indicates a purpose to assume liability for freight delivered, though the ladings are received but not received and the drafts not paid."

The bond required surrender of bills of lading within five days after delivery of shipments, and the surety company pleaded that the railway company's failure to notify it of the mill's repeated failure to do this released it from liability. Overruling this contention, the court observed:

"The railway company was helpless to prevent a default by the milling company. When a default occurred it could notify the casualty company. It did not agree to do so. In the absence of an agreement to give notice, there inhering in the default no criminality or fraud or dishonesty, the holdings do not seem to require it. . . .

"We are not to be understood as holding that cars might not be delivered without the surrender of bills of lading in such numbers and under such circumstances as would relieve the surety from liability. If there were fraud or concealment or such negligence as to constitute bad faith or wrongdoing such result might follow. The situation might be such as to cast upon the obligee, as a matter of common business honesty, the duty of informing the surety or refusing to deliver more cars."

CHAPTER XXXII

WHEN CARRIER'S LIABILITY BEGINS

SECTION 306. IN GENERAL

THERE are numerous decisions that where a car has been spotted at a mill for loading and has been loaded for transportation to a specified point, and the proper representative of the railway company has been notified that the car is ready to be moved, the relationship of carrier has been created and the railway company becomes an insurer of the safety of the shipment, in the absence of any showing of intention on the part of the shipper to still hold the car out of actual transit.

But, ordinarily, it must appear that the destination of the car had been fixed; mere loading and sealing of a car without advice to the railway company as to its destination would be no such delivery to the carrier as to afford a basis for holding the company to its strict liability as insurer. And, as will be seen in section 308, the question as to when the carrier's liability begins is affected by a clause in current standard forms of bills of lading.

Also it is quite clear that actual issuance of a bill of lading or prepayment of the charges will not impose liability on the company, if it appears that the shipment was not ready to be moved at the time of the loss or injury.

As said by the Missouri court of appeals, "the carrier's duty and obligation always attach as soon as the delivery of goods for transportation is completed so as to place upon it the exclusive duty of seeing after their safety. . . . The delivery of the goods and the acceptance of them, therefore, necessarily precede the execution of the bill of lading.

"It would seem that if the delivery and the acceptance of the goods is for immediate transportation, and they are not merely held by the carrier to await the further convenience of the owner before he ships them, the delivery and acceptance is a part of the entire transaction between shipper and carrier, and the liabity should at once attach, since the contract has in fact been made, and the bill of lading is only evidence of it."

The rule that a railway company becomes an insuring carrier of a shipment on "acceptance" thereof does not require proof of express acceptance. It being the duty of such a company to carry all freight tendered to it, subject to proper regulations, acceptance will be implied from proof of tender of a shipment for transportation conforming to such regulations.

In order to bind a railway company by notice to an employee of readiness of a car to be moved, it must be within the scope of the employee's duties to receive and act upon such notice.

* *

In the case of Cox vs. Kansas City, Mexico & Orient Railway Co., 108 Pac. 380, the court followed the rule applied by the courts of other states to the effect that, although a car be in the physical custody of a railway company, by reason of standing on its tracks, its liability is merely that of a warehouseman, who is liable for loss only when caused by his carelessness, until the shipper has not only relinquished control over the car, but has also given the railway company notice of the readiness of the shipment for transportation.

See, also, section 328.

SECTION 307. CUSTOM AS A FACTOR

The question as to when a car has been delivered by a shipper to the railway company will be affected by consideration of well-established custom between the parties disclosing intention as to when it was intended that the car should pass to the company's control.

To illustrate this point, I cite the case of Cincinnati Grain Co. vs. Louisville & Nashville Railroad Co., 142 S.W. 374, decided by the Kentucky court of appeals. There it appeared that it was a custom between the parties that cars loaded at an elevator at Latonia should not be routed from there, but taken over to yards in Covington and there routed, a bill of lading being given at Latonia in the usual form, showing that the car was to be taken to a certain track in Covington.

On these facts it was decided by the court that the cars were at the risk of the

carrier from the time of delivery at the elevator, where a car was lost before it reached the Covington track, although the final destination of the car was then unknown. The court said, however: "If the carrier had carried this car of wheat to the southbound track in Covington, and it had been destroyed while waiting there for the consignor to route it to its final destination, a different question would be presented."

In the case of Cox vs. Kansas City, Mexico & Orient Railway Co., 108 Pac. 380, it appeared that it was a shipper's custom to notify the defendant's freight agent when cars were loaded, giving the consignee's name, the destination and routing, but this was not done in the case of a car which was destroyed by fire in the nighttime following completion of loading. Hence, the Oklahoma supreme court exonerated the defendant from liability, the fire not having been shown to have resulted from negligence on defendant's part.

SECTION 308. BILL OF LADING PROVISIONS

The West Virginia supreme court of appeals placed a noteworthy interpretation upon a clause in the standard form of bills of lading, concerning the liability of common carriers for shipments damaged or lost while remaining on sidings. The clause in question read as follows:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings . . . shall be at owner's risk until the cars are attached to and after they are detached from trains."

The gist of the decision of the court, which was handed down in the case of McClure vs. Norfolk & Western Railway Co., 98 S.E. 514, is that this entire paragraph applied only to stations, etc., at which the carrier had no agent. As to stations at which the carrier has an agent, it is not necessary that a car which has been loaded and placed under the control of the railway company for transportation be actually attached to a train before the company's liability as carrier commences. Nor, at such stations, does the mere detaching of an inbound car from the delivering train on a siding at a place convenient for unloading relieve the carrier's liability.

From this decision it seems that, as to stations where agents are maintained, the old rule obtains that the carrier's strict liability as such commences when the car is ready to go forward, in the case of outbound shipments, and ends, in the case of inbound shipments, when the car has been spotted for unloading and the consignee has been given due notice of the arrival and reasonable opportunity for unloading.

* *

The New Jersey court of errors and appeals was called upon to determine whether a railway company is liable for loss of freight loaded on a car spotted for the shipper on a siding but destroyed before the car was put in transit. Finding that in this case there was no delivery of the shipment to the carrier by the mere fact of loading, the court denied the shipper right to recover against the railway company.

It appears that there was a custom whereby the shipper was entitled to 48 hours in which to load the car; that this period had not expired; and that no notice had been given the carrier's agent that loading had been completed.

The opinion of the court also held that the clause in a "uniform bill of lading" covering an interstate shipment to the effect that property destined to or shipped from a "private or other siding" shall be at the owner's risk until the cars are attached to and after they are detached from trains, applies to public sidings upon which cars are spotted for shippers.

It was further decided that under the interstate commerce act and the regulations of the Interstate Commerce Commission respecting tariffs and uniform bills of lading, when delivery to a carrier is complete, though no bill of lading has been issued, the rights and liabilities of the parties are regulated by the uniform bill of lading so far as applicable to the particular shipment.

CHAPTER XXXIII

TO WHOM CARRIER IS LIABLE

SECTION 309. OWNER AT TIME OF LOSS

BEFORE a shipper of goods can recover against a common carrier for loss of or injury to them in transit to a customer, the shipper must affirmatively show that he still held title at the time such loss or injury arose, according to a view taken by the Georgia court of appeals in the case of Lowden vs. Merchants' & Miners' Transportation Co., 93 S. E. 45.

This decision is apparently sound, being consistent with the general rule of law that where, pursuant to a contract of sale, goods are shipped directly to the buyer, it will be presumed that the parties intended that title should pass to the buyer on the carrier's receipt of the goods, in the absence of mutual understanding to the contrary. And, when goods have been constructively delivered to a buyer through receipt of them by a carrier as his representative, it must justly follow that the buyer, and not the shipping seller, is the person aggrieved by any loss of or injury to the shipment in course of transportation.

The Georgia court also declared it to be the law of that state that, where the consignee of goods has become the owner of them before their loss through negligence of the carrier, his claim for damages cannot be assigned to the shipping seller so as to entitle the latter to sue on it.

* *

When a contract for a sale of flour or grain is such that title passes to the buyer on delivery to a railway company, routed to a destination in another state in conformity to the buyer's directions, the buyer, and not the seller, is the proper person to maintain suit for damages resulting from failure of connecting railways to follow the routing. This is the gist of a decision announced by the Arkansas supreme court (170 S.W. 998).

Goods were sold f.o.b. car at a point in Arkansas for delivery to the buyer by the Philadelphia & Reading Railroad at a Pennsylvania point. This routing was directed, since the buyer had switch connections with that road. Through fault of an intermediate carrier, the shipment was delivered to the Pennsylvania Railroad, which tendered delivery on its tracks.

The buyer refused to receive the shipment because of the violation of his shipping instructions, and the seller brought suit against the railway company which received the shipment in Arkansas for through transportation.

Under the provisions of the interstate commerce act, the railway company was forced to admit its liability for neglect of the connecting carriers, but successfully interposed the defense that, since title to the freight passed to the buyer in Arkansas, he was the only person who could maintain the suit.

* *

The Ithaca (Mich.) Roller Mills sold a quantity of flour for delivery to a customer in a Michigan town. Shipment was made under a straight bill of lading which named the customer as consignee. On arrival of the flour, 20 of the 40 sacks were found to have become soaked with oil in transit, and 10 were torn. The consignee refused to accept delivery, and, on notice of the condition of the shipment, the mill sent a substitute quantity, and filed claim against the carrier, the Ann Arbor Railroad Co., to cover the loss. The claim being disallowed, suit was brought and the Michigan supreme court affirmed judgment in the mill's favor. (163 N.W. 934.)

First, the railroad denied that the mill was entitled to recover, because the flour was shipped directly to the buyer. On this point the court held that this manner of billing did make the buyer presumptively the owner of the goods and the proper party to make claim for injury to it, but that the presumption was rebutted by the mill's showing that the contract of sale required the mill to deliver at the destination, and that the injury to the flour occurred before such delivery had been made.

In these circumstances, the mill must be regarded as the holder of title to the

flour, for the buyer was not bound to accept delivery of damaged goods. The buyer's mere inspection of the flour on its arrival could not be regarded as an acceptance of it.

SECTION 310. CONSIGNEE AS PRESUMED OWNER

So far as concerns a railway company's liability for negligent delay in delivering freight, the consignee is presumptively the owner and the person aggrieved, declared the Indiana appellate court in the case of Cleveland, Cincinnati, Chicago & St. Louis Railway Co. vs. Partlow, 123 N.E. 838.

Accordingly, it was decided in this case that defendant was entitled to set off against plaintiff railway company's claim for demurrage, accrued on cars not unloaded with proper dispatch, damages caused defendant by negligent delay in the delivery of shipments which had been made to a third party by a fourth, but reconsigned in transit by the third party with the consent of the railway company.

SECTION 311. ORDER BILLS OF LADING

Under the decision handed down by the Alabama supreme court in the case of Sarris & Collas vs. Louisville & Nashville Railroad Co., 95 So. 903, the seller, and not the buyer, of a shipment of flour is the proper party to sue a railway company for damage to the goods in transit, where the shipment was made under an order bill of lading not taken up by the buyer until after transportation was completed. The court said:

"The consignor-consignee having retained title, the goods at the time of the damage were at his risk. . . . The right of action accrued to him, and the subsequent delivery of the flour did not operate as an assignment of the damages alleged. . . . This court has held in a case circumstanced like this that the consignor may sue for the use and benefit of the purchaser. . . . But there has been no decision that the purchaser in like case may sue the carrier in his own name."

* *

In the case of Farmers' Union & Co-operative Association vs. Payne, 205 Pac. 1035, the Kansas supreme court reaffirmed the rule of law that where a buyer takes up an order bill of lading attached to draft drawn on him for the price of goods bought, he becomes the owner of the shipment, and the proper party to sue for loss occurring in transit.

Plaintiff sold a quantity of wheat to a grain company, inspection and weights at the destination to govern. Draft for the price was promptly paid, and the proceeds retained by plaintiff. On weighing the shipment at destination, a loss of 27,570 lbs in transit was disclosed, and plaintiff sued to recover against defendant as federal agent of the railroads.

Affirming a judgment dismissing the suit on the ground that the suit was improperly brought by plaintiff, and citing a former decision, the supreme court declared that "the title to the wheat passed to the purchaser upon the payment of the draft. The real party in interest, therefore, was the consignee, who purchased and paid for more wheat than it received. The defendant, if compelled to pay a judgment in this case in favor of plaintiff, might still be sued by the consignee upon the same cause of action."

* *

The opinion of the Kansas supreme court on a rehearing in the case of Bennett vs. Dickinson, 190 Pac. 757 (original opinion, 186 Pac. 1005), deals with the question as to who may maintain suit against a railway company for loss of, or injury to, a shipment in transit under an order bill of lading attached to the customary draft for purchase money.

One Rule contracted to sell plaintiff a car of corn, and shipped it to himself under an order bill of lading. The day the corn arrived at its destination, plaintiff paid a draft attached to the bill of lading, the payment being made at a point distant from the destination of the shipment. After paying the draft, plaintiff declined to accept the corn from the delivering railway company on account of it having become wet and rotten because of a leaky condition of the car roof.

Plaintiff's suit against the receiver of one of the railroads was dismissed, on the ground that the title did not pass to him until he paid the draft—after the corn had arrived at his destination—and that, therefore, he was not the proper party to sue for the loss or injury, except as he may have taken an assignment of the shipper's cause of action against the carrier. Reaffirming this decision on a rehearing, the supreme court said:

"Appellant [plaintiff] now insists that the indorsement of the bill of lading assigned to Bennett all the rights the consignor had in the original contract of shipment, which would be true if Bennett had been the consignee, because in such case a delivery by the consignor to the carrier makes the carrier the agent of the consignee. . . .

"It may be well to state again a few general principles which govern the right to maintain an action against the carrier for loss or damage to goods in transit. Where the goods are shipped on an 'open' bill of lading delivered to the consignee, the carrier becomes liable to the consignee for any loss in transit. . . . Prima facie the consignee is entitled to the possession of the consigned goods, and may sustain an action for damages in transit. . . . This follows necessarily from the well-established rule that where goods are shipped to a consignee the carrier becomes the agent of the consignee. In other words, delivery to the carrier is a delivery to the consignee.

"It frequently happens that the right to maintain such an action is concurrent in consignor and consignee [e.g., where the consignor has bargained to deliver f.o.b. destination], a judgment in one suit being a bar to any other suit for the same loss. Moreover, any one having a special interest in the goods or the shipment may maintain the action. . . .

"Again, where the consignor releases all claim to goods lost in transit, the consignee is the proper party to sue for the loss. . . . In this case . . . the same person was both consignor and consignee, and the universal rule is that, if the vendor reserves title to the goods, the vendee is at no risk until the goods are actually delivered to him; and so, in such a case, the right to maintain an action for injury to the goods during transit rests alone with the vendor, who is the only party incurring a risk. [There are judicial authorities which qualify this rule, as applied to cases where loss occurs in transit after the buyer has taken up an order bill of lading or where it is shown that the seller shipped to his own order only for the purpose of securing payment of the purchase price.] . . .

"A very pertinent inquiry is, Upon whom would the loss have fallen if the car of corn had been by an act of God destroyed while in transit? Beyond any question upon Rule, who, as the trial court found, took good care to see that he retained absolute title until Bennett paid the draft and took up the bill of lading. Bennett had no general or special interest in the property, and incurred no risk in its transportation. . . .

"Bennett's situation in respect of damages to the corn in transit was no different from what it would have been if, on the day he paid the draft and received the bill of lading, he had purchased any other property by a bill of sale, and discovered that before it became his property it had been damaged by the fault or neglect of a third party. It is clear that he would have no cause of action against the party at fault, because it is the law that, where property is injured or destroyed, 'the loss falls upon the holder of the legal title.' . . .

"Rule had a cause of action against the carrier, and if Bennett had procured an assignment of Rule's cause of action a different question would be presented. But there was no assignment of Rule's cause of action, and plaintiff's action was not brought, nor was it prosecuted, upon the theory of such an assignment."

SECTION 312. TRANSFEREE OF SHIPPING DOCUMENTS

Where a carload of grain was shipped under an order bill of lading, and the bill was attached to draft drawn on a contract buyer of the grain, and these papers were transferred to a bank by the drawer, the bank crediting him with the face value of the draft, the bank became vested with legal title to the grain, according to the decision reached by the Oklahoma supreme court in the case of Marsh Milling & Grain Co. vs. Guaranty State Bank of Ardmore, 171 Pac. 1122.

It was also held by the court that such transaction constituted no violation of the Oklahoma statute which forbids state banks to employ their funds in buying or selling goods, etc; title to the goods being held merely as an incident to the legitimate banking business of buying and selling drafts.

Hence it was decided that the bank had a valid claim against the carrying railway company as for conversion of the grain, on that company delivering the shipment to the contract buyer without payment of the draft or surrender of the bill of lading.

CHAPTER XXXIV

CONNECTING CARRIERS

SECTION 313. WHO ARE CONNECTING CARRIERS?

IN Veitch vs. Illinois Central Railroad Co., 68 So. 575, the Alabama court of appeals was called on to determine plaintiff's right to recover damages for injury to a shipment of chops. The particular shipment was received for transportation over connecting lines and for delivery on the consignee's sidetrack. Before the car was received and unloaded by the consignee, he directed that it be delivered to a third person, one of his customers, and the third and delivering carrier undertook to do this.

On these facts, it was held that the three railway companies were "connecting carriers," within the meaning of the Alabama statute which permits connecting carriers to be sued jointly for loss of or injury to freight, judgment to be awarded against the one or more of them shown to be liable.

SECTION 314. LIABILITY IN GENERAL

The several responsibilities of connecting railway companies for deterioration of dry shelled corn in transit were considered by the Kentucky court of appeals in the case of Avey vs. Southern Railway Co., et al. 191 S.W. 460.

The car furnished the shipper to carry the corn was damp, airtight and unfit for use; he being required to remove 10 wagonloads of decayed bananas, ice, and other refuse before loading. On arrival of shipment at its destination, 400 miles away, and after 14 days consumed in transportation, the consignee rejected it as being soggy and hot. The shipper diverted it to another point, but refused to receive it there on account of its damaged condition. The corn was sold by the initial carrier as hog feed, not bringing enough to cover transportation and demurrage charges.

Plaintiff, as assignee of the shipper's rights, was permitted by the supreme court to recover against the initial carrier the full value of the shipment on the ground of its fault in failing to furnish a suitable car, and on the ground that under the Carmack amendment it was liable for any deterioration negligently caused by any one of the several carriers handling the freight to its destination. But the decision recognized the point that before a shipper can hold a carrier other than the initial one for loss or injury in transit it must appear that the loss or injury occurred on that carrier's line.

* *

When a shipment carried over connecting railway lines as through freight arrives in a damaged condition and is shown to have been shipped in good order, it will be presumed, in the absence of specific proof to the contrary, that the damage occurred upon the delivering line, as affecting right of recovery for the loss. But where the initial carrier undertakes a through shipment beyond its own line, it may be held responsible for loss occurring on the delivering road, even though the bill of lading names the end of the initial line as the destination. In other words, an actual agreement to carry freight to a point on another road at a through rate will control the mere recitals of the bill of lading. (Keithley vs. Lusk, 189 S.W. 621), decided by the Springfield, Mo., court of appeals.

SECTION 315. INTERSTATE SHIPMENTS

The provisions of the federal statutes, making the initial carrier of a through interstate shipment liable for loss occurring on either its road or the road of a connecting carrier, connecting carriers being regarded as agents of the railway company which makes the contract for through transportation, is frequently applied in litigation.

To illustrate, a carload of feed was water damaged in transit, and the sealed car was delivered at the point of destination to a branch railroad for delivery to the consignee. He rejected delivery on account of the damaged condition of the shipment, and the feed was returned by him to the delivering carrier. Pending delay in its sale by that carrier, the feed depreciated further in value.

On these facts, the Louisiana supreme court decided, in a suit brought against the initial carrier, that defendant was

liable to the shipper for the damages to the feed, not only from the water, but from the failure of the delivering carrier to promptly dispose of the shipment to the best advantage after its rejection by the consignee. (70 So. 44.)

In another case, the Springfield, Mo., court of appeals applied the Carmack amendment by holding that an initial carrier may be held responsible for loss occurring on the delivering line, even though the bill of lading named the end of the initial line as the destination, it appearing that the initial carrier had actually contracted for through transportation.

* *

The initial carrier of an interstate shipment is liable to the lawful holder of the bill of lading for any damage to the freight caused by such carrier or any connecting line over whose road the goods passed before reaching the destination. (Arkansas supreme court, Cunningham Commission Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 188 S.W. 1177.) In this case chop was damaged in transit on account of leaky condition of cars.

* *

That the simplest and best remedy to a shipper for recovering damages for loss of or injury to an interstate shipment carried over connecting lines is, ordinarily, a claim against the initial carrier, is shown by the decision of the United States district court for the southern district of Georgia in the case of Johnson-Brown Co. vs. Delaware, Lackawanna & Western Railroad Co., 239 Fed. 590. It was there determined that a shipper has no valid claim against an intermediate or delivering carrier on account of damages sustained to the goods in transit, without showing that the injury occurred on the line of that company.

Referring to the provisions of the Carmack amendment, the court said: "In order to avoid the great confusion which existed on this subject, Congress, by the amendment, has afforded the shipper the most convenient means of redress from any carrier, which, by interrelation, had undertaken to transport his goods in interstate commerce. The simplicity and effectiveness of this remedy would be rendered nugatory if the shipper was at liberty to single out and sue any one or more of the succeeding carriers. The recourse of the initial carrier, if not to blame, is to adjust its loss with the succeeding carriers which are blamable."

* *

In Erisman vs. Chicago, Burlington & Quincy Railroad Co., 163 N.W. 627, it was decided by the Iowa supreme court that the provisions of the Carmack amendment do not preclude a shipper or consignee from enforcing liability against a terminal carrier for loss or damage occurring on that carrier's line.

* *

One of the last acts of Justice Hughes as a member of the United States Supreme Court was the preparation of the opinion of that court in Blish Milling Co. vs. Georgia, Florida & Alabama Railway Co., 36 Sup. Ct. 541. This decision affirmed the liability of the railway company for conversion of an interstate shipment of flour by delivering it to a customer before surrender of a bill of lading drawn to the mill's order and attached to an unpaid draft on the customer, the shipment having been later returned to the carrier as being damaged, and sold by the carrier as perishable property.

Before the Supreme Court the action was defended on the grounds that, under the Carmack amendment of the interstate commerce act, any remedy must be enforced against the initial carrier, and not against defendant, the delivering carrier; and that plaintiff mill had failed to give written notice of claim within the time required by the shipping contract. Both of these defenses failed.

The court held that the provision of the Carmack amendment does not relieve the terminal carrier's liability directly to a shipper of freight for misdelivery.

* *

In the case of Kemper Mill & Elevator Co. vs. Missouri Pacific Railway Co., 186 S.W. 8, the Kansas City court of appeals decided that an initial carrier's liability under the Carmack amendment extends to misdeliveries made by the final carrier, as well as to losses and injuries occurring in the course of transit.

* *

In the case of Schlitten vs. Hines, 186 N. Y. Supp. 831, the appellate division of the New York supreme court decided that the liability of an initial carrier ceased when the goods were refused by the consignee, but that it was revived on the making of a new contract for reshipment. See, also, section 317.

* *

The Hamilton (Texas) Mill & Elevator Co. lost a suit brought against the Stephenville North & South Texas Railway Co. to recover the value of a car of oats. (189 S.W. 774.)

Plaintiff, having agreed to sell the oats

to a grocery company at Mobile, shipped them under an order bill of lading attached to draft for the price. The draft was negotiated to a bank. After some delay in presentation of the draft, the grocery company refused to pay it, or to receive the oats. Thereupon, plaintiff repurchased the draft and bill of lading and directed the delivering carrier to deliver the shipment to a brokerage company. This was done more than 48 hours after arrival of the car.

The bill of lading provided, as does also the Alabama laws, that the carrier's liability should terminate after lapse of 48 hours after arrival, the delivering carrier thereafter being responsible only as warehouseman. The brokerage company settled for the shipment by delivering a certified check to the terminal carrier, but immediately brought suit against the plaintiff on an independent claim and garnished the money in the hands of the railway company, obtaining judgment on the claim.

Plaintiff then sued defendant as initial carrier of the through interstate shipment, under the Carmack amendment, but the Texas court of civil appeals held that there was no ground for the suit, because delivery had been made to the shipper's order, and because the railway companies' liability as common carriers had been terminated by the lapse of more than 48 hours after arrival of the shipment at the destination.

* *

But there was no right to divert a shipment, after its arrival at its original destination, in such sense as to make the initial carrier liable for loss resulting on another railroad over which the shipment was reconsigned, decided the Georgia court of appeals in the case of Taylor vs. Central of Georgia Railway Co., 121 S. E. 348. A shipment from Buena Vista, Ga., to Atlanta, Ga., was ordered to Chattanooga, Tenn., after arrival in Atlanta. The goods were in good order when received in Atlanta. Holding that defendant, the initial carrier, was not liable for loss occurring on the other road over which the shipment moved from Atlanta, the court of appeals said:

"When goods in carload lots are consigned to a person from one point to another in this state and transported to their destination over the railroad on which they are shipped, and the consignee is given notice and afforded an opportunity to receive and unload, but orders a delivery to some other person, which is made, the liability of the railroad company as a common carrier ceases. . . . It appears in this case that the plaintiff had notice of the shipment and an opportunity to receive it in Atlanta, the original destination, but desired a further transportation to a point beyond the state. This required a new contract."

* *

Loss of wheat in transit gave rise to the case of Forest Green Farmers' Elevator Co. vs. Davis, Director General of Railroads, 270 S. W. 394. One question involved was what railroad line was the initial carrier, within the meaning of the federal statutes which make an initial carrier of an interstate shipment liable for losses resulting in transit. The wheat was originally shipped from a Missouri point to St. Louis, but was sold and reshipped under a second bill of lading to an Illinois point. It was held that the original shipment was intrastate and so far independent of the second shipment that the carrier moving the wheat from St. Louis was the "initial carrier" as to any loss thereafter occurring. It made no difference, the court held, that original sale of the wheat was made subject to final mill weights, thereby giving the seller an interest in the shipment even after its reshipment from St. Louis.

* *

See, also, the decision of the United States Supreme Court in the case of Pere Marquette Railway Co. vs. J. F. French & Co., 41 Sup. Ct. 195.

* *

A Tennessee decision on the point that an initial carrier is not liable for default of the delivering railway company in the latter company's capacity as warehouseman will be found in Model Mill Co. vs. Carolina, Clinchfield & Ohio Railway Co., 188 S.W. 936.

In that case plaintiff mill sued for damages for alleged conversion of a shipment of flour. It was claimed that the delivering railway company as warehouseman sold the flour below its market price and without observing legal requirements governing the making of such sales, and that defendant, as initial carrier of the interstate shipment, was liable for this default on the warehouseman's part. This point was ruled against the mill on the ground that the warehouseman had become the agent of the mill and was not the representative of either carrier.

This decision was largely based on clauses of the bill of lading providing that the carriers should not be responsible for loss due to default of the shipper, and that, on failure of the owner to remove the freight within 48 hours, exclu-

sive of holidays, after notice of arrival, the goods might be stored with a licensed warehouseman to be held at the owner's risk. The supreme court concludes:

"If an unlawful sale, or negligent storing, of the flour was made, at the instance of the delivering carrier, by the warehouseman, after the original contract of carriage was discharged, it is clear that the shipper, as owner of the flour, must look alone to the delivering carrier and the warehouseman as the responsible parties; the initial carrier cannot be held responsible, because it had no part or lot in the keeping or disposal of the flour after its delivery to the warehouseman. . . .

"If the shipper, as the party entitled to receive the flour under section 5 of the bill of lading, had discharged its duty in respect of receiving and caring for the same at the point of destination, it is clear that there would have been no deterioration in the quantity, quality or condition of the flour."

* *

In the case of Adams Seed Co. vs. Chicago Great Western Railroad, 165 N.W. 367, disposed of by the Iowa supreme court, plaintiff was denied the right to recover against the defendant, as the initial carrier of an interstate shipment that passed over two connecting lines, on account of loss or destruction of the goods while in the possession of the terminal carrier. It was unsuccessfully sought by the plaintiff to hold the defendant under the provision of the Carmack amendment.

It was shown that on safe arrival of the goods at their destination they were held there more than a reasonable time without acceptance of delivery by the consignee, thereby converting the liability of the final carrier into that of mere warehouseman.

* *

As holding that an initial carrier is not liable for any breach of duty on the part of the final carrier as warehouseman, see, also, Dodge & Dent Mfg. Co. vs. Pennsylvania Railroad Co., 162 N.Y. Supp. 549.

* *

A railway company receiving a shipment for transportation to a point in a foreign country on another railroad may validly provide in the bill of lading that the liability of each carrier for loss or damage shall be limited to occurrences on its own road.

The South Carolina supreme court so decided in a suit arising under a shipment from a point in the United States to one in Mexico, deciding that the provision of the Carmack amendment is limited to interstate transportation, and does not include shipments to foreign countries. (Aldrich vs. Atlantic Coast Line Railroad Co., 89 S.E. 315.)

* *

Where an interstate shipment was made to the seller's own order, with instructions to notify the buyer, but the bill of lading was lost or delayed in the mails on its way to the seller's broker at the destination, and the initial carrier, at the shipper's request, telegraphed the delivering carrier to make delivery without surrender of the bill of lading, but the latter refused to do so until six days later, there was such breach of duty on the part of the delivering carrier as to give the shipper a valid cause of action against the initial carrier under the provisions of the Carmack amendment. This is the gist of a decision of the North Carolina supreme court in the case of McCotter vs. Norfolk Southern Railroad Co., 100 S.E. 326.

* *

The Carmack amendment is broad enough to make the initial carrier of a shipment transported over connecting freight lines liable to the shipper for loss or damage resulting from the last carrier's failure to notify the consignee of arrival of the freight, and failure to take proper care of the shipment, on the consignee's refusal to accept delivery. But, on a consignee refusing to accept delivery, the shipper is bound to take charge of the goods at the destination. (Wien vs. N. Y. C. & H. R. R. Co., 166 N.Y. Supp. 766.)

* *

Although the liability of an initial carrier of an interstate shipment for loss or injury occurring anywhere in transit on connecting lines is the same as if the loss or injury had happened on its own line, the rule is not reversible, so as to make a carrier liable for damage arising on a preceding carrier's line.

In the case of Copenhaver & Massey Milling Co. vs. Kanawha & West Virginia Railroad Co., 93 S.E. 940, the mill sued for injury to corn which became wet in transit, due to leaky condition of the car, and was awarded judgment in a West Virginia circuit court, but the supreme court of appeals of the state reversed the decision, because plaintiff's own evidence was found to show that the injury occurred before the shipment reached the line of defendant, a connecting carrier.

The higher court followed the well-established rule of law that a connecting carrier is liable only for such damage or injury to a shipment as is attributable to its fault, and found that defendant had nothing to do with selecting or loading of the car, and that there was nothing to show that any such apparent defect in the car existed as rendered it negligent for defendant to fail to discover and remedy it when the shipment was received from the preceding carrier.

* *

An eastern firm of flour merchants asked information concerning the liability of connecting freight lines under the following stated circumstances: A carload of mill products was carried over connecting rail and water lines from a point in Iowa to a point in Pennsylvania. A considerable quantity of the freight was lost in transit. The terminal carrier, a railroad, disclaimed liability, and it was claimed that none of the rail carriers were liable, because the water carrier had failed and gone out of business. The railroads claimed that the loss occurred on the water.

We were asked whether the failure of the steamship company absolved all the rail carriers from liability. Our correspondent took the view that since "this shipment moved under a through bill of lading from point of origin to final destination, all or any one of the carriers are liable for loss and damage while in transit from original point of shipment to final destination."

That view was erroneous. The initial carrier of an interstate shipment may be held liable for loss in transit not resulting from an excepted cause, or the carrier on whose line the loss occurred may be held, but the other carriers are exempt.

About the time this shipment was in transit the Supreme Court of the United States handed down a decision which is as clear and concise on this subject as it is authoritative. That court said, in the case of Oregon-Washington Railroad & Navigation Co. vs. McGinn, 42 Sup. Ct. 332:

"The settled federal rule is that, in the absence of statute or special contract, each connecting carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier; . . . and the liability of a connecting carrier for the safety of property delivered to it for transportation commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent. . . .

"The Cummins amendment deals with and modifies the common law liability only of the initial carrier. It renders that carrier liable for loss or damage to the property committed to its care throughout the entire route by which it is billed until delivered to the consignee, but it leaves the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee and to each other, entirely unaffected, . . . and therefore their liability is as we have stated it unless modified by contract. . . .

"The Blish Case [36 Sup. Ct. 541] . . . was against the terminal carrier, and one contention in that case was that under the Carmack (now Cummins) amendment the shipper's remedy against the initial carrier was exclusive, even where the default claimed was misdelivery by the terminal carrier. In denying this, this court said:

" 'The connecting carrier is not relieved from liability by the Carmack (Cummins) amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligation of all participating carriers to the extent that the terms of the bill of lading are applicable and valid.' . . .

"What was decided in the Blish Case was that the terminal carrier was liable for failure to make delivery, just as the initial carrier would have been if it had been sued for misdelivery, because by the terms of the bill of lading each was under obligation to make final delivery. The suit before us is not for misdelivery or other fault of the carrier sued, but for the fault, as alleged, of a prior connecting carrier. In express terms the bill of lading we have here declares that no carrier shall be liable for loss or damage not caused by it, and, therefore, the statute not providing otherwise, the petitioner cannot be liable for the damage alleged to have been caused before the stock reached its line.

"The Carmack and Cummins amendments were enacted to enable the holder of a bill of lading to sue the initial carrier for any loss or damage to property suffered on any part of a through route, and thereby to relieve him from the necessity of searching out and proving a case against a terminal or intermediate carrier. . . . Having regard to the customary methods of doing a through business in this country, it may

have been important to have given like rights against others of connecting carriers, but plainly, either from design or accident, the terms of the amendment limit its application to the initial carrier."

Noting that the shipment in the case presented to me may have moved to a destination other than that fixed in the original bill of lading, it is to be observed that mere diversion of a shipment in transit does not change the rules above mentioned, but that where the shipment is reconsigned on arrival at the original destination, the initial carrier of the original shipment is not liable for loss occurring after such reconsignment. (10 Corpus Juris, 526.)

The fact that the steamship company which was one of the connecting carriers has failed and gone out of business can have no further effect than to preclude recovery against that company as an intermediate carrier, should it appear that the loss occurred on that line.

* *

Of a 504-sack shipment of flour made from Minnneapolis to St. Louis, 132 were missing when the car was opened at destination. The Randazzo Macaroni Mfg. Co., as owner of the flour, sued the initial carrier, the Minneapolis & St. Louis Railroad Co., for the amount of the loss. It was admitted that the "seal record" on the car was perfect up to the delivery to the terminal carrier, but the seals were found to have been broken when plaintiff's men went to unload the car.

Trial of the suit resulted in judgment for plaintiff, and the award was affirmed by the St. Louis court of appeals (251 S. W. 466). Responding to the railway company's insistence that it was not liable, the court of appeals said:

"This contention appears to proceed upon the theory that the defendant, as initial carrier, is not liable for a loss of a part of the shipment, since it is not controverted that the seals upon the car remained unbroken until after its receipt by the Terminal Railroad Association, from which it appears that the loss occurred while the car was in the possession of that carrier.

"Obviously this contention is devoid of merit. The shipment was an interstate one, and defendant undertook to make through shipment of the goods from Minneapolis to St. Louis, and there deliver them to the order of the consignor. Under such circumstances irrespective of the Carmack amendment to the interstate commerce act, the initial carrier is prima facie liable for loss occurring either on its own line or on the line of any connecting carrier which it utilizes, as its agent, for the purpose of completing the transportation and making delivery of the goods.

"Under the Carmack amendment, where a carrier accepts goods for shipment to a point on another line in another state, it is conclusively treated as having made a through contract, and thereby elects to treat the connecting carriers as agents for all purposes of transportation and delivery. The case is then to be treated as though the point of destination were on the line of the initial carrier, and if the goods are lost the presumption is that the loss resulted from the negligence of the initial carrier or its agents, casting the burden on that carrier to prove that it resulted from some cause for which it is not responsible."

SECTION 316. INTRASTATE SHIPMENTS

The Oklahoma supreme court has thus defined the liability of railway companies in that state concerning intrastate shipments: "The only liability assumed by an initial common carrier of intrastate commerce in this state, unless it contracts for greater responsibility, is that it will deliver the shipment to the end of its route, in the proper direction of its destination to some other competent carrier carrying to the place of address, or connected with those who thus carry. When it has done that, its responsibility ceases, subject, of course, to a proper response to the demand of the shipper for proofs that the loss or injury did not occur on its line." Foote vs. M., K. & T. Ry. Co., 149 Pac. 223.

Another decision of the Oklahoma supreme court holds that where suit is brought against the delivering carrier of an intrastate shipment, carried over two or more lines under a contract for through transportation, for injury to the goods in transit, a recital in the bill of lading that the goods were received by the initial road "in apparent good order" is enough to place on the defending railway company the burden of proving that the injury complained of occurred before that company received the shipment from the preceding carrier. (188 Pac. 104.)

* *

For the purpose of fixing the responsibility for damage to grain in transit as between the initial carrier and a connecting line, under an intrastate shipment, it will be presumed, in the absence of proof as to the line on which the loss actualiy

occurred, that it happened on the last road, the Arkansas supreme court held in the case of Davis vs. St. Louis, Iron Mountain & Southern Railway Co., 185 S.W. 478. That is, where a shipper or consignee shows that grain was dry and sound when delivered to the initial carrier, and the shipment was found to be wet and damaged at the destination, there is a presumption, or inference of fact, in the absence of proof to the contrary, that the injury arose while the freight was in the possession of the last carrier.

The same opinion recognizes, however, that a delivering carrier cannot be held liable for loss shown to have occurred on the line of the preceding carrier.

* *

In the case of Kemp vs. Fort Worth & Denver City Railway Co. and receivers of the Texas & Pacific Railway Co., 207 S.W. 605, the Texas court of civil appeals at Amarillo affirmed judgment in favor of plaintiff for wheat lost from a car in transit over the lines of the two railroads.

Plaintiff succeeded in establishing that the order bill of lading under which the wheat was consigned from a point on the Denver road to a destination on the Texas & Pacific constituted a "through bill of lading," within the meaning of a Texas statute which makes connecting carriers of a through intrastate shipment jointly liable for losses in transit, despite stipulations in the contract to the contrary.

The bill of lading issued by the initial carrier showed on its face that it was intended to serve as the only contract to be made for transporting the shipment over the two lines. Therefore, the court held that the statute applied, although there was a clause in the bill of lading to the effect that the initial carrier's liability should terminate on delivery to the connecting carrier.

Defendants also unsuccessfully attempted to invoke on appeal another Texas statute, which provides for an apportionment of damages between two or more carriers of an intrastate shipment when loss occurs in transit. This point was ruled against them, because they had filed no pleading in the suit asking for such apportionment.

* *

On a Texas intrastate shipment each of two or more connecting carriers is liable for any damage to the goods in transit, according to a decision of the Texas court of civil appeals, involving a shipment of corn. (Patterson & Roberts vs. Quanah, Acme & Pacific Railway Co., 195 S.W. 1163.)

SECTION 317. LIABILITY ON RETURNED SHIPMENTS

An important aspect of a common carrier's liability as initial carrier of an interstate shipment, although one not often presented to the courts, was involved in the decision of the appellate division of tne New York supreme court in the case of Schlitten vs. Hines, 186 N.Y. Supp. 831.

Plaintiff's assignors shipped goods under an order bill of lading from New York to Conyers, Ga., the freight going by defendant's steamer to Savannah and thence by rail to destination. The contract buyers of the goods rejected the purchase money draft attached to the shipping documents, and the shippers directed defendant to return the shipment to them at Philadelphia, delivering the original bills of lading to defendant. The railroad delayed returning the goods to Savannah, and they were then missent to New York. Plaintiff sued to recover damages from defendant on account of the delay. Defendant resisted the suit on the ground that the initial carrier of the return shipment was the railroad company, for whose neglect defendant was not responsible.

Holding that defendant was the initial carrier, in the eyes of the law, and therefore liable under the Carmack amendment, the court says:

"The defendant contended that its liability as initial carrier under the original acceptance of the goods at New York City for Conyers, Ga., ended when they reached the place of destination and were refused by the purchasers at that place. Such undoubtedly is the law. It is also well settled that, upon the refusal of the purchaser to accept, the defendant was under no obligation under the original contract of carriage to Georgia to return the goods to the plaintiff, and that the defendant was entirely within its rights to merely advise the shipper of the fact and to await further instructions.

"But if it be a fact that, after the nonacceptance of the goods by the purchaser in Georgia, the parties in effect entered into a new contract for the reshipment of the goods, then the defendant would be deemed to be the initial carrier from Georgia to Philadelphia. . . .

"Defendant claims that its actions were gratuitous, and in the nature of an accommodation to the shippers, in receiving the original bills of lading, so that the goods might be readily obtained from

the storage warehouse in Georgia, where they had been placed after the purchasers' refusal to accept them. The delivery of the indorsed original bills of lading, entitling the holder to receive the goods, was tantamount to a constructive delivery of the goods to the defendant.

"The circumstance that, when the new contract was made . . . for the return of the goods, the goods were at Conyers and not at Savannah, where defendant's steamship was docked, is not controlling. Defendant had the right to make a contract for the carriage of the goods, notwithstanding that the starting point was elsewhere than along the line of its own route. A corporation, carrying over a portion of a continuous line of transportation, may contract to carry beyond the terminus of its own route, and may also contract to receive goods away from its terminus, to be transported to such terminus over the route of another carrier, and to be forwarded over its route."

CHAPTER XXXV

LIABILITY FOR DELAYS*

SECTION 318. DUTIES OF CARRIER

THE carrier's liability for delay in transportation differs from its responsibility for loss or injury not resulting from delay in that while, subject to certain exceptions, a railway company insures the safety of goods in transit, regardless of negligence, it is not liable for losses occasioned a shipper or consignee by reason of a delay, when no time for delivery is specified, unless the delay was negligent. The burden of proof, however, as to freedom from negligence devolves upon the carrier after the shipper or consignee has made out a prima-facie case of fault on the railway company's part by showing an unreasonable delay.

Among other excuses on which carriers have been exempted from liability are unusual floods, unusual and unexpected congestion of traffic, strikes of employees, etc. But in every such case a carrier must exercise all reasonable diligence to expedite delivery after the cause of delay has been removed, and it seems that even these excuses are not available when it appears that shipments were received by a carrier with knowledge of the probability of delay as to which the shippers were not informed.

* *

"The law imposes upon a carrier, in case of extraordinary delay in transportation, the duty to use all reasonable care to protect a shipment from damage on account of such delay.

"It is the duty of a carrier to exercise reasonable care to protect property from loss or injury during delay in transportation, where the circumstances and conditions are such as cause an unusual delay, and it is the duty of the carrier to give the consignor or owner notice of the delay."

These rules were laid down by the Indiana appellate court in the case of Daniels & Pickering Co. vs. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., 125 N. E. 426. The court affirmed judgment in favor of plaintiff for damages to a carload of shelled corn shipped over defendant's line from Middletown, Ind., to Baltimore, Md., for export.

The gist of the complaint, which the decision supported, was that the defendant failed to safely transport and deliver the corn within a reasonable time, negligently sidetracked it en route without care or attention, and negligently permitted it to be delayed in transit for an unreasonable time (five weeks), and that, because of want of proper care, it became damp, hot, rotten and greatly reduced in value.

Plaintiff also relied on the fact that, if defendant had notified it of the whereabouts of the car during the delay, plaintiff could and would have unloaded and aired the corn, thereby largely preventing injury to the shipment, but that defendant failed to give plaintiff such information.

This last stated circumstance involved application of the legal rule recognized by the court that a carrier is bound to notify the owner of a shipment of existing delay in transportation where the notice is of material advantage to the owner.

See, also, section 254.

SECTION 319. WHAT CONSTITUTES UNREASONABLE DELAY?

"The obligation of the common carrier is to transport the goods safely and within a reasonable time," declared the West Virginia supreme court of appeals. "What is a reasonable time is not susceptible of being defined by any general rule; but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case. But it may be said that the mode of conveyance, the distance, the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether, in the particular case, there has been an unreasonable delay."

*For rights of shippers against carriers for delay in furnishing cars see Chapter XXVI. For liability of connecting carriers as such see the preceding chapter. As to proper party to sue, see Chapter XXXIII. See, also, Chapter XXXVIII on Liability for Loss or Damage.

Reference is properly made to the usual time for carrying a shipment between two given points, in solving a question whether delivery has been made within a "reasonable time" in a particular instance.

There are numerous decisions to the effect that a special contract to make delivery on or before a specified date is valid, and that a delay is not excusable on the ground of inevitable accident or other cause, except as stipulated against in the contract. The courts, however, indicate an increasing tendency to refuse enforcement of special contracts to expedite delivery when discrimination against other shippers is thereby involved.

When a carrier has validly contracted to expedite delivery of goods, it is no excuse for nondelivery within the agreed time that the carrier was not negligent, although negligence is a good excuse where a shipper or consignee relies on breach of a carrier's failure to make delivery within a reasonable time. (Roberts vs. Nashville, Chattanooga & St. Louis Railway Co., 185 S.W. 69, decided by the Tennessee supreme court.)

* *

In upholding a judgment against defendant common carrier for unreasonable delay in delivering shipments in New York, the appellate term of the New York supreme court said in Meany & Saisselin, Inc., vs. Erie Railroad Co., 173 N. Y. Supp. 96:

"The rule is well established that 'when the goods are actually delivered at the place of destination, and the complaint is only of a late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse him, unless he [the carrier] has expressly contracted to deliver the goods within a limited time.' "

Other points declared by the court: Unless delay be satisfactorily excused, it will be presumed that it was negligent and, therefore, actionable. Congestion at a railway terminal is no defense against liability for delayed delivery, when it is not shown to have been due to temporary conditions, or that the carrier did not know of the congestion when the shipment was received and could not have apprised the shipper, or that, despite the congestion, the goods could not have been delivered earlier. An embargo laid on shipments after receipt of the particular shipment is no ground of excuse for unreasonable delay in delivery.

* *

In Laser Grain Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 179 S.W. 189, the Arkansas supreme court decided that unprecedented and unexpected rush of traffic excuses a delay by a carrier in transporting goods offered for shipment.

A railway company does not escape legal liability for damages suffered by a shipper through delay in transporting freight by merely showing a congestion of traffic due to an unprecedentedly large volume of business overtaxing equipment which is sufficient to handle all freight offered under normal conditions. The company must go farther and prove that the congestion was not foreseen or that the shipper was advised of the probability of delay on that account.

This is the gist of the decision of the New York supreme court, appellate division, announced at Buffalo in the case of Burns Grain Co. vs. Erie Railroad Co., 172 N. Y. Supp. 740, in which plaintiff was declared to be entitled to recover damages for delay in the movement of a car of corn from Buffalo to Port Jervis, on proving the allegations of its complaint.

A question of law was raised on the allegations of the pleadings as to whether defendant had set up a valid defense, and the court ruled in the negative, saying:

"It is conceded that unusual and extraordinary congestion of traffic not due to defendant's negligence, and which could not reasonably have been foreseen at the time the goods were accepted for carriage, would excuse delay in shipment. An entirely different rule applies when goods are accepted by a railroad company for carriage with full knowledge on its part of an extraordinary and unusual congestion of traffic on its lines, so that the lines are badly congested, and it is impossible for the railroad to transport freight with the usual dispatch.

"Under such circumstances it is the duty of the railroad company to advise the shipper as to the conditions within its knowledge which are likely to delay the shipment. If it fails to do so, and accepts goods for shipment, it will be liable for damages caused by delay growing out of such causes which are known to it when it accepts the goods for carriage. This is a reasonable rule, founded on common sense and fair dealing. The shipper should be given an opportunity to exercise his judgment as to the advisability of making the shipment after knowledge of the facts of the situation."

This decision affirmed a judgment by a

lower court. (168 N. Y. Supp. 154.) To the same effect see 195 Ill. App. 157.

* *

The right of the owner of a car of meal to recover against a railroad company on account of the meal deteriorating in transit was denied in the case of Hines vs. First Guaranty State Bank, 230 S. W. 764.

SECTION 320. DIVERTED SHIPMENTS

The Oklahoma supreme court affirmed judgment in favor of the Lawton Grain Co. against receivers of the St. Louis & San Francisco Railroad Co., for damages accruing through a delay in complying with instructions to divert a car of wheat. (174 Pac. 793.)

July 23, 1915, the plaintiff grain company shipped the car to Oklahoma City to its own order, with instructions to notify the Oklahoma Mill & Elevator Co., but the following day instructions were given the railway company to divert the shipment to the grain company's order at Kansas City, and to "notify" another grain company. The original bill of lading was surrendered, and a new one covering delivery at Kansas City was issued to plaintiff.

On arrival of the car in Oklahoma City, July 24, and notwithstanding receipt by the railway company's agent at Oklahoma City of instructions to send the car to Kansas City, the car was spotted on the Oklahoma Mill & Elevator Co.'s track and was permitted to remain there three days, before movement of the shipment to Kansas City was begun.

Delay in arrival of the wheat in Kansas City resulted in loss to plaintiff, and suit for damages was brought. The railway company unsuccessfully resisted liability on a claim that the delay was attributable to plaintiff's own act in diverting the shipment.

Referring to a tariff regulation permitting shippers to reconsign shipments, without responsibility vesting in the carrier in connection therewith, the Oklahoma supreme court said:

"The most reasonable construction of which the provision in said tariff rate is susceptible is that the defendants would be exempted from any liability by reason of delay that was reasonably and necessarily incident to making the diversion. This provision would not exempt the defendants from damages arising by reason of refusal or neglect to transport the car with reasonable dispatch when said delay was not the proximate result of making the diversion."

It was also decided in favor of the grain company that a witness who had had 17 years' experience in the grain business and in diverting shipments was qualified to testify on the point as to what was a reasonable length of time required for diverting a car from Oklahoma City to Kansas City.

SECTION 321. DAMAGES RECOVERABLE. IN GENERAL

For unreasonable delay in furnishing cars to carry wheat, the shipper is entitled to recover damages resulting from a decline in the market price of the wheat, caused by an increase in freight rates and levy of a war tax taking effect after the time when the wheat would have been shipped had cars been furnished within a reasonable time, holds the Oklahoma supreme court in the case of St. Louis-San Francisco Railway Co. vs. Hobart Mill & Elevator Co., 239 Pac. 165.

As a general rule, damages recoverable for negligent delay in delivering freight are to be measured by the excess, if any, of the market value of the goods at the destination, at the time that they should have been delivered, above their value at the time of actual delivery. Special damages can be recovered only when the carrier was apprised at the time of the making of the shipment that they would probably result from any delay. (192 S.W. 211.)

An apparent exception to the general rule of damages above stated exists where, because of unreasonable delay, the goods becomes valueless, or, in other words, where the delay has caused what is equivalent to a total loss to the owner. Under such circumstances a recovery of the full value of the goods when and where they should have been delivered is proper.

* *

The measure of damages for inexcusable delay in the delivery of ordinary commodities having a market value is the excess of the market value of the shipment at the time and place when and where delivery should have been made, above the value at the time and place of actual delivery. Consequently, there is no basis for recovery of actual damages against a carrier in such case when there is no evidence of value at the time and place when and where delivery should have been made. (Warren Land Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 195 Ill. App. 157.)

Mere delay in delivery of freight, however long continued, if followed by delivery, cannot give the owner a claim

for the value of the goods. He must accept delivery, and content himself with a claim for damages resulting as a direct consequence of the delay.

Applying this trite rule of law to the case of Harrill vs. Seaboard Air Line Railway Co., 103 S.E. 21, the North Carolina supreme court held that an initial carrier's misrouting of a shipment, whereby considerable delay ensued, did not make it responsible for loss of the goods on their being reshipped on a new routing given by the shipper when found.

Provision in a bill of lading for basing the carrier's liability for "loss or damage" on the value of the goods refers to loss of or injury to the property in transit, and not to liability for delay in transportation, according to the decision of the Arkansas supreme court in Cunningham Commission Co. vs. Chicago, Rock Island & Pacific Railway Co., 192 S.W. 211.

See, also, sections 332, 345, and Chapter XLI.

SECTION 322. SPECIAL DAMAGES

In Sharpe vs. Southern Railway Co., 41 S.E. 799, the North Carolina supreme court refused to allow plaintiff, a miller, to recover the amount of profits lost to him because of inability to operate his mill pending the railway company's negligent delay in delivering a cogwheel. Recovery was denied because it did not appear that the railway company had been advised that such serious consequence as shutting down of the mill would result from the delay in delivery. The court said:

"Profits become a measure of damages only when they were within the contemplation of the contracting parties and the data of estimation is so definite and certain that they can be ascertained reasonably by calculation; in which case the party in fault must have notice, either by the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance.

"It is not alleged in the complaint, or shown by the proof, that plaintiff lost any definite and certain profit by the stopping of the mill. . . . What the profits would have been during that interim would have depended upon the quantity and quality of grain brought to it; regularity with which it was brought; convenience and caprice of the patrons; price of the flour; opportunity of selling, and collecting the price for the same, and other contingencies, all of which were uncertain, conditional and indeterminate, and failed to furnish data upon which a reasonably accurate estimate might be made."

See, also, Sankey vs. Chicago, Milwaukee & St. Paul Railway Co., 198 Pac. 544, decided by the Montana supreme court.

* *

Hadley vs. Baxendale, an English decision treated by the courts on both sides of the Atlantic as the leading case on the point that damages not within the contemplation of the parties to a contract at the time of the making of the same are not recoverable, will be found fully referred to in the chapter in Part III on the subject of Damages. The decision dealt specifically with the liability of carriers for delaying delivery of goods.

According to the Mississippi supreme court, the general rule of law that the measure of damages recoverable against a railway company for negligently delaying delivery of freight is the excess of the market value of the goods at their destination, at the time they should have been delivered, above their value at the time of actual delivery, applies, although the shipper may have lost the advantage of a special price on account of the delay.

This is true unless the carrier was advised at the time the shipment was made that such special loss would result from delayed transportation. The court applied the rule that special damages are recoverable for breach of a contract only when they were within the contemplation of the parties when the agreement was entered into.

Incidentally, it was decided in the same case (A. J. Lyon & Co. vs. Southern Pacific Railway Co., 66 So. 209) that, under the Carmack amendment to the Hepburn act, a railway company which receives an interstate shipment is liable for a delay on a connecting line the same as if it had occurred on its own line, notwithstanding any provision to the contrary in the bill of lading.

Where a carrier is shown to have been fully advised of some particular use to which the complaining party intended to devote a particular shipment, special damages may be recovered. This principle was applied by the Oklahoma supreme court in the case of Kennedy et al. vs. Lusk et al., receivers of the St. Louis & San Francisco Railroad Co., 176 Pac. 502.

Plaintiffs bought a quantity of cottonseed cake at an oil mill at Holdenville, Okla., for shipment to a near-by point and for special use in feeding cattle. In making the shipment, plaintiffs advised the

defendants' station agent that the feed was needed by their cattle at once, and was assured that it would be delivered the same day, but there were seven days' delay, although the carrier was daily reminded of plaintiffs' needs for immediate delivery.

Under these circumstances the court decided that plaintiffs were entitled to special damages based on their cattle's loss in flesh, plaintiffs having been unable to secure proper substitute feed pending delay in delivery of the shipment.

SECTION 323. STATUTORY PENALTIES

A section of the Nebraska reciprocal demurrage act was annulled by the supreme court of the state on the ground of unconstitutionality. The provision purported to make a railway company liable, as to intrastate shipments, to a penalty of $1 per day for delay in delivering shipments, etc., in addition to actual damages sustained by the aggrieved shipper.

In the case of Sunderland Brothers Co. vs. Chicago, Burlington & Quincy Railroad Co., 177 N.W. 156, the Nebraska court held that the statute falls within the rule of constitutional law that an unreasonable regulation which in effect deprives owners of property used in rendering public service, and operates as a limitation upon the rights of those devoting their property to public use and imposes double damages, a part of which is in the nature of a fine and a part as compensatory damages, constitutes a deprivation of property without due process of law and is a violation of the state constitution.

"In the instant case," said the court, "the railroad company is liable for all actual damages. When the legislature seeks to impose a greater liability in damages than compensatory damages, it is taking private property for private use, which is unconstitutional."

SECTION 324. COMPETENCY OF EVIDENCE

In Laser Grain Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 179 S.W. 189, the Arkansas supreme court decided that on an issue as to the market value of goods at a certain time and place, one may testify as to such value, although his testimony be based upon examination of published market reports.

The admissibility of trade journals' market reports was also recognized by the Nebraska supreme court in the case of Trennt vs. Chicago, Burlington & Quincy Railroad Co., 186 N. W. 322.

And see Pierce vs. Miller, 187 N. W. 105, decided by the Nebraska supreme court.

CHAPTER XXXVI

MISROUTING OF SHIPMENTS

SECTION 325. CARRIERS' DUTIES AND LIABILITIES

SAID the Wisconsin supreme court not long ago: "This court has certainly adopted the doctrine that if a common carrier contracts to carry freight by a specified route and sends the goods by another route it becomes liable as an insurer for any injury which may result by reason of its unauthorized act." (154 N. W. 367.)

This holding is consistent with the general rules of law followed by the courts of all states, it having been frequently decided that when a railway or steamship company has violated shipping instructions, it is immaterial to the company's liability what was the immediate cause of resulting loss, unless, perhaps, the carrier can show that the loss was beyond its control and would have occurred even if instructions had not been violated. But, in the latter case, the burden would be on the carrier to establish those two conditions.

It has also been decided by several courts that loss resulting from unnecessary transshipment or reshipment must be borne by a carrying railway company; and that an unauthorized deviation deprives the carrier of its lien for freight charges, and of the benefit of any provision in the contract for shipment purporting to limit the valuation of the freight.

* *

Plaintiff, having contracted to sell 19 cars of grain to the Loughry Bros. Milling & Grain Co., to be shipped from various points in Kansas and delivered to the Panhandle Railway Co. at Chicago, as agent of the buyer for further transportation to Monticello, Ind., and payment to be made on such delivery in Chicago, intrusted the grain to defendant railroad company for transportation to Chicago and delivery in accordance with the routing mentioned.

This routing was noted on the bills of lading, but was ignored by the defendant, which made delivery to the Wabash at St. Louis. By reason of the misrouting, the buyer of the grain was required to pay higher charges than would have applied had the grain been carried according to instructions, and properly deducted the overcharges in settling with the plaintiff, since the defendant was plaintiff's agent for the purpose of the transportation to Chicago.

Plaintiff then sued to compel reimbursement by the defendant, and the Kansas supreme court affirmed judgment in plaintiff's favor, on the theory that defendant's violation of routing instructions constituted such wrongful misappropriation of the grain as to render defendant liable for any resulting loss. Said the court:

"The defendant was not justified in shipping it in any other way and delivering it at any other place, although the course taken and the delivery made may have seemed to it to have been more practicable than the one stipulated for in the contract of carriage." (Bennett vs. Missouri Pacific Railway Co., 164 Pac. 1084.)

* *

A case before the Alabama supreme court dealt with the legal obligation of railway companies to obey routing instructions given by a shipper, especially where an unauthorized rerouting by a carrier results in increased freight charges. (79 So. 139.)

In this case it appeared that shipments were billed from a point in Mississippi to Louisville at a specified rate of 19c, which applied to a certain route, although that route was not specified, but that the shipment was deflected over another route involving a higher rate. It was recognized that there was a wrong in the rerouting of which the shipper could complain, but decided that the terminal carrier was not responsible for the diversion, which occurred on another line. The court said:

"It is the carrier's duty to observe the directions of the shipper as to the routing, especially where a greater freight charge than the lawful charge agreed upon will be incurred if a different route is employed, unless intervening circumstances justify the change. . . . Even where the carrier has an option to route the shipment, the exercise thereof must be reasonable in view of the circum-

stances and the interest of the shipper. . . .

"No reason whatever is here disclosed for the change, at Milan, Tenn., of the routing of these shipments, from the Illinois Central to the Louisville & Nashville; if, indeed, that could have been validly effected without the consent of the shipper. The 19c through rate to Louisville had the sanction of the Interstate Commerce Commission, was therefore of a statutory effect, and neither shippers nor carriers could lawfully change it as the charge or basis of charge for transportation over that route, between those points."

But, the shipments having been actually deflected, it is held that the terminal carrier could not do other than collect the charges fixed by its tariffs for the actual routing, and that therefore this carrier was not liable to the shipper. It is left to be inferred from the opinion that claim should have been made against the carrier which caused the deflection.

* *

The McCullough Grain Co. recovered judgment against the Missouri Pacific Railway Co. for damages claimed to have resulted through loss of a milling-in-transit privilege concerning wheat shipped from Kansas points to Indiana, due to misrouting of the freight by the carrier. But the Kansas supreme court reversed the judgment on the ground that the milling privilege had not been properly reserved.

The higher court held that, where a shipper of grain is required to submit to a reduction in the selling price because such privilege was lost through misrouting, he is entitled to recover the amount of his loss from the carrier at fault; but that damages for loss of the privilege cannot be recovered where the privilege was available only on reference to it being noted on the shipping order and bill of lading, and no such notation was made.

The railway company argued that whatever injury resulted from the loss of the milling-in-transit privilege fell upon the consignee, and gave the shipper no right of action, but the supreme court said:

"The plaintiff was entitled to receive the agreed purchase price upon the delivery of the wheat in such manner as to give the purchaser the advantage of that privilege. Not having made delivery in this manner, he was compelled to submit to a corresponding reduction. He suffered a loss of the amount involved, through the failure of the defendant to perform its duty, and therefore had a right to look to it for compensation.

"The carrier's mistake reduced the selling value of the property shipped. The case is not analogous to one where a demand for increased damages for the loss of goods is based upon a contract for their sale at a price above the market. In that situation the carrier's liability could not be affected by a special contract of which it had no notice."

The supreme court found that, in view of the surrounding circumstances, the shipment might be held to have been so made to the mill as to have properly preserved the milling-in-transit privilege, but it was decided that failure to note on the shipping order and the bill of lading the words "for milling or malting purposes," as required by carrier's published tariffs, was fatal. On this point, the opinion says:

"If (as we have concluded) the privilege of milling in transit was available only where the words . . . had been noted upon the shipping order and bill of lading, the absence of such notation was of course destructive in the present case, for the carrier could allow no advantage to the shipper except in accordance with the published tariff, and the plaintiff therefore suffered no injury from the misrouting of his shipments." (160 Pac. 214.)

* *

The right of a shipper of corn to recover against an interstate carrier for loss of a milling-in-transit privilege through the carrier's failure to deliver to a connecting carrier according to the shipper's routing was reaffirmed in a decision of the Oklahoma supreme court (Wm. Bondies & Co. vs. St. Louis & San Francisco Railroad Co., 166 Pac. 179).

The court notes that, prior to an amendment of the interstate commerce act in 1910, a carrier was entitled to dictate what connecting line should be used in moving an interstate shipment, but that even then its agreement to deliver to a particular line bound it to observe the stipulated routing. The opinion said, in part:

"It has been the uniform holding of the Interstate Commerce Commission, where a carrier has negligently misrouted a shipment in interstate commerce by reason of which negligence the shipper or consignee is required to pay higher rates for transportation, or is deprived of a transit privilege for the loss of which damages result, to award reparation in all such cases."

See, also, Chapter XXXIV.

CHAPTER XXXVII

LIABILITY FOR PERMITTING INSPECTION*

SECTION 326. IN GENERAL

WHAT legal redress is open to a mill which ships products to its own order for delivery to a customer on taking up the bill of lading attached to a draft drawn on him for the purchase price, where the buyer obtains access to the car containing the shipment without first taking up the draft and, after inspecting the goods, refuses to accept delivery or pay the draft? Is the delivering carrier liable?

This interesting question was raised in a transaction wherein both carrier and buyer denied responsibility. The bill of lading contained the following customary clause: "The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper."

It is well-settled law that any wrongful act on the part of a railway company which deprives the owner of a shipment of property rights in it, to his damage, will support a suit for damages, but "not every wrongful act on the part of the common carrier authorizes an action against it for conversion. It is only the wrongful exercise of dominion over another's property that constitutes a conversion.

"To constitute a conversion, however, it is not necessary that the carrier should have applied the property to its own use, or that it should have derived any benefit therefrom, it being sufficient that it has dealt with the property as if it was its own and in defiance of the owner's legal rights." 10 Corpus Juris, 271.

"The fact that the carrier permits an unauthorized inspection of goods which does not injure them does not amount to a conversion, although the consignor [consignee?] refuses to accept them." 10 Corpus Juris, 274.

There is a fundamental principle of law that an act, although wrongful, which does not produce substantial injury, will not afford the basis of a claim for substantial damages, and the courts apply this principle to cases of the kind here under discussion.

If a contract buyer excusably rejects a shipment because the goods tendered to him are not of the kind he bargained for, no judge or jury is apt to hold the delivering railway company liable in damages because it has committed a technical wrong in permitting an inspection without production of the bill of lading. If the rejection is inexcusable, the buyer's breach of contract in refusing to accept delivery, and not the carrier's act in permitting inspection, will ordinarily be regarded as the proper basis of claim on the part of the shipping seller, the same as if the buyer had rejected delivery without first examining the goods.

A decision in point was handed down by the appellate division of the New York supreme court in the case of Earnest vs. Delaware, Lackawanna & Western Railroad Co., 134 N. Y. Supp. 323. There plaintiff unsuccessfully sued to recover damages because the delivering carrier of an interstate shipment intrusted to defendant, the initial carrier, permitted an inspection under an order bill of lading without production of that document. The facts of that case were substantially the same as here presented, including the bill of lading clause above quoted. The court said:

"In the present case the evidence undisputably establishes that the carrier at the point of destination permitted an inspection of the apples, and hence the defendant, in pursuance of the Carmack act, must respond for whatever loss resulted to the plaintiff by the breaking of the agreement. The extent of the loss or injury the plaintiff must prove. There is no claim that the apples were injured by the inspection, or that the refusal of the Chicago firm to accept the apples, which

*The right of the buyer, as against the seller, to inspect goods, is treated in Chapter XII. See, also, Chapter XXXIX and the case of Old National Bank vs. People's Bank, 108 S.E. 716, decided by the West Virginia supreme court of appeals and referred to in section 435.

it was not legally bound to purchase, was by reason of this inspection. There is not the slightest proof of any loss or damage or injury to the fruit. On the contrary, the proof shows they were not injured at all by the inspection.

"The railroad company retained actual possession of the property. Its dominion over it was not surrendered, and the plaintiff was promptly notified by Train, Letterman & Ford that they did not wish the apples, and plaintiff refused to receive them from the railroad company. It knew possession of the apples was not to be given to the Chicago firm until it had honored the draft upon it. The railroad company did violate its agreement, and the measure of its liability for that breach was the loss or injury to the apples.

"Without regard to the Carmack amendment and the approval of the uniform bill of lading, the courts have held that [an action as for] conversion did not lie for an unauthorized inspection of the goods at the point of destination."

The New York court cited decisions of the highest courts of West Virginia, North Carolina, Michigan and New York, quoting the following pertinent language from a West Virginia case:

"Sharp's agent was simply permitted to enter the cars, set barrels out in his wagon, open them, and examine the apples. Then they were put back in the car and it was resealed by the agent. It may be true that he had no right to do so, and that the defendant did wrong in permitting the inspection, no evidence of title or right to possession being shown, but it does not follow that upon these facts there was a delivery. It may have been an unauthorized act of dominion over the property; but whose act was it? Clearly that of the railroad company, for the property was still in its actual and legal custody. It never parted with its possession.

"Not every wrongful act on the part of a common carrier authorizes an action against it for conversion. Where goods intrusted to a common carrier are injured only, the owner's remedy is for damages for the injury, not their value. . . . What is the nature of the plaintiff's injury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found."

As to instances where a buyer obtains an inspection without taking up draft drawn on him with bill of lading attached, and excusably refuses to accept delivery because the goods are not of the kind ordered by him, courts will look with particular disfavor on any claim against the carrier based on permitting inspection. The buyer's rejection being fairly based on the ground stated, it would be inequitable to hold the carrier responsible because of any technical default in permitting an examination of the goods. Judges and juries are not apt to sympathize with the shipper who has been prevented from compelling a customer to take goods of a kind neither ordered nor contracted for.

From what has been said it is my opinion that, in cases of this kind, the safer course for the shipping seller is to rely upon any just claim against the customer who has refused to accept delivery of goods bargained for. If goods of the contract kind have not been shipped, the shipping seller should shoulder the burden of his own negligence or breach of agreement. If goods of the contract kind have been shipped, but rejected, the defaulting buyer should be looked to, whether he was given an opportunity by the carrier to inspect or not.

* *

Permitting a contract buyer to inspect a shipment, though in violation of lading terms, does not render a carrier liable as for making unauthorized delivery, held the Springfield, Mo., court of appeals in the case of Bernie Mill & Gin Co. vs. St. Louis Southwestern Railway Co. (238 S. W. 847).

Plaintiff shipped under an interstate order bill of lading providing: "Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper."

Plaintiff gave no permission for inspection, but defendant's connecting carrier permitted plaintiff's customer's prospective buyers under resale contracts to inspect the corn as it arrived at its destinations. The shipments and drafts covering them were rejected, and plaintiff, refusing to accept redelivery from the railway companies, sued for the value of the rejected shipments.

The theory on which plaintiff's suit unsuccessfully proceeded was that by unauthorizedly permitting inspection the carriers made delivery of the corn to the

plaintiff's customer, and thereby became liable for the amount of the rejected drafts.

* *

Right of the Model Mill Co., of Johnson City, Tenn., to recover damages against the Carolina, Clinchfield & Ohio Railway Co., on account of permitting a contract buyer of flour to examine the shipment before taking up a draft for the price, with bill of lading attached, and on account of the disposition made of the unclaimed shipment, was denied by the Tennessee supreme court, 188 S.W. 936.

The mill contracted to sell 200 bbls of flour to Murphy & Co., the sale being made with reference to a submitted sample. The mill made shipment under an order bill of lading attached to draft on the buying firm. Defendant was the initial carrier, routing being made over a connecting line for delivery at Augusta, Ga.

On arrival of the flour, Murphy & Co., without first paying the draft, were permitted by the delivering road to examine the shipment. Then, claiming that the flour was not up to the sample, the firm refused to accept delivery or to pay the draft. Immediate notice of these facts was given the mill, which, however, failed to give any instructions concerning disposition of the shipment.

The flour remained in the car five weeks, and was then stored by the delivering railway company in a licensed warehouse. Several months later, on beginning to show signs of deterioration, the goods were sold by the warehouseman. In the meantime, the mill made prompt claim against the initial carrier as for wrongful conversion of the flour, and, the claim being disallowed, suit was brought on it. The decision of the supreme court holds that there was no liability.

It was first claimed by the mill that the carrier rendered itself responsible by permitting the buyer to inspect the flour before payment of the draft, thereby enabling the buyer to "create and invent some objection to the flour in order to reject it, and thereby save itself from loss by reason of the fall in price of 15c on the barrel." In overruling this point, the supreme court said:

"It has long been the settled law of this state that a purchaser such as Murphy & Co. is disclosed to have been has the legal right to inspect such a shipment as that here involved before payment of the draft, and without production of the bill of lading. Murphy & Co. had this right of inspection in order to ascertain if the flour was in quality, quantity, and condition such as it had agreed to purchase, and in the event that it was not, to reject the flour and refuse to take it. . . .

"At all events, however the matter may be reasoned out, it is clear upon authority that where a carrier grants the right of inspection in such a case, his act does not amount to a conversion of the goods, although it may result in a rejection of the goods and subsequent nonpayment of the draft by the drawee."

CHAPTER XXXVIII

LIABILITY FOR LOSS OR DAMAGE*

SECTION 327. IN GENERAL

AS decided by the Florida supreme court in the case of Mullins vs. Seaboard Air Line Railway, 70 So. 467, the liability of a common carrier of goods is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails the carrier, except that such loss or injury was caused by the act of God, or by the public enemies of the state, or by the sole fault of the shipper or his agent. The carrier is an insurer against all risks of loss or injury, excepting those resulting directly from the act of God or the public enemy and without the intervention of human agency.

The only acts of God that excuse common carriers from liability for loss or injury are those operations of the forces of nature that could not have been anticipated and provided against, and that by their superhuman force unexpectedly injure or destroy goods in the custody or control of a carrier.

The carrier is not an insurer against loss or damage resulting from interference of a "public enemy," which term has been interpreted as including mobs, armed forces, etc., of such superior force as to overcome any resistance the carrier might reasonably be expected to offer. Capture of a car of flour by Mexican bandits would illustrate this exception.

* *

Seizure of goods in transit under valid legal process is another excuse available to the carrier as ground for delay in making delivery, or failure to deliver. But there are decisions to the effect that where the seizure is palpably not authorized by law, as where a car was held on mere telegraphic order from a sheriff, it affords no defense to the railway company. Valid seizure may be by attachment, replevin, garnishment or under such police regulations as are embodied in pure food laws, etc.

To afford excuse, however, the seizure must be without collusion on the part of the carrier, and must be promptly reported to the owner of the goods. The duty to give notice to the owner arises under the broader rule that the carrier is bound to use ordinary care and prudence to minimize the loss to result from any of the excepted causes hereinbefore discussed.

Under the last-stated rule, it has been held that, where goods have become wet, the carrier must dry them if that is a reasonable precaution, under the circumstances, to avoid further deterioration in value.

But it has been held that a carrier is not liable for deterioration due only to inherent conditions, as where meal heated in transit (Hines vs. First Guaranty State Bank, 230 S. W. 764, decided by the Texas court of civil appeals.)

* *

That a railway company's employees in charge of yards in which freight is being held in the course of transportation cannot adopt a policy of indifference for the safety of such freight, without subjecting the company to liability for resulting loss, is made clear by the decision of the Kentucky court of appears in the case of John T. Barbee & Co. vs. Southern Railway Co., 226 S.W. 376.

Specifically, the opinion deals with loss caused by a spread of fire to railroad yards while the race riot of 1917 was in progress at East St. Louis, Ill. But the remarks of the court on the governing legal principle show that negligent failure of a common carrier to protect shipments against any imminent loss is actionable. The court says, in affirming judgment against defendant railway company:

"The railroad employees in charge of the yards were charged with the duty of protecting the freight consigned therein. In fact, the railway company was an insurer, and it could not and cannot relieve itself of liability merely by plead-

*See Chapter XLI on Limitation of Liability. For liability of connecting carriers as such see Chapter XXXIV. See, also, discussion of liability for delays in delivery in Chapter XXXV. As to proper party to sue, see Chapter XXXIII.

ing and showing that a mob was in progress in the city, and that a conflagration, started by the mob, spread to and consumed the freight in question, unless it further shows that such destruction did not result through its negligence.

"In other words, if the railway company, by the exercise of ordinary care, could have saved the freight consignment from the fire after its danger from the fire was discovered, but failed to do so, it cannot be relieved of responsibility by showing that a mob started the fire. It was charged with the duty of exercising ordinary care to save the freight consignment after the fire which threatened its destruction was discovered. If it failed in its duty in this regard it is liable.

"The accepted rule is that a railroad company may contract against liability for loss of goods while in transit through mobs or riots, but it cannot contract against its own negligence, and, although a fire may be started by a mob, the railroad company is not relieved of liability by merely showing that the fire was started by a mob, if the facts are sufficient to show, as in this case, that there was ample time between the starting of the fire and the destruction of the property in which the freight might, by the exercise of ordinary care on the part of the railroad company, have been removed from the danger zone to a safe place.

"For the purposes of this case, we might wholly disregard the fact that the mob started the fire. It is conceded that the fury of the mob was not in any degree directed toward the destruction of freight cars or their contents, but only toward the shacks near the tracks, in which Negroes lived."

SECTION 328. PERIOD OF CARRIER'S CONTROL

A clause in the uniform bill of lading form, declaring that freight received on "private or other sidings" shall be at the owner's risk until the car is attached to a train, and that a delivered car shall be at his risk after being detached from the delivering train, was held by the New York court of appeals to apply to a track constructed by a railway company on its own land for the use and convenience only of shippers whose warehouses are adjacent to the track. (Bers vs. Erie Railroad Co., 122 N.E. 456.)

That a bill of lading has not been issued for a carload shipment when the car and its contents are destroyed by fire before being actually put in transit does not necessarily show that the freight was never received from the shipper, and so exonerate the railway company from liability for the loss, according to the decision of the Kansas City court of appeals in the case of Morrison Grain Co. vs. Missouri Pacific Railway Co., 170 S.W. 404.

In this case it appeared that a car was loaded at the shipper's elevator, and the carrier's agent was notified thereof and that a bill of lading would be prepared in the morning. Thereupon the railway company moved the car to a place convenient for switching into an outgoing train, where it was standing when destroyed by fire during the night.

The court of appeals overruled the railway company's claim that these facts failed to show that the shipment was received by it for transportation.

* *

Burning of a carload of meal before it had actually gone into transit was the basis of the lawsuit of Colorado Alfalfa Mill & Power Co. vs. Atchison, Topeka & Santa Fe Railway Co. (184 Pac. 373), before the Colorado supreme court.

Plaintiff's mill is situated at Roberta, Colo., on a branch line of defendant's railroad and three miles from Swink, Colo. There being no agent at Roberta, the nearest agent of the defendant to the mill was at Swink.

The car in question was loaded about 5:30 p.m., one Saturday, after the last train had left. Because trains were not operated on Sunday, it was not expected that the car would be moved until Monday. Saturday night the car and its contents were destroyed by a fire of unknown origin, while on the mill siding. Plaintiff sued for the value of the meal, taking the position that the shipment had been delivered to the railway company for transportation.

The railway company defended on the ground that the bills of lading issued by it contained the customary provision:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

To avoid the effect of this clause, the mill insisted that the clause had been waived by the previous course of dealing between the railway company and the mill. This contention was sustained by the trial court, but was overruled by

the supreme court on an appeal taken by the railway company.

The supreme court recognizes that the clause may be waived by the railway company, but holds that it was not waived in this case. The mill relied on the fact that the railway company had furnished it with blank bills of lading, a seal book, and car seals; that the mill customarily made out bills of lading all ready for signature by the railway company; that cars were moved on telephonic notice to the agent at Swink or on train crews discovering the cars ready to be moved; and that the conductor of the train picking up a car would sign the bill of lading and deliver a copy thereof to the agent at Swink.

Holding that the evidence failed to show delivery of the car in question to the carrier, the supreme court says:

"No car was ever removed from this siding until notice by telephone to the agent at Swink that the car was loaded and ready, or until such notice was given orally to the train crew by plaintiff's agents, or until bill of lading had been signed and copy thereof passed into the hands of defendant's agent, the conductor. Such notice and signing of bill of lading were an essential part of the custom and usage constituting the contract, or supplanting that portion of the contract requiring the attachment of the cars to defendant's train to constitute delivery. Delivery and acceptance were essential to impose upon the railway company the duties and obligations of a common carrier."

* *

A railway company was held not to be liable for freight burning after the consignee has receipted for the same but before completing removal from the car or the company's warehouse, by the Colorado supreme court in the case of Johnson et al vs. Denver & Rio Grande Railroad Co., 193 Pac. 729. The court said:

"The plaintiffs rely upon the rule that the extraordinary liability of the carrier continues until the consignee has had a reasonable time in which to remove the goods. This rule, however, is usually applied in cases where the shipment, on its arrival at the destination, is awaiting delivery to the consignee. . . .

"In the instant case there was a delivery. The signing of the receipts was a delivery of all of the goods involved in this case."

See, also, Chapter XXXII.

SECTION 329. UNSUITABLE CARS

In Schuff & Co. vs. Director General of Railroads, 237 S.W. 410, the Kentucky court of appeals affirmed judgment in favor of plaintiffs on account of loss arising from bulk shelled corn becoming damaged in transit through mixture with coal dust. The opinion approved a ruling by the trial judge that the plaintiffs were entitled to recover the difference between the fair and reasonable market value of the corn in clean condition at the time and place of delivery and its fair and reasonable market value at the same time and place in the condition in which it was delivered. The evidence tended to show that the shippers did not select the car, and that the car and the corn were in clean condition when the loading occurred.

See, also, sections 329, 359.

SECTION 330. STORMS AND FLOODS

"There is some difficulty in framing a concise, comprehensive, and accurate definition of the term 'act of God,' as that term is used and understood when applied to occurrences causing damage for which the carrier is not liable," said the Texas court of civil appeals in the case of Texas Star Flour Mills vs. Gulf, Colorado & Santa Fe Railway Co., 143 S.W. 1179, a case in which plaintiff sued for injury to a shipment of flour caused by rain after a storm had unroofed the car.

"We think it settled, however," proceeded the same court, "that when the injury is due directly and exclusively to natural causes, without human intervention, and no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury, it should be regarded as an 'act of God,' for which the defendant is not liable. . . . All that is required to make an occurrence an 'act of God' is to show that it was so unusual that it could not have been reasonably expected or provided against."

Applying this test, the court decided that defendant railway company was not liable for the injury to the flour, it appearing that, although stronger cars than the one in which this shipment was made were manufactured and in use by railways, the particular car was not so defective that the railway company could have reasonably foreseen that it was apt to be unroofed by storm.

In other words, there was no negligence on the part of the company, concurring with the storm, to produce the loss, and hence no liability. The decision was influenced by undisputed testimony to the effect that the car was of standard make,

comparatively new, and was found to be in good condition when carefully inspected the day the flour was loaded.

Through numerous decisions of courts of authority it has become a settled rule that unprecedented floods, of such magnitude that the ordinary safeguards provided by the carrier are wholly insufficient to withstand their effect, are within the term "act of God." The Kaw valley flood of 1903, in which much freight was lost in the Kansas City yards, affords a good illustration of such an unusual and unexpected flood as relieves a carrier from liability when shown to be the direct cause of the loss.

Liability may be fixed upon the carrier by showing that the approach of an unprecedented flood was known in ample time to have afforded opportunity to the carrier to remove the imperiled freight to a place of safety.

* *

Another principle is well illustrated by the decision of the Alabama supreme court in the case of J. A. Elliott & Son vs. Alabama Great Southern Railway Co., 43 So. 738, wherein defendant was held liable for damage to a shipment of flour done by a cyclone shortly after the car arrived at its destination, but before the consignee had had reasonable opportunity in which to receive the shipment. Liability was predicated upon the fact that the defendant had negligently delayed for four days in putting the car in actual transit after receiving it.

Said the Alabama court: "This court holds that the negligence, resulting in the delay at Birmingham, continued to be an active cause until the plaintiff had had a reasonable time, after the arrival, within which to remove the goods. Hence the causes were concurring, and the defendant cannot claim that the cyclone was the only proximate cause."

In a similar case, the Minnesota supreme court has said: "The rule that permits a carrier to excuse his negligence by an 'act of God,' overtaking him while thus in fault, seems to us unsound."

In the case of National Rice Milling Co. vs. New Orleans & Northeastern Railroad, 61 So. 708, the Louisiana supreme court decided that defendant was liable for loss attributable to failure to take reasonably prompt steps to remove cars from low tracks which were flooded after defendant was informed of the danger, although the waters reached a higher point than was predicted by the weather bureau.

* *

An interesting decision of the Minnesota supreme court, handed down in the case of Northwestern Consolidated Milling Co. vs. Chicago, Burlington & Quincy Railroad, 160 N.W. 1028, draws attention to a difference in opinion between courts on the question as to a carrier's liability for freight lost in a flood, where the carrier's only fault has been delay in transporting the goods, whereby they were caught in an unforeseen flood.

The plaintiff sued for the value of flour lost in a Columbus flood while in transit from Minneapolis to West Virginia, relying upon the fact that, except for negligent delay in carriage, the loss would have been avoided. The trial judge awarded judgment in the mill's favor, but the supreme court, constrained by decisions of the federal courts in similar cases, reversed the judgment, recognizing the point that, as to interstate shipments, the loss must be attributed to an act of God, rather than to the negligent delay.

At the same time the court's opinion shows that Minnesota is still in line with the courts in many other jurisdictions on the point that, as to intrastate shipments, loss in such cases is to be charged to the carrier on the theory that the negligent delay was the proximate cause of the loss.

* *

The Georgia court of appeals has decided that an unprecedented flood is no defense to liability where it appears that the loss would not have occurred except for an unreasonable delay on the part of the railway company in moving the shipment. (Lamb vs. W. H. Mitchell & Co., 84 S.E. 213.)

In the case of S. J. Kibler & Brothers Co. vs. Toledo & Ohio Central Railway Co., 119 N.E. 733, the Ohio supreme court added a decision on the question whether a railway company is liable for loss of goods in transit, directly due to an unprecedented flood, where it appears that except for previous and negligent delay in transporting the goods they would not have been caught in the particular flood.

The court held that such antecedent negligence does not fix liability, but that the carrier may be compelled to respond in damages if it appears that the loss was due to negligent failure to exercise due care for the safety of the shipment after the impending peril was discovered and before the loss occurred.

An interesting decision under this head was handed down by the United States circuit court of appeals for the seventh circuit in the case of Collins Produce Co.

vs. Chicago & Eastern Illinois Railroad Co., 235 Fed. 857. The claim involved the carrier's liability for loss of a shipment of poultry at Dayton, Ohio, through confiscation by the military authorities while that city was under martial law at the time of a flood there. In affirming judgment in the shipper's favor, the court decided the following points:

A suing shipper need not show that a freight loss was due to the carrier's fault. Confiscation of a shipment by military authorities is no defense to claim against the carrier, if the carrier's fault made the confiscation possible. That a shipment was caught in an unprecedented flood is no excuse against responsibility, if the loss could have been avoided or mitigated by the exercise of reasonable care on the carrier's part. Where an act of God and negligence of a carrier concur in causing loss, the carrier must bear the legal responsibility. To avoid liability, the carrier must show loss as a direct result of some cause for which it was not responsible in law or by contract.

In a case passed upon by the New York court of appeals—Barnet vs. New York Central Railroad Co., 118 N.E. 625—it was decided that the exemption from responsibility might be applied where a car of goods itself was not reached by a flood, but caught fire from a near-by carload of lime which had been set in blaze by flood waters coming in contact with the lime, there being no evidence to show negligence on the part of the carrier in failing to foresee that the unprecedented flood would reach either car in time to have avoided the loss.

* *

In the case of International Paper Co. vs. New York Central Railroad Co., 166 N.Y. Supp. 751, the appellate term of the New York supreme court refused to charge defendant on account of loss of goods in an unprecedented flood of the Hudson River near Albany, although a government weather observer had issued a flood warning, predicting a rise which would not have endangered the freight in question, and had issued a later prediction of a higher rise; the fact of the prediction not appearing to have been drawn to the attention of the railway company, and the grounds on which it was based not being disclosed. It was undisputed that the defendant was guilty of no negligence after it became apparent that the water would rise to an unusual height.

But a contrary conclusion, reached by the Michigan supreme court in the case of Ithaca Roller Mills vs. Ann Arbor Railroad Co., 186 N. W. 516, appears to be sounder and more just.

After referring to a conflict in judicial opinion throughout the country as to whether an act of God or negligent delay in transportation is to be regarded as the active cause of loss of freight caught in a flood at an intermediate point, although it would not have been so caught except for the carrier's delay in transporting the freight from the point of shipment to the destination, the Michigan court concluded:

"Where the carrier, as in the instant case, had warning of the oncoming flood in ample time to protect the shipment, and did not take reasonable precautions to protect the same after such notice, he is not exonerated from liability upon the principles laid down in the delay cases."

SECTION 331. SHORTAGES

The case of Nye-Schneider-Fowler Co. vs. Chicago & Northwestern Railway Co., 182 N. W. 967, passed upon by the Nebraska supreme court, dealt with the liability of railroad companies as to shrinkage in grain weights in the course of transportation. The following is an abstract of the points decided by the court:

A railroad company is liable for loss of grain shipped over its road, and the proof of loss makes a prima facie case against the company, by reason of the presumption that the loss resulted from some cause other than one which would exempt the company from liability; but the company is not liable for the natural shrinkage in weight of grain during shipment, due to its drying and losing a percentage of its moisture content.

The burden of proving the extent of loss of grain from the car during shipment is upon the shipper, and does not shift to the railroad company.

Proof of weights of grain before and after shipment, when shown to have been carefully made and with proper apparatus, is presumptively correct, but where the railroad company introduces evidence of mistakes, or other evidence tending to impeach the accuracy or reliability of weights, or of the record of the weights made, the question of the correctness of the weights is for the jury, and is a fact which the shipper must prove by a preponderance of the evidence.

Where evidence is introduced to show that grain will shrink in weight during shipment, owing to loss of moisture con-

tent, it at once appears that the mere discrepancy in weight before and after shipment cannot be relied on alone to prove the actual loss of grain from the car, and the burden, therefore, of proving such shrinkage, or the reasonable limit of such shrinkage, and of making allowance therefor, is upon the shipper.

* *

In the case of National Elevator Co. vs. Great Northern Railway Co., 163 N.W. 164, the Minnesota supreme court considered the question as to the burden of proving the cause of shortage in a grain shipment arising from the carrier's failure to deliver the full quantity called for by the bill of lading. It appeared that plaintiff delivered 63,600 lbs of wheat to defendant for shipment from one Minnesota point to another, as shown by the bill of lading issued. Upon unloading the car, it was found that it contained only 63,090 lbs of wheat, and plaintiff sued for the value of the 510-lb shortage. At the trial, plaintiff relied on the bill of lading as showing the quantity of wheat received by the railway company. Defendant admitted the unloading weight, and plaintiff proved the value of the shortage, due filing of proper claim, and its disallowance by defendant. This constituted the proof on which the supreme court holds that plaintiff made out a prima facie right to recover.

Defendant offered evidence tending to show that the seals attached to the car at the point of shipment were intact until the time of unloading; that the car was inspected by the state inspector while standing on the track, and was in good condition and not leaking. It also asserted that there was a mistake made as to the quantity loaded, and the trial judge instructed the jury that the burden was on plaintiff to show that more wheat was loaded than was delivered at the destination, refusing plaintiff's request that the jury be instructed that the burden was on defendant to show that a mistake was made in the loading weight stated in the bill of lading or the state certificate of weight. The supreme court decided that the trial judge improperly instructed the jury on this point, and that plaintiff's instruction should have been given, as correctly stating the law.

Citing earlier decisions of the supreme court and of the appellate courts of Arkansas and Massachusetts, and the statutes of Minnesota which require carriers to receive and deliver the full quantities stated in bills of lading, the court said:

"When a shipper, in an action to recover the value of grain lost in transit, introduces in evidence a bill of lading calling for the delivery of a certain specified amount of grain at the point of destination, and then proves that a less amount was delivered, the presumption arises that the loss was caused through the negligence of the carrier, and it then becomes necessary for the carrier to prove the contrary; that is, to meet the presumption of negligence by showing a fact or state of circumstances which otherwise accounts for the shortage, and this it must do by a preponderance of the evidence. . . .

"While the amount involved is trifling, the case is important. Having in view, no doubt, the immense traffic moving from one end of the country to the other by rail, and appreciating the vast amount of money passing daily upon recitals in bills of lading, the legislature enacted the present statutes. . . . The statute places upon the carrier the duty to issue to the shipper a bill of lading reciting the number of pounds of grain received by it, and for the delivery of the same to the consignee at the point of destination, or to a proper connecting carrier.

"To hold that a shipper, in an action of this character, must prove in the first instance the amount of grain delivered to the carrier, the action being based on the contract, would indeed be a new rule of evidence, yet this is what the refusal to give the instructions requested amounts to."

The decision accords with a well-established rule of law, apart from the fact that the opinion rests partly on Minnesota statutes which may not have counterparts in the legislation in some of the other states. We quote from a standard legal authority, which cites numerous American and English decisions:

"It is nowhere questioned that a bill of lading is prima facie evidence of the receipt of the goods by the carrier. And this is true, although a statute forbids the issuance of bills of lading except for goods actually in the carrier's possession. But such recitals are not conclusive, and it may be shown by parol evidence that none of the goods, or only a part of the goods, described in the bill of lading were in fact received. . . . Nevertheless, the recitals of the bill of lading as to the receipt of the goods place the burden on the carrier to show the contrary, and in the absence of convincing testimony establishing mistake they must control.

"Conversely, the shipper or consignee

may contradict the bill of lading by parol evidence showing that the carrier received a larger quantity than the bill of lading acknowledged to have been received. The fact that the goods were underbilled will not justify the carrier in converting the excess." (10 Corpus Juris, 199, 200.)

A federal court and the Kentucky court of appeals are among tribunals which have declared that a carrier must show by clear and unquestionable proof that a less quantity of goods was actually received than shown by the bill of lading. (10 Federal Cases, No. 5,545.)

But it must be noted that the Minnesota decision is not inconsistent with a view that, had the jury been properly instructed as to who had the burden of proof, a finding in the carrier's favor might have been sustained on proof that the car was in sound condition and that the seals placed on the car at the time of loading remained intact up to the very time of unloading, for it would seem that such proof would conclusively establish, as a fact, that there was no grain lost in transit.

In cases of this kind it is purely a question of fact, largely determinable according to probabilities, whether there was a mistake by overstating the quantity of grain in the bill of lading, or whether there was a loss in transit. Opportunities and likelihood of a tampering with the seals in transit and theft of part of the grain, etc., and the established condition of the car, must be weighed by the jurors against the probability of a mistake having been made in the bill of lading.

If these conflicting elements of evidence balance, or if the probability of loss in transit is the greater, the carrier fails to sustain the burden of proof imposed upon it by the law and should lose; otherwise, it is not liable. Finally, it is to be remembered that jurors are the judges of the weight and credibility of conflicting evidence, and that their findings thereon are usually conclusive.

* *

The H. Dittlinger Roller Mills Co. secured a decision of the Texas court of civil appeals at San Antonio, affirming a judgment against James A. Baker, receiver of the International & Great Northern Railway Co., previously entered in the mill's favor on account of loss of 89 bus of wheat from a carload in transit.

The bill of lading specified the weight of the shipment, "subject to correction." The weight inserted was obtained from a scale ticket prepared by the shipper's employee, who was licensed to serve as a weighmaster by the Western Weighing and Inspection Bureau, an organization maintained by carriers to verify the correctness of vouchers, scale tickets, etc.

The following extract from the opinion of the court of civil appeals appears to state rules of law followed by the courts in other states, as well as in Texas:

"If the appellant [the railway company] received the quantity of wheat stated in the bill of lading and delivered only a part thereof, it would of course be liable for such portion as it failed to deliver. The fact that the weight given by the Western Weighing and Inspection Bureau was adopted by the railroad company in issuing its bill of lading places the company in no better or worse attitude than if it had done the weighing itself. The company is bound by its recital of weight, unless it shows that there was a mistake.

"The weights stated in the bill of lading are prima facie evidence of the amount received, and the burden is on the carrier to show that it did not receive the amount of grain mentioned in the bill of lading. This burden can only be discharged by showing that a mistake was made in weighing the wheat, or in making out the certificate upon which it issues its bill of lading. The testimony, in so far as it relates directly to these two transactions, fails to show any mistake. In fact, all of it tends to show there was no mistake.

"However, if the carrier can show that it delivered all of the wheat received, and that at the destination it was carefully and correctly weighed, and there was found to be a discrepancy of 89 bus, it has discharged the burden resting upon it, for it would follow that it could not have reecived the quantity stated in its bill of lading.

"The difficulty of making this showing is dependent largely upon the kind of goods transported. When wheat is shipped in bulk, the only test is the weight. It therefore becomes necessary for the carrier to show that no wheat was taken out of the car while in its possession, and that none could leak out.

"The testimony in this case, introduced on behalf of appellant, even if credited by the court, fails to preclude the idea that a leak may have occurred, followed by repairs made by appellant's employees. Proof that at two places en route no leak was perceived, and none perceived at destination, while persua-

sive, is by no means conclusive. The evidence is not so satisfactory and conclusive as to preclude a theory that wheat may have been stolen from the car by an employee of the carrier or some one else.

"The court was justified in finding that appellant did not discharge the burden resting upon him of showing that the company did not receive the quantity stated in its bill of lading." (203 S.W. 798.)

* *

"While the transferee of an 'order notify' bill of lading, after paying the draft attached and obtaining possession of the bill of lading, and thus acquiring the legal title to the goods mentioned therein, may maintain a suit against the carrier for any shortage in the shipment occasioned subsequently to the transfer of title and before delivery to him, where such shortage is traced to the carrier, yet where, in such a suit, the bill of lading does not appear in evidence, and there is no evidence of any admission upon the part of the carrier as to the amount of goods received by it from the consignor, or other evidence tending to prove the amount of goods in the possession of the carrier and delivered to the transferee, the latter, although proving title to the goods shipped and received, fails to prove any loss or damage to the shipment accruing after he had obtained title thereto."

This language was used by the Georgia supreme court in disposing of the case of Hunt vs. Southern Railway Co., 102 S.E. 757.

* *

A distinction between a grain carrier's penal and civil liability under the Minnesota statutes was pointed out by the supreme court of the state in the case of National Elevator Co. vs. Great Northern Railway Co., 164 N.W. 79.

Sections 4491 and 4492 of the General Statutes require such common carriers, on request, to issue a receipt for the number of pounds of grain received, and to deliver that quantity, "less loss from transportation, not to exceed 60 lbs to each car"; and prescribe a penalty of from $10 to $50 for refusal to issue a receipt, and a penalty of from $50 to $100 for failure to deliver the proper quantity of grain. These fines are collectible by the state.

In the case before the supreme court, the elevator company sued for loss of 3,926 lbs of rye under an intrastate shipment of 85,086 lbs. The trial judge allowed judgment for the value of the shortage, less 60 lbs, holding that the cited statutes limit a carrier's civil liability to an owner of grain, as well as allowing a credit of 60 lbs in a proceeding to recover the statutory penalty. But, on appeal, the supreme court reversed the judgment, holding that the statutes in question have no bearing on the civil liability of railway companies for shortages in delivery, and that recovery may be had for shortage to the full quantity actually lost by the carrier.

SECTION 332. DAMAGES RECOVERABLE

Despite the provisions of the Cummins amendment to the interstate commerce act, a carrier is liable for the full actual loss or damage to an interstate shipment, the liability not being limited to the value of the goods at the destination. This is the substance of the very important decision handed down by the St. Louis court of appeals in the case of Bernet, Craft & Kauffman Milling Co. vs. New York, Chicago & St. Louis Railroad Co., 260 S. W. 508.

Plaintiff sued for a balance claimed as damages to a shipment of flour lost in a railroad wreck. The flour was shipped from plaintiff's mill in Illinois to New York to its own order, with instructions to notify Bliss-Dallett & Co. Bliss-Dallett & Co. paid the draft, but a refund was made by the mill. The flour not damaged was delivered, and afterward the mill furnished a quantity of flour equal to that lost in the wreck.

This was an interstate shipment, and therefore governed by the federal laws. The Cummins amendment provides that the carriers affected by the act shall issue a bill of lading and shall be liable to the lawful holder of it, or to any party entitled to recover thereon, "for any loss, damage, or injury to such property, . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability . . . imposed," and, further, that the carrier "shall be liable . . . for the full actual loss, damage, or injury, . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

Disposing of the case, the court of appeals said: "At common law the rule applicable to the place of estimating damages is the destination. . . . Under the Cummins amendment, the damages are not limited to destination, for the carrier on whose line the loss occurs is liable for the full actual loss, damage, or injury. It is said in Chicago, etc., Ry. Co. vs. McCaull-Dinsmore Co., 253 U. S. 100, 40 Sup. Ct. 504, 64 L. Ed. 801:

" 'The rule of the common law is not an arbitrary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed.'

"While, in the instant case, plaintiff shipped the flour, shipper's order, bill of lading notify Bliss-Dallett & Co., the flour was, under the contract of purchase, shipped in sacks owned and furnished by Bliss-Dallett & Co., it was intended for them, the draft attached to the bill of lading was paid by them, and they became invested with title thereto, the indicia of title carrying with it the shipment of flour. Having contracted to deliver the flour for $8.50 bbl, in sacks furnished by Bliss-Dallett & Co., which company paid the draft, thereby becoming entitled to the flour, the market value at destination was not the true measure of damages.

"Whatever may be the distinction between the words 'loss, damage, or injury,' we are of the opinion that they are broad enough to cover the value of replacing the flour lost. As plaintiff did not go into the market to purchase flour, but manufactured the flour with which it replaced the flour lost, its full actual loss, damage, or injury was the cost of manufacturing the flour replacing that lost, not less than the controlling contract price."

* *

Where flour is lost in interstate transit, damages against the carrier to be held responsible are properly based on the market value of the shipment at the destination, the Mississippi supreme court held in the case of Yazoo & Mississippi Valley Railroad Co. vs. Delta Grocery & Cotton Co., 98 So. 777. The railroad company was defendant in a lower court, and appealed from judgment against it on account of partial loss of a flour shipment made from Fort Collins, Colo., to Clarksdale, Miss. Affirming the judgment, the supreme court said:

"The sole question presented is as to the proper measure of damages for the loss sustained. The exact point in controversy is whether the appellee, a wholesale grocer, is entitled to recover the replacement value of the damaged flour (that is, the invoice or cost price, plus the freight), or the resale value (that is, the price at which the flour could have been sold, or, we will say, the reasonable cash market value), at the point of destination, Clarksdale, Miss. If the measure of recovery is to be the value of the flour at Clarksdale, then the judgment for $63.56 is correct; but if the recovery is to be based upon the cost price or value at the point of shipment, or the replacement value, then the verdict should have been $58.73. . . .

"The damaged flour cost plaintiff $10.44 per bbl delivered at Clarksdale. Plaintiff recovered $11.30 per bbl for it, which represents what it could have sold the flour for, or its reasonable wholesale cash market value at the point of destination, Clarksdale, Miss. The shipment being interstate, the correct measure of damages is a federal question, and must be determined by the rules of the common law, as interpreted and applied in the federal courts, and as modified by federal statutes.

"We shall omit discussing the question as to the measure of damages in such cases before the enactment of the Cummins amendment, . . . because this amendment, we think, provides that the liability of the carrier shall be the 'full actual loss to the holder of the bill of lading at the point of destination.' . . .

"We understand that, prior to the enactment of the Cummins amendment, the bills of lading specified that, in the event of loss, injury, or damage to goods in transit, the measure of damages would be based on the value of the property at the time and place of shipment. The federal courts held this to be a reasonable regulation. In effect, replacement cost value prior to the enactment of the Cummins amendment had been adopted as a rule of the measure of damages by many of the courts of the United States; but since the enactment of the Cummins amendment the Supreme Court of the United States has had occasion to pass upon the question, and held impliedly, if not expressly, that the measure of recovery in such cases is the actual value of the lost property at the point of destination; that is to say, the consignee is entitled to recover the market value of the property, or the full

actual loss to him, at the point of destination."

* *

The St. Louis court of appeals, in the case of Forest Green Farmers' Elevator Co. vs. Davis, 270 S. W. 394, said concerning the measure of damages recoverable against a railroad for loss of wheat in interstate transit:

"The Cummins amendment . . . provides that the carrier shall be liable for the full actual loss, damage or injury. We do not think that Railway Co. vs. McCaull-Dinsmore, 253 U. S. 97, 40 S. Ct. 564, . . . construes the above statute as unequivocally limiting the measure of damages to the market value of the commodity at destination. By the words, 'full actual loss, damage or injury' is meant the actual loss, damage, or injury sustained within the contemplation of the parties. Unless the testimony tends to show that defendant [the carrier] knew that the wheat had been sold at a certain price, such contract price was not within the contemplation of defendant. Therefore plaintiff's measure of damages, if permitted to recover, is the market value of the wheat either at St. Louis, the point of origin, or Chester, the point of destination, less the freight between such points, if unpaid; the market value, however, not to exceed the contract price at which the lost wheat was sold to the milling company. Plaintiff is necessarily limited to the contract price per bushel, because plaintiff's actual loss, under the circumstances of this case, could not exceed the contract price at which the wheat was sold."

It seems to be the law that if a shipment is damaged in transit and the buyer rejects delivery on that ground, the measure of the carrier's liability turns on the question whether it was advised in advance that the goods were being sold at a fixed price. In the absence of such advice, the market value of the goods in uninjured condition at the destination governs. A standard legal authority says:

"Where goods are shipped in pursuance of a sale thereof at a stipulated price which is less than the market price at destination, damages for loss or injury must be estimated on the basis of the price to be received under the contract of sale. But if the price contracted for is greater than the market value at destination, the estimate will have to be based on the market value, unless the carrier had been notified at the time of shipment of the fact that the goods had been sold for a higher figure." 10 Corpus Juris, 399.

At first blush, it may appear to be inequitable to hold that where the carrier has no notice that the goods have a certain contract value at their destination it is entitled to the advantage of the contract price, if that happens to be less than market value, but that it does not bear the disadvantage of a contract price higher than market value. However, reflection shows the soundness of the law on this point.

It is fundamental that one aggrieved by another's breach of contract is not entitled to profit by the breach; he is not entitled to more than reimbursement against actual loss. So, if a shipment was to be sold by the owner at its destination for a certain sum, that ought to measure his loss on frustration of a sale through injury to the goods in transit.

Another fundamental principle of the law of damages is that the loss must not only be actual, but must have been one within the contemplation of the parties at the time they made their contract. So it is considered that, unless the carrier is advised to the contrary, it is entitled to assume that the goods will have no greater value at their destination than their market value.

This is not a rule of law that specially favors railroad companies; it may be applied to cases where a mill or wholesale merchant sells mill products to another. If through a market drop the buyer can purchase substitute goods for less money than he has agreed to pay under a broken contract, he is not entitled to substantial damages. If he has made an undisclosed contract to resell the goods at a profit, it would hardly be fair to hold the mill or other seller liable in damages based on loss of profits under that contract for resale. But if the seller knows that his customer has made a resale in advance, breach of the sale contract may so plainly involve a breach of the buyer's resale agreement as to make it proper to assess damages on that ground.

The general reasoning on which rests the rule that special damages are not recoverable unless within the contemplation of the parties at the time of the making of the contract was aptly stated by the Mississippi supreme court in a case involving the liability of express companies:

"If one of the parties to a contract is to be made liable for extraordinary damages, it is right that before the con-

tract is made he should have notice of the exceptional circumstances that may warrant them, in order that he may decline, if he wish, to make a contract to which such enhanced liability may attach, or may make special stipulations for increased compensation. He has the right to do either, and is entitled to notice to that end.

"If he, however, enter into the contract, or if, being a common carrier, he receive an article for transportation [as a common carrier must], after having received from the other party notice of the special circumstances, he is conclusively presumed to have contracted with reference to the enlarged liability. It is also to be remarked that he is entitled to notice of the special circumstances, in order that he may use special diligence and employ extra precautions to guard against the increased risk." (86 Miss. 329.)

* *

In the case of Gibson vs. Inman Packet Co., 111 Ark. 521, the Arkansas supreme court said: "There is no proof in the record tending to show that plaintiff gave notice to the carrier of his contract with the purchaser for a fixed price; therefore he is not entitled to recover special damages, and the measure of his recovery must be limited to the difference in the market value on account of depreciation caused by the injury. . . . If he had given notice of the contract with the purchaser, he would have been entitled to recover the difference between the price stipulated in said contract and the market value in Newport in its injured condition."

In many cases the law works exact justice. For example, if a seller agrees to deliver a carload of wheat in Chicago at $2 bu, and it is lost in transit, and if at the time for delivery in Chicago wheat is selling at $1.50 there, the seller can buy substitute wheat at the market price, and therefore has not been damaged more than the lost carload would have brought on the market. And it is against the policy of the law to permit recovery of more than actual loss.

Furthermore, in computing actual loss, the computation is made on an assumption that the aggrieved person has done all that he reasonably could to minimize his loss. Therefore, the price at which a shipping seller could have replaced lost or destroyed goods at the destination is always a pertinent consideration in determining loss.

So, the explanation of a seeming inconsistency of positions taken by railroad companies is that a shipping seller is not entitled to the full market value of goods at the destination when he has contracted to sell them for less. Otherwise, he is more than reimbursed for his loss; he profits by his loss.

On the other hand, where the market goes down, the railway company is not to be held to have foreseen that the goods would be worth more at the destination than they were worth in the market, unless informed of the circumstance giving rise to a higher value—the circumstance that the goods are not shipped for sale on the open market, but to fulfill a specific contract at a specific price.

If these rules do not do exact justice in most cases, the commercial experience which makes them unjust should be drawn to the attention of appellate courts and lawmakers, with a view to a statutory or judicial modification of what now appears to be rather well-settled law.

* *

Damage to goods in transit, not rendering them worthless, does not entitle the owner to refuse to receive them, he being left to his remedy by claim against the carrier for any loss for which the latter is liable, according to a decision of the Texas court of civil appeals, involving a shipment of corn. (Patterson & Roberts vs. Quanah, Acme & Pacific Railway Co., 195 S.W. 1163.)

To the same effect is the decision of the California district court of appeal in the case of Pacific Heater Mfg. Co. vs. Southern Pacific Co., 188 Pac. 600.

In a suit brought by the St. Anthony & Dakota Elevator Co. against the Great Northern Railway Co. to recover for shortage of a wheat shipment at its destination, the Minnesota supreme court decided that where no grade wheat has a market value at the destination, but not at the place of shipment, its value at the latter place is properly ascertained by deducting from the value at the destination the cost of transportation (149 N.W. 471).

SECTION 333. PROOF CONCERNING DAMAGE OR LOSS

When freight was shipped in good condition, the burden falls on the carriers to show that damage complained of occurred after termination of the transit. (Arkansas supreme court, Cunningham Commission Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 188 S.W. 1177.) In this case chop was damaged in transit on account of the leaky condition of cars.

A difference in the opinions of the United States Supreme Court and the Texas supreme court gives rise to a difference in the law governing a railway company's liability for deterioration of goods in transit under an intrastate shipment and the law applying to an interstate shipment. The conflict is noted in the decision of the state court in the case of Cleburne Peanut & Products Co. vs. Missouri, Kansas & Texas Railway Co. of Texas, 221 S.W. 270. The court made the following remarks, which plainly apply to shipment of mill products, as well as to the peanuts involved in this case:

"Under our view, it was the duty of defendant to furnish plaintiff a suitable car in which to transport its peanuts, whether they were green and uncured, or dry and well cured. Plaintiff was entitled to compensation for damage to the shipment, if any, if it resulted from defendant's negligence as alleged; and defendant, if negligent, would not be relieved from liability for damage proximately resulting therefrom, even if the shipment when received for transportation was not in first class condition. . . .

"The rule in this state is that the carrier must bring itself fully within the exception, not merely by showing the damage resulted from the inherent defect of the goods, but by going further and showing that it exercised ordinary care to avoid the damage. In other words, the carrier has the burden of showing that it was free from any negligence contributing to the damage. . . .

"The rule followed by the Supreme Court of the United States is that, when it has been shown that the damage results from inherent infirmity of the goods transported under circumstances not showing negligence, the burden of proving negligence devolves upon the plaintiff. . . .

"In view of the fact that liability in this case is predicated upon damage to an interstate shipment, and in recognition of the controlling force of the decisions of the United States Supreme Court in such cases, we are constrained in this instance to follow the national court rule, notwithstanding we think the established rule of this state the sounder and more just rule."

* *

Touching the point that an owner of grain or other commodity is not entitled to recover against carrying railway companies on account of damaged condition of the shipment on its arrival at the destination, without first showing that the condition did not exist at the time of loading, the Kansas City court of appeals held in the case of Equity Elevator Co. vs. Union Pacific Railway Co., 191 S.W. 1067, that there was sufficient proof as to the good condition of corn when shipped, where an employee of the elevator company testified that he examined all outgoing freight to ascertain its condition, and that, although he had no recollection concerning the particular car of corn, he was sure, from the uniform practice of not permitting cars to go out in bad order, it must have been in good condition.

The court decided the additional point that, as affecting the right to hold a terminal carrier liable for damaged condition of freight originating on a connecting line, the damage will be presumed to have occurred on the last line, in the absence of proof to the contrary, thereby placing responsibility for the loss on the delivering carrier.

* *

The condition of a shipment at its destination is proper evidence of its condition when loaded, when accompanied by a showing of absence of anything that would naturally produce a change or that would tend to explain a change in condition. This rule was laid down by the Idaho supreme court in the case of Intermountain Farmers' Equity vs. Norris, 229 Pac. 745.

The shipment involved in the cited case was one of oats sold f.o.b. Inkom, and shipped to Salt Lake City. The court said:

"Appellant [the seller] contends that the trial court erred in admitting evidence of the condition of the oats at Salt Lake City, without showing that such condition was the same . . . as at Inkom. . . . The condition of the oats at Inkom was material, and evidence of their condition elsewhere was not relevant, except to the extent that it related to their condition at Inkom. Naturally the weed seed was contained in the oats when loaded at Inkom, and evidence of the extent of such foreign matter at Salt Lake City was admissible as tending to show the condition and grade of the oats at Inkom. . . . The fact that such foreign matter was found in the oats when delivered constituted some evidence that there was foreign matter in the oats when they were shipped.

"And what has been said about the testimony as to the weed seed is true of the testimony regarding the damp, discolored and sprouted condition of the oats. That they were wet at Salt Lake City was not

conclusive that they were wet at Inkom; but the fact that the sacks were found to be uniformly wet throughout the car, when examined at Salt Lake City, was admissible to show the condition of the oats, not at Salt Lake City, but at Inkom. This is specially true, in view of the conflict in the evidence as to whether the roof of the car leaked, and in view of the testimony of the witness Merrill that, had the damp condition been caused by a leaky car, the oats would have been wet in spots and not uniformly wet. . . .

"Oats is one of the staple commodities, extensively bought and sold and shipped throughout the country, and there is no reason as a matter of law why one who has had years of experience in buying and selling and handling oats may not be qualified to give intelligent and valuable evidence as to whether a shipment, found wet at the point of destination, was wet when loaded, or became wet on account of leaks in the roof of the car."

* *

A question as to the proof required to establish liability against a delivering railway company for injury to a shipment carried in interstate commerce over more than one railroad was involved in the case of Scrivens vs. Central of Georgia Railway Co., 100 S.E. 233.

The Georgia court of appeals held that in a suit against a connecting carrier in interstate commerce to recover for damage to goods received by it from a preceding carrier and delivered by the connecting carrier at the destination in a damaged condition, proof that the goods were delivered in good condition to the initial carrier raises a presumption that they were received in good condition by the connecting carrier.

There is nothing in the federal statutes, fixing the liability of interstate carriers for goods damaged in transit, which relieves a connecting carrier of this presumption. But the presumption is not conclusive against the connecting carrier, as a matter of law. Proof may be made that the goods were, in fact, damaged when received by that railroad company.

It is to be remembered, however, that, under acts of Congress, an initial carrier, receiving goods from a shipper for delivery at a point on another line and in another state, is liable for loss or damage in transit, regardless of whether the same occur on its own line or a connecting line.

* *

In a suit to recover against the Great Northern Railway Co. for loss of part of two carloads of wheat in transit from a Minnesota point to Minneapolis, the State Elevator Co. proved the quantity loaded by showing that the wheat was loaded by a hopper scale indicating bushel weights. Appealing from a judgment in the elevator company's favor, the railway company claimed that there was no legal proof as to the amount of grain lost, since the showing as to the quantity delivered at the destination was in terms of weight, whereas the proof as to the quantity loaded was in terms of bulk.

The Minnesota supreme court agreed that there could be no finding as to the extent of the loss unless the same standard of measurement was used at both the shipping point and the destination, but found that the testimony sufficiently showed that the figures given as to the number of bushels loaded were based upon weight, and not bulk, and therefore afforded proper basis for comparison with the proof as to weight at the destination. (158 N.W. 399.)

Section 4498, Minnesota General Statutes, 1913, provides: "Every shipper of grain shall fasten upon the inside of each car shipped by him a card giving the number and initials or other distinctive mark of such car, the date of shipment, and the exact weight of all the grain in such car, as claimed by the shipper. If he fail so to do, the official weight shall be prima facie evidence of the quantity of grain shipped in such car." The Minnesota supreme court held in the case of Farmers' Elevator Co. vs. Great Northern Railway Co., 154 N.W. 954, that this section relates only to Minnesota intrastate shipments.

* *

Under a sale of grain subject to weight by board of trade weighers at the destination, and delivery by the terminal carrier without being weighed, the quantity actually delivered may be shown by affidavit of such weighers, in a suit brought by the shipper to recover against the carrier for shortage in delivery. (Farmers' Grain Co. vs. Illinois Central Railroad Co., 201 Ill. App. 261.)

* *

In Farmers' Elevator Co. vs. Great Northern Railway Co., 154 N.W. 954, a suit to recover for grain lost in transit, the Minnesota supreme court held that it was not error at the trial to exclude evidence offered by the defendant railway company tending to show the total quantity of flaxseed received at plaintiff's elevator and the quantity shipped out. Such evidence, the supreme court

held, would have introduced collateral issues into the case, involving the correctness of weight given the depositors of the flaxseed, the dockage upon each load, and the result would only remotely bear upon the issue whether there was a loss in the particular shipments involved in this suit.

See, also, cases referred to in sections 121 and 331 on proof of shortages.

CHAPTER XXXIX

DELIVERY, MISDELIVERY AND CONVERSION OF FREIGHT*

SECTION 334. ACTS CONSTITUTING DELIVERY

THE law imposes upon a railway company not only the duty to carry goods safely, but also the duty of making proper delivery at the destination, and its liability as insurer continues up to the moment when there has been either actual or constructive delivery to the consignee.

"The liability of the common carrier ceases with delivery of the goods at the point of destination according to the directions of the shipper, or according to the usage and custom of the trade at such place of destination," said the Arkansas supreme court in the case of Smoker Merchandise Co. vs. Arkadelphia Milling Co., 139 S.W. 680, a suit to recover the value of flour and feedstuffs destroyed after a car had been partially unloaded.

"This delivery may be actual, or it may be constructive; and in either case the liability of the carrier terminates with such delivery. An actual delivery of goods is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time has been given him in which to remove the goods. When such delivery is thus made, the carrier is fully discharged from further liability [excepting, of course, liability for loss due to the railway company's negligence or other direct fault].

"To constitute constructive delivery, the carrier must give notice to the consignee or his duly authorized agent, if that is at all practicable, of the arrival of the goods, and he must also give a reasonable opportunity and time thereafter for the consignee or his agent to remove the same. When that is done, the liability of the carrier is terminated, whatever its liability may otherwise be."

It is clear that on constructive delivery, the goods actually remaining in the railway company's possession, the company ceases to stand in the relation of insuring common carrier, and becomes a mere warehouseman, with no greater duty than to use ordinary diligence to keep the goods safely.

As said in the Arkansas decision, "this extraordinary liability which the law imposes upon a common carrier cannot be continued at the option or to suit the convenience of the consignee or his agent. The duty to take and receive is as imperative upon the consignee and his agent as it is upon the carrier to deliver. . . . It is the duty of the consignee to be on hand and to receive the goods after due notice, and it is his duty to be in a position upon the arrival of the goods to receive notice thereof and to act promptly in taking and removing them."

Finding that the consignee's agent, a transfer company, was notified of the arrival of the car in question more than a day and a half before the unloaded portion of the freight was burned, and that more than a reasonable time for unloading had elapsed, the court refused to hold the railway company liable for the loss, the fire being admittedly due to a cause for which none of the parties were at fault.

If delivery cannot be made to the consignee, because of his absence, death, refusal to receive the goods, or for other reason, the railway company's liability as common carrier ends when the company notifies the shipper and makes suitable provision to store the freight, pending further instructions from the shipper.

* *

In a case passed upon by the Arkansas supreme court, it appears that a shipment addressed to a retail dealer was turned over by the carrying railway company to a transfer company which was generally authorized to receive shipments belonging to the dealer, but he refused to receive the goods, on the ground of delay in arrival, and they were returned to the carrier's warehouse. Later the dealer concluded he had bet-

*For matter pertaining in general to bills of lading, see Chapter XXXI. As to the liability of connecting carriers, see Chapter XXXIV. See, also, Chapter XLIV.

ter accept delivery, but then the shipment could not be found, and he brought suit against the railway company for its value.

The trial judge directed verdict in his favor, on the ground that no valid delivery had been made to plaintiff, in that he had previously notified the carrier's agent to hold the shipment on its arrival and not to deliver it; but the supreme court, on appeal, ordered a new trial, holding that the jury should have been permitted to determine, under the evidence, whether there was not a complete delivery to the plaintiff when the shipment was received by the transfer company which had been authorized by him to receive all freight addressed to him, and whether the freight had not been returned to the warehouse without the carrier's acceptance of its return.

The higher court held that goods are legally delivered to the consignee when possession is turned over to him or his representative, but that when delivery is rejected the carrier must take care to avoid loss of the freight. (Yazoo & Mississippi Valley Railroad Co. vs. Altman, 187 S.W. 656.)

* *

It is uniformly held by the courts that the reasonableness of time for unloading by the consignee after notice of arrival depends upon the facts of each particular case. In the case of Scott County Milling Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 104 S.W. 924, decided by the St. Louis court of appeals, the evidence showed that a carload of flour arrived at its destination and was spotted for unloading at 6 o'clock one winter evening, but it was destroyed eight hours later, before removal of the car's contents was attempted. The court held that there was no reasonable time for unloading, and, therefore, no termination of the carrier's liability as insurer.

* *

That a freight consignee accepts a car after notice of its arrival, breaks the seals, and commences unloading, does not terminate the railway company's strict liability, under the uniform bill of lading, as common carrier, and substitute the less strict responsibility of warehouseman, as far as goods not removed from the car within 48 hours after notice of arrival are concerned, was decided by the highest court of the land in the case of Michigan Central Railroad Co. vs. Mark Owen & Co., 41 Sup. Ct. 554.

* *

In the case of Northern Milling Co. vs. Davis, 190 N. W. 351, the Wisconsin supreme court ruled that the answer pleaded as a good defense that there had been such delivery of flour under order bills of lading as to exonerate defendant, federal railroad administration agent, from liability on a theory of failure to notify the mill of nondelivery. It was also held that the suit was barred through delay in bringing it.

The mill shipped the flour from Wausau, Wis., to Boston, Mass., in October, 1918, under order bills of lading, with directions to notify the American Flour Export Co. In November, 1919, the mill filed claim for loss on the flour, and defendant disallowed it Feb. 25, 1921. Sept. 22, 1921, suit was brought on the claim. The mill demurred to an answer filed by defendant, but the supreme court affirmed an order overruling the demurrer, saying:

"We reach the conclusion that the answer states three good defenses. It states that the notify party presented the bills of lading properly indorsed in blank by the plaintiff, to whom they were issued; that the notify party made disposition of the cars, and that defendant complied with such disposition. That constituted a delivery of the flour, and defendant's duty as carrier ceased. The federal uniform bills of lading act passed in 1916 governs the shipment. Sections 8 and 9 of the act . . . provide:

"'Sec. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by . . . (b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill. . . .

"'Sec. 9. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is (a) a person lawfully entitled to the possession of the goods; or (b) the consignee named in a straight bill for the goods; or (c) a person in possession of an order bill of lading for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed by him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.'

"It will thus be seen that the carrier was bound to deliver the flour to the notify party upon its presenting to it the bills of lading properly indorsed.

"The fact that the flour was stored in a warehouse and the warehouse receipts were kept by the carrier as security for the payment of the freight, and the fact that the notify party afterwards refused to receive the flour from the plaintiff, could not and did not affect the question of delivery. This was complete when the proper party, the notify party in possession of the bills of lading, received disposition of the flour as ordered by it. Under the facts stated in the answer the defendant was not only justified in delivering flour to the notify party under section 9, the case not coming within the exception mentioned, but it was bound to deliver it under the provisions of section 8.

"There having been a complete delivery to the proper party, it follows that there was no one to notify of a failure to deliver. The refusal to accept the flour from the plaintiff came long after the carrier had made a proper and complete delivery of it. Its lien for freight did not prevent a complete delivery from being made under the provisions of the shipping act. That was a separate and subsequent transaction between the notify party and the carrier."

On the question as to the time within which the suit should have been brought, even if there had been a valid claim, the supreme court adds: "It is undisputed that more than two years and one day had elapsed between the delivery of the flour and the bringing of the action. This is the limitation provided for in the bills of lading, and such limitations are valid."

The opinion then proceeded to discuss the effect of the federal act of Feb. 28, 1920, fixing the time within which suits might be brought on account of the operation of railroads by the government as a war measure. This conclusion was reached:

"It was the intent of Congress to limit, and not to extend, the time of bringing such actions. State or federal laws were to govern if they did not extend the time of bringing actions beyond two years from its passage; if they did, then this act limited them to two years from its passage."

The court also ruled that the claim was not presented to the defendant in due time, not being filed within six months after delivery of the flour, as provided for in the bill of lading.

For liability for loss or damage in general see the preceding chapter.

SECTION 335. EFFECT OF CUSTOM

"No effect can be accorded a practice or so-called custom that would sanction a delivery otherwise than in accordance with the absolute obligation resulting from the terms of the ordinary bill of lading." (Alabama supreme court, Harris vs. Southern Railway Co., 80 So. 101.)

In an action against a carrier by a shipper for damages for reconsigning order shipments on request of the "notify" party who did not take up or surrender the bill of lading, the Missouri supreme court decided that the carrier could not justify the act of reconsigning by a claimed custom at the original destination permitting such reconsignments. The court seems to have had in mind the general rule that proof of a custom is not admissible to contradict the terms of legal effect of a contract. (Kemper Mill & Elevator Co. vs. Hines, 239 S.W. 803.)

SECTION 336. SPOTTING CARS ON DELIVERY TRACK

The legal relation of railway companies to freight delivered on private switch tracks was considered by the Vermont supreme court, in the light of the familiar bill of lading provision: "Property, . . . when received from or delivered on private or other sidings, wharves, or landings, shall be at the owner's risk until the cars are attached to and after they are detached from trains."

The case before the court—Charles Bianchi & Sons vs. Montpelier & Wells River Railroad Co., 104 Atl. 144—concerned the liability of the defendant for a shipment made from Barre, Vt., to St. Louis under a nonnegotiable bill of lading naming plaintiffs as both shippers and consignees, and specifying a private switch track as the precise destination. The shipment was intended to be delivered ultimately to a customer, but plaintiffs never surrendered the bill of lading and were never paid for the goods. The customer secured possession when the freight was unloaded, and plaintiffs unsuccessfully sought to hold the defendant liable as for misdelivery by its agent, the terminal carrier.

The opinion of the Vermont supreme court upheld the validity of the bill of lading stipulation above quoted, and decided that, because the bill of lading was nonnegotiable and the car containing the shipment was placed on a private track called for by the contract for transpor-

tation, there was a termination of liability of the common carriers, as such.

The decision also held that, even if the terminal carrier could be regarded as occupying the position of warehouseman after the car was spotted on the private track, still it was not bound to more than the exercise of ordinary care and diligence to keep the goods safely. As reasonable prudence did not require the terminal carrier to remove the goods from the car, and it did not authorize any one else than the plaintiffs to remove the freight, there was no liability on its part, nor on the part of the defendant, as the initial carrier and principal of the delivering road, for unauthorized removal of the freight by the plaintiff's customer.

* *

The mere fact that a delivering railway company places carload shipments on a track affording direct delivery service to an intended buyer of the goods does not constitute such surrender of control by the railway company as to render it liable for making delivery without requiring surrender of a shipper's order bill of lading attached to draft drawn on the buyer. To constitute delivery, it must appear that the carrier intended to release its control and that the buyer intended to accept delivery. This is the gist of the decision of the New Mexico supreme court in the case of Levers vs. Atchison, Topeka & Santa Fe Railway Co., 166 Pac. 1178.

Plaintiff shipped three carloads of hay to his own order over defendant's road, with instructions to notify an elevator company on which draft had been drawn with bills of lading attached. On arrival of the cars, they were placed on a sidetrack which was used by the elevator and the railway company in common, and, apparently, at a point convenient for unloading at the elevator.

The elevator company took up one bill of lading and unloaded the car covered by it, but refused to accept the others without the privilege of inspection, permission for which was telegraphed by plaintiff. On inspection, the remaining two cars were rejected by the elevator company as being below the contract grade, and they were afterwards sold by the railway company to cover freight and storage charges.

In suing the carrier for the value of the rejected shipments, plaintiff relied upon the fact that the cars had been spotted on the delivery track and that the carrier's agent had sent to plaintiff cards stating that delivery had been made as showing wrongful delivery without production of the bills of lading.

But the case was decided in favor of the railway company on the grounds that there was no delivery, because placing of the cars on the track was not inconsistent with the railway company's continued control over them until the bills of lading should be taken up and surrendered, and that the mere inadvertence of the freight agent in reporting delivery could not estop the carrier to show that no delivery was actually made.

See, also, decision of the Minnesota supreme court to the same effect in the case of Quinn-Shepherdson Co. vs. Great Northern Railway Co., 169 N. W. 422.

SECTION 337. INSPECTION BY CONSIGNEE, ETC.

The Louisiana supreme court has recognized the right of a consignee of a carload shipment to inspect it before accepting delivery at the destination (70 So. 44).

Although my attention has not been called to any decision bearing precisely on the point, it seems that a consignee, or his assignee, cannot be required to make inspection at a place other than that fixed for delivery, excepting as there may be a contrary stipulation in the contract for transportation. Where no different place is specified for inspection, it is only reasonable to infer that it was mutually understood that inspection would be made at the place fixed for delivery.

"The lawful holder of the bill of lading has a right to inspect the consignment at a sidetrack designated in the bill of lading, and cannot be required to make inspection on another sidetrack which, by the rules of the railroad known to such holder, has been set aside for inspection. However, the delivery of cars of goods at the proper place for inspection by the consignee releases the carrier from liability as a common carrier, unless the consignee, on inspection, rejects the freight and notifies the carrier to that effect." 10 Corpus Juris, 253.

By parallel reasoning, a buyer to be notified under an order shipment, with privilege of inspection before taking up the bill of lading, should not be required to make inspection at a point other than that at which delivery is to be made, unless there is an agreement to that effect.

See, also, Chapter XXXVII on liability for permitting unauthorized inspection, and section 435.

SECTION 338. NOTICE OF NONACCEPTANCE BY CONSIGNEE

Where goods are shipped under a straight bill of lading running to one other than the shipper himself, the delivering railway company is under no obligation to notify the shipper of nonacceptance of the shipment by the consignee, except as some notation on the bill of lading or some special circumstance may require it. And, this being so, an initial carrier of an interstate shipment is not liable for any loss sustained by the shipper through the delivering carrier's failure to give such notice.

In other words, a railway company is not presumed to know of the mutual relations of the shipper and the consignee to the goods, nor that the latter may be indebted to the shipper on account of an agreed purchase price therefor.

This is the gist of the decision of the appellate term of the New York supreme court in the case of Markowitz vs. New York Central Railroad Co., 172 N. Y. Supp. 233.

The court holds that bankruptcy of a consignee occurring several weeks after arrival of the shipment could not constitute such circumstance as would bind the delivering carrier to notify the shipper, even if bankruptcy arising upon tender of delivery of the goods and the consignee's refusal to accept would in any case require the shipper to be notified by the carrier, a question which the court found it unnecessary to decide on the facts presented.

Denying the right of a shipper to recover against an initial carrier the value of an order shipment after the shipper's customer had refused to accept delivery and the goods were sold by the terminal carrier for storage charges, the appellate division of the New York supreme court held in the suit of Dodge & Dent Mfg. Co. vs. Pennsylvania Railroad Co., 162 N. Y. Supp. 549, that return of the draft and bill of lading to the shipper was sufficient notice of nondelivery of the goods to the customer.

SECTION 339. DIVERSION OF SHIPMENTS

In Cummer Mfg. Co. vs. Texas Midland Railroad Co., 207 S.W. 617, the Texas court of civil appeals at Texarkana laid down these rules of law applicable to diversion of shipments from their originally contemplated destinations:

Carriers cannot excuse themselves from liability for loss to a shipper resulting from negligent execution of requests to divert shipments, on the ground of lack of statutory or contractual obligation to comply with such requests. Even if an initial carrier is not legally bound to change the destination of goods after they have left its line, still any attempt to do so must be accompanied by the exercise of reasonable care.

A carrier acts at its peril in diverting a shipment on order of one not known to be the owner of it.

When a consignee of a shipment gives an order to divert it, the courts will enforce a clause in the diversion order to the effect that the carrier shall be liable for loss in executing the order only in the event that the same results from gross negligence on the part of the carrier. Hence, the consignee cannot recover damages on a mere showing that the carrier failed to deliver in accordance with the order. (Lowenthal vs. Pennsylvania Railway Co., 151 N. Y. Supp. 916.)

SECTION 340. CONVERSION OF SHIPMENTS, IN GENERAL

Any wrongful or unauthorized act of the carrier whereby a shipment is lost to the owner or whereby the latter is deprived of its control constitutes actionable conversion, for which the carrier may be held liable. Conversion may consist in refusal to deliver except upon unreasonable conditions, or in delivery to an unauthorized person, as where a shipment consigned to the shipper's order with draft attached to the bill of lading is surrendered by the delivering carrier without production of the bill of lading or payment of the draft. Transportation to a wrong destination is also recognized as an act of conversion.

As will be readily supposed, there is no liability under this head where the carrier refuses to make delivery until payment of freight charges, such payment not having been waived by express or implied agreement.

Plaintiffs shipped wheat from Wichita, Kansas, consigned to their own order at Galveston, Texas, to fill certain contracts there. Because defendant carrier wrongfully unloaded the wheat in elevators, thereby mixing it with other grain, the customers refused to accept delivery, and plaintiffs sold the wheat on the open market at a loss over the prices fixed in the contracts mentioned. Plaintiffs sued defendant for reimbursement against this loss, and recovered judgment with interest.

But the Kansas supreme court reduced the amount of recovery, eliminating the item of interest and limiting the

recovery to the excess of the fair market value of the wheat at the point and time of shipment above the price at which it was sold, under a provision of the bill of lading reading as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The supreme court held that this was a reasonable and valid stipulation, and that it was not, as claimed by plaintiffs, limited to cases where freight has been lost or injured. But see sections 332, 356.

"Public policy requires that provisions of this character in bills of lading, the forms of which have been approved by the Interstate Commerce Commission, shall be upheld," said the court, "and that the carrier, in the settlement and adjustment of all claims for damages arising under the contract, shall in each instance enforce its provisions; and it is the policy of the courts to enforce them uniformly, rather than open the door to abuses which might result from the opportunity which would otherwise be afforded to grant to one shipper more favorable terms than to another."

On the question of interest, the court said that "in an action for damages on account of the injury to or destruction of property in transit, interest is not recoverable." The same principle was held to apply to a damage claim of the kind involved in this suit. (Wallingford Bros. vs. Atchison, Topeka & Santa Fe Railway Co., 167 Pac. 1136.)

When a carrier inexcusably makes delivery to the wrong person the aggrieved owner is under no obligation to make demand upon the carrier for the shipment before bringing suit to recover its value. (Alabama supreme court, Harris vs. Southern Railway Co., 80 So. 101.)

For discussion of damages recoverable for loss or delay of, or injury to goods in transit, see Chapters XXXV and XXXVIII.

SECTION 341. RECONSIGNING ON UNAUTHORIZED ORDER

The suit of the Kemper Mill & Elevator Co. vs. Hines, 239 S.W. 803, before the Missouri supreme court, involved the liability of railway companies for changing the destination of an order shipment at the request of the notified buyer.

Plaintiff shipped two cars of corn meal over connecting lines from points in Missouri to East Joliet, Ill., under order bills of lading, "notify Jonas F. Eby & Son," Lancaster, Pa. Drafts to which the bills of lading were attached were not paid, and therefore the bills of lading never came into the possession of Eby & Son.

In the meantime, the terminal carrier reconsigned the cars from East Joliet to eastern points, on Eby & Son giving indemnity bond. No new bills of lading were issued, the railroad billing merely being changed to show new destinations. On arrival at these points the meal was found to be spoiled, and was rejected by Eby & Son.

Plaintiff sued defendant, as the initial carrier, for damages, on the theory that the terminal carrier's action in reconsigning without surrender of the bills of lading amounted to a wrongful conversion of the property, for which conversion the initial carrier was liable under the interstate commerce act.

The bills of lading, being of standard form, provided that surrender of the originals, properly indorsed, was required, but the suit was defended on the disputed ground that plaintiff had orally authorized the reconsignment. Disposing of the case on appeal, and ordering a new trial, the supreme court said:

"The shipments in question being interstate shipments, it is not denied that the defendant, as the initial carrier, was liable for the acts of the terminal carrier at East Joliet under the federal uniform bills of lading act. . . .

"We think, too, that the act of said terminal carrier, at the request of Eby & Son, in reconsigning the corn meal from Joliet to eastern points by changing the way bills, although it did not issue any new bills of lading, was a delivery of the meal to Eby & Son, . . . and unless such delivery was authorized by plaintiff, the defendant is liable as for a conversion of said meal without any subsequent demand therefor. But if such delivery was authorized by plaintiff, the defendant is not liable herein."

In passing, the court quoted the following declaration by the United States Supreme Court (41 Sup. Ct. 195): "There is nothing in the act which imposes upon the carrier a specific duty to the shipper

to take up the bill of lading. Under section 8, the carrier is not obliged to make delivery except upon the production and surrender of the bill of lading; but it is not prohibited from so doing.

"If, instead of insisting upon the production and surrender of the bill, it chooses to deliver in reliance upon the assurance that the deliveree has it, so far as the duty to the shipper is concerned the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case, the carrier is liable for conversion and must, of course, indemnify the shipper for any loss which results. Such liability arises, not from the statute, but from the obligation which the carrier assumes under the bill. . . .

"Although there is a conflict of language in the cases in which a shipper sues a carrier for delivery of goods without surrender of the bill of lading, there appears to be no conflict of principle or in decision. Where the failure to require the presentation and surrender of the bill is the cause of the shipper losing his goods, a delivery without requiring it constitutes a conversion. . . . But where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require the surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct, the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion."

"In the case before us," proceeds the Missouri court, "the plaintiff or consignor remained the lawful holder of the bills at the time of the delivery to or reconsignment by Eby & Son. The goods could therefore have been delivered to plaintiff at that time without the surrender of the bills of lading. . . .

"It will hardly be contended that what the consignor could do himself he could not do by his authorized agent. . . . Consequently, where the goods are deliverable by the bill to the order of the consignor, as in this case, the consignor could authorize his agent to receive the goods for him, without surrendering the bill, as long as he is the holder of the bill, and the delivery would be a legal delivery as between him and the carrier, no rights of third party intervening."

The opinion then goes on to hold that the shipper may validly authorize delivery or reconsignment without surrender of the bill of lading, although the authority be not conferred in writing. "The fact that the bill of lading itself is required to be in writing does not require the authority of the agent receiving the property thereunder to be in writing." Furthermore, under the statute of frauds, a fully executed verbal contract is good.

"So," the opinion adds, "if the terminal company at Joliet surrendered possession of the corn meal to Eby & Son under verbal authority given them by the plaintiff, the delivery having been completely executed, the statute of frauds could not be invoked by plaintiff, even if there was a provision of law requiring the authority of the agent to receive such delivery to be in writing. So that we hold that parol [oral] evidence of the authority of Eby & Son from the plaintiff as plaintiff's agent to order the terminal carrier at Joliet to forward said shipments to Lowell and Philadelphia, offered by defendant and excluded by the court, should have been admitted. . . .

"It is also true that the mere fact that Eby & Son were required to be notified by the bills of lading themselves in no way gives them any rights in or authority to receive the goods or makes them agents of the consignor for so doing. Under the language of the bills themselves, Eby & Son had no interest in or authority over the goods whatever. . . .

"But the claim is here, not that Eby & Son had any such authority by implication from the bill of lading itself, but that they were specially authorized by plaintiff to receive and reconsign the goods for and on account of the plaintiff as the agents of the plaintiff by the parol testimony under consideration."

SECTION 342. DELIVERY WITHOUT BILL OF LADING SURRENDER

By delivering a shipment to a person to be notified under an order bill of lading, without production of the bill of lading attached to draft drawn on such person, a delivering railway company renders itself liable to the shipper as for wrongfully converting the goods, according to a decision of the Texas court of civil appeals, involving a shipment of corn. (Patterson & Roberts vs. Quanah, Acme & Pacific Railway Co., 195 S.W. 1163.)

"A direction in a bill of lading to consignor's order to notify some one else does not warrant the carrier in delivering the property to the person so to be notified without the production of the bill of lading. The use of the term 'notify' shows that the party to be notified was not intended as the consignee, but was

simply to be advised on the arrival of the goods. The fact that the bill of lading is made out to the consignor's order makes this still plainer. Indeed, it has been held that such a contract is so plain and unambiguous that a custom in a certain city to deliver property under similar bills of lading to the person to be notified cannot be shown." (Oklahoma supreme court, in Lawton Grain Co. vs. Receivers of St. Louis & San Francisco Railroad Co., 174 Pac. 793.)

* *

Concerning the liability of a common carrier to a shipper for delivering freight without requiring the deliveree to surrender the bill of lading, the United States Supreme Court said, in the case of Pere Marquette Railway Co. vs. J. F. French & Co., 41 Sup. Ct. 195:

"Although there is a conflict of language in the cases in which a shipper sues a carrier for delivery of goods without requiring a surrender of the bill of lading, there appears to be no conflict of principle or in decision. Where the failure to require the presentation and surrender of the bill is the cause of the shipper losing his goods, a delivery without requiring it constitutes a conversion. . . .

"But where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct, the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion."

The railway company was exonerated from liability in this case because it appeared that, although delivery was made without surrender of the bill of lading, the goods were subsequently refused by the intended buyers, who caused their return to the sellers, together with the bill of lading, which had been obtained from a collecting bank without paying a draft, to which the bill of lading was attached, by the shipping sellers.

* *

A waybill being intended merely for the carrier's own use, no mistake made by its own agent in designating in it the person to be "notified" can affect the carrier's liability to the owner indicated by the bill of lading and indorsement thereon of an assignment. "Only the fault of the shipper can exonerate the carrier from the consequences of a delivery to the wrong person."

When goods are consigned for transportation under an order bill of lading, and the person to be "notified" by the carrier becomes entitled to delivery by taking up draft with the bill of lading attached, he is entitled to maintain an action against the carrier for the value of the freight on it being unauthorizedly delivered to some other person. If the value depends upon a fluctuating market, the aggrieved person may recover on the basis of the highest value between the date of the carrier's conversion of the property by such unauthorized delivery and the date of the trial, plus interest. (Alabama supreme court, Harris vs. Southern Railway Co., 80 So. 101.)

* *

The Blish Milling Co. shipped a carload of flour to Bainbridge, Ga., naming itself as consignee, with instructions to notify the contract buyer, a grocery company, on which draft was drawn with bill of lading attached, of the shipment. In the course of transportation, the car was carried over connecting lines of railway, the Georgia, Florida and Alabama Railway Co. being the delivering carrier.

Without requiring surrender of the bill of lading, the car was switched by the carrier to the grocery company's private track, and the last-named company began unloading, but, discovering that some of the flour was wet, reloaded the car and returned it to defendant railway company.

The draft not being paid, the mill brought suit against the railway company to recover the value of the entire shipment, which remained in the hands of the latter. The suit resulted in the mill's favor, and the judgment was affirmed by the Georgia court of appeals (82 S.E. 784), and by the United States Supreme Court (36 Sup. Ct. 541). The court of appeals laid down the following stated legal propositions:

"The milling company, by electing to retain title until payment of the draft, sold the goods for cash. The railway company, without any regard for the milling company's rights or wishes, and in violation of its expressed intention, undertook to let the Draper-Garrett Grocery Co. have the flour on time, or without paying the draft; and, of course, this must be held to be a conversion. It is the wrongful exercise of dominion over another's property that makes a conversion.

"It is not necessary that the proof show that the defendant applied it to his own use; it need only be shown that he dealt with the property as if it were

his own, and in defiance of the owner's rights. . . . Whenever goods which the consignor has shipped to his own order are delivered without production of the bill of lading, the delivery is at the carrier's own risk, and subjects the carrier to liability."

In a suit of this kind, where the shipper seeks recovery of the value of freight converted by the delivering carrier, the question whether injury to the shipment accruing in the course of transportation occurred on defendant's line or was the fault of a connecting carrier is immaterial, plaintiff's damages being measured by the value of the freight at the time of its conversion, with interest.

Defendant was not entitled to a reduction of damages on the theory of an offer to return the flour to the mill, it appearing that 18 bbls had been sold by defendant before any offer was made to return the remainder, and that the shipment had deteriorated in value and condition while in transit, which damage defendant did not offer to make good.

Suit to recover against a carrier for conversion of freight may be brought in the county where the conversion occurred, regardless of whether the shipment was of interstate character and received from a connecting carrier.

A carrier who, by converting freight, abandons the contract for carriage, is not entitled to complain of the shipper's noncompliance with a clause in such contract, as evidenced by the bill of lading, requiring claim for loss or damage to be made in writing and within a specified time at the point of delivery.

* *

A decision of the Texas court of civil appeals was handed down in the case of Kansas City Produce Co. vs. International & Great Northern Railway Co., 200 S.W. 254.

Defendant sought to excuse delivery without production of an order bill of lading on the ground that it had customarily dealt in the same manner with plaintiff's previous shipments, but the court held that plaintiff was not estopped for that reason, because no knowledge of such previous dealing had been drawn to its attention.

It was further decided that wrongful delivery in a case of this kind amounts to such misappropriation, or, to use the legal term, conversion, as renders the carrier liable for the full market value of the goods at the place where the conversion occurs. Provision in a bill of lading for assessment of damages for any loss of or injury to the shipment in transit on the basis of value at the point of shipment is not to be deemed to apply to a claim for wrongful conversion of the goods by the carrier.

* *

In Judson et al. vs. Minneapolis & St. Louis Railroad Co., 154 N.W. 506, the Minnesota supreme court held that although a consignee of freight is presumptively the owner, the carrier makes delivery to him at its peril, unless upon surrender of the bill of lading, and in accordance with its terms.

Plaintiff sold the A. J. Thompson Co. a carload of beans, shipped from Durand, Mich., to Fort Dodge, Iowa, under a bill of lading providing for delivery to the order of the buying company, notify Iowa Grocery Co. The bill was attached to draft drawn on the Thompson company at Kansas City, but the draft was not paid and defendant carrier made delivery to the grocery company on the order of the Thompson company as consignee, without production of the bill of lading. Plaintiff sued the defendant railway as for conversion of the shipment, and the supreme court upheld the right of recovery, saying, in part:

"The consignee of a shipment is the presumptive owner thereof. . . . But the presumptive ownership may be rebutted. The provisions of a bill of lading under which the shipment is made govern the rights of both carrier and shipper. The bill of lading becomes the symbol of the property described therein, and the transfer of the bill of lading transfers the property. Therefore, while such bill of lading is outstanding, the carrier delivers the shipment at its peril, if it turns out that under the terms and provisions thereof the one to whom delivery was made was not entitled thereto."

Meeting the fact that the buyer in this case was designated as consignee, whereas under an "order" bill of lading the seller is usually designated both as shipper and consignee, the opinion proceeds:

"The statement sometimes found in textbooks and in decisions, that the carrier will be protected whenever delivery is made to the consignee, should be subject to the qualification that such delivery be also made according to provisions of the shipping contract to which the shipper and the carrier are the immediate parties. It should be presumed that such contracts are made with reference to commercial usages with respect to the extensive shipments of grain and merchandise constituting such an important part of the transportation business, and

so as to protect both the owner of the property and the carrier. . . .

"The provision that the order bill of lading must be surrendered before delivery of the property to the consignee is hardly to be treated as a provision solely for the protection of the carrier, and which may be waived by such carrier. We think it may also be invoked to protect the shipper if he be the real owner of the property."

The court concludes that the fact that a seller ships to the order of the buyer, instead of to the order of himself, does not entitle the delivering railway company to treat the consignee as absolute owner, if the bill of lading contains a clause requiring surrender of the bill before delivery.

The opinion distinguishes decisions of other courts which were cited by the railway in support of the claim that there was no liability. In an Arkansas case it was held that a mill company was not entitled to recover against a railway company for delivery of a shipment of meal to the consignee under a straight bill of lading, without production of that document. But there surrender was not expressly provided for, and the carrier had no notice that the bill had been attached to draft on the consignee.

Incidentally, the Arkansas court held that the local statute requiring surrender of bills of lading did not apply unless there was a transfer of the bill.

* *

Failure of defendant carrier to take up a bill of lading was held by the Arkansas supreme court to render it liable to the shipper, although delivery was made to one for whom, the shipper telegraphed the carrier, the goods were intended. (Missouri Pacific Railroad Co. vs. Toll, 261 S. W. 652.)

C. F. Toll, trading as the Four Generations Hay Co., sold a car of hay to N. O. Ellis, for shipment from one point to another in Arkansas. The bill of lading was taken in the name of the Four Generations Hay Co., C. F. Toll being specified as consignee. The consignee being unknown at the destination, the railway agent there asked the shipper to "advise disposition." The shipper replied, "Car hay billed C. F. Toll is for N. O. Ellis." Thereupon the hay was delivered to Ellis, who unloaded it without obtaining and surrendering the bill of lading, which had been attached to a draft drawn on him. Ellis failing to pay for the hay and being insolvent, Toll sued the delivering railway company and recovered judgment, which was affirmed by the supreme court on the carrier appealing.

It was argued by the railway company's attorneys that the contract of shipment was complied with when delivery was made to the designated consignee as directed by the telegram. The court replied:

"This court did hold in the case of Nebraska Meal Mills vs. St. L. S. W. R. Co., supra [41 S. W. 810], and has reaffirmed that doctrine in later cases, that where freight was billed 'straight' to the consignee, and the railroad company had no notice of the intention of the consignor to retain the ownership and control of the property, it is justified in presuming that the consignee is the owner thereof, and is discharged from liability as a carrier by a delivery to the consignee at the place specified in the bill of lading.

"But that doctrine has no application here, because the delivery was not made to the consignee. Toll—and not Ellis—was the consignee, yet the delivery was made to Ellis, and this was done without Ellis having surrendered or ever having had possession of the bill of lading. The consignor did not bill the hay to itself, but employed a different name; yet upon the receipt of the telegram set out above the carrier delivered the hay to one not named as consignee in the bill of lading.

"It is obvious that the real question in the case is the effect of the telegram, for if it did not authorize the agent's action, then the carrier is liable for the misdelivery of the shipment.

"It will be observed that the telegram did not advise the agent to deliver the hay to Ellis, but stated merely that the hay was for him, and we think under all the circumstances the court was warranted in finding that the telegram was not an authorization to make a delivery contrary to the terms of the bill of lading.

"It is a matter of common knowledge that shipments are frequently made by one person to another with direction in the bill of lading to notify still another, and that the purpose of the direction to so notify is that the consignee may have notice of the shipment and may take the necessary action to obtain a delivery to it, and we think the court was warranted in finding that such was the purport of the telegram from the consignor. . . .

"If the consignor had intended a delivery to Ellis without the surrender of the bill of lading, it would have billed the shipment to him direct. The agent knew there was no such person at Alexander as C. F. Toll, yet he knew Toll was

named as consignee. The shipment was not, therefore, on a 'straight' bill of lading to Ellis, for he was not the consignee at all, and the telegram did not direct that delivery be made to him. . . .

"We do not hold that the consignor could not by a telegram have directed that delivery be made to Ellis without the surrender of the bill of lading. Upon the contrary, we are of the opinion that, had this been the meaning of the telegram, the delivery to Ellis would have been a completion of the contract of carriage. But what we do hold is that, under the circumstances stated, the court was justified in finding that such was not the purport of the telegram; that it should have been interpreted by the agent as a mere direction to notify Ellis, a direction which might have been contained in the bill of lading itself without converting it from a 'shipper's order' bill of lading to a 'straight' bill of lading."

* *

A decision of the Rhode Island supreme court exonerated a railway from liability where delivery was made in accordance with previous custom between the parties and at the address designated in the bill of lading, although the consignee was named as "S. W.,"—the shipping seller's initials.

It was decided by the Iowa supreme court that where an ordinary order bill of lading was indorsed by the shipper in blank to the order of the bank through which draft was drawn on the buyer, with the bill attached, the shipper was bound by the bank's telephonic authorization of delivery to the buyer without surrender of the bill. This decision turned, however, on the fact of the bank's agency for the shipper, and on the further point that the contract of sale gave the buyer the right to two days' trial of the machinery sold before payment of the draft.

The Minnesota supreme court cited, as supporting its decision, a holding of the Michigan supreme court to the effect that, while it is true that a consignee is prima facie the owner of freight, the carrier surrenders the shipment to a third person at its peril, on the order of the consignee but in violation of the terms of the shipping contract evidenced by an order form of bill of lading; and that the carrier is liable to a bona fide holder of the bill of lading if the bill is not required to be surrendered, or to the owner of the freight if he thereby loses the price.

* *

The mere fact that a railway company delivers a shipment made to the shipper's order before delivery of the bill of lading does not make the company liable to the shipper as for a conversion of the goods, provided that the company afterwards and rightfully obtains possession of the bill of lading, according to the holding of the Iowa supreme court in the case of Midland Linseed Co. vs. American Liquid Fireproofing Co., 166 N.W. 573.

The suit arose from the fact that the collecting bank received from the buyer, as payment of a large part of the price of the goods, a check of a third person, which was believed to be good but which later proved to be worthless. On receipt of this payment the bill of lading was surrendered by the bank to the buyer, who in turn surrendered it to the carrier.

Under these circumstances the court decided that the railway company was not affected by the worthlessness of the check, and that the shipper's recourse was against the bank or the buyer of the goods.

Concerning the liability of carriers, the Iowa court said: "All the authorities agree that if a shipment is to be delivered only upon the surrender of the bill of lading, and the carrier delivers without obtaining such bill, the shipper may, as to any loss resulting, treat the carrier as guilty of a conversion. . . . But no case holds that, if the carrier does obtain the bill of lading, he is guilty of conversion merely because he made delivery before he obtained the bill of lading. . . .

"If the shipment be delivered before the bill is presented, the carrier takes his chance on whether the person receiving the goods is entitled to them. He takes his chance on whether the bill of lading is genuine, or of a false impersonation. In one word, he takes his chance of rightfully obtaining the bill of lading. If he never gets it, or if he does and the person who surrenders it has no right to it, he must make good the loss of the seller."

The shipper's right to recover in this case was denied on the further ground that, after the carrier had made delivery to the buyer, the shipper received a partial payment for the goods and demanded payment of the balance from the buyer.

This is held to have constituted a waiver of any right to proceed against the railway company, because it would be inconsistent for the shipper to attempt to collect from the buyer on the theory that the latter acquired title to the goods, and at the same time to attempt to hold the railway company on

the theory that the company converted the goods by delivering them to one who had no right to them. In short, unauthorized delivery by a carrier without production of the bill of lading is ratified when the shipper attempts to collect the price from the buyer, instead of looking to the carrier or seeking to recover the goods.

* *

Where a seller of goods ships them under an order bill of lading attached to draft on the buyer, with instructions to the railroad company to "notify" the buyer, the carrier cannot justify a delivery to the buyer without surrender of the bill of lading, the draft being rejected, on the ground of any complaint the buyer may have had against the shipping seller. So held the Louisiana supreme court in the case of Harwood-Barley Mfg Co. vs. Illinois Central Railroad Co., 74 So. 569.

Plaintiff made a shipment of this kind to a customer in New Orleans, and defendant made delivery to the customer without production of the bill of lading, taking in lieu thereof a bond to indemnify defendant against liability to the plaintiff. Because of misunderstanding concerning the terms of sale, the customer refused to pay the draft, and the plaintiff sued defendant railway company as for conversion of the property by making the unauthorized delivery.

Affirming judgment in plaintiff's favor against the defendant, the supreme court held that the railway company was not entitled to inject into the suit any complaints that the buyer might have against the plaintiff, and that defendant rendered itself liable to plaintiff for making delivery without surrender of the bill of lading.

In the case of Kemper Mill & Elevator Co. vs. Missouri Pacific Railway Co., 186 S.W. 8, the Kansas City court of appeals decided that the fact that the holder of bills of lading made claim against a grain company which secured making of unauthorized delivery of a shipment of bran did not constitute a waiver of right to abandon that claim and proceed against defendant carrier on account of the unauthorized delivery.

SECTION 343. UNINDORSED BILLS OF LADING

Possession of a bill of lading by one other than the consignee will not justify the delivering carrier in making delivery to him, where there has been no indorsement or assignment of the document by the consignee. This is the nub of the decision of the Alabama court of appeals in the case of Davis vs. Hines, 85 So. 882. Says the court:

"A bill of lading does not pass by delivery, and the possession of it by one other than the consignee, without indorsement, will not authorize or justify the carrier in delivering the consignment to such person. . . . The obligation to deliver only to the party having title to the bill of lading is imposed by law on the carrier, and is absolute. . . . Any custom of a particular carrier, or of carriers generally at a particular place, to make deliveries to persons in possession of a bill of lading, is a bad custom, and cannot be adduced in evidence to exempt such carrier, or carriers, from liability for delivering to wrong persons."

SECTION 344. FORGED BILLS OF LADING

Barbarin & Beach, grain and elevator men at Freeland, Mich., secured affirmance of a judgment against the receivers of the Pere Marquette Railroad Co., on account of the surrender of a shipment without production of an order bill of lading attached to draft drawn on a customer. In the course of the affirming opinion, the United States circuit court of appeals for the sixth circuit laid down the following rule:

A railway company delivers goods at its own peril without production of the bill of lading, especially where there is a clause in that document specifying that surrender of the bill, properly indorsed, shall be required before delivery.

In this case it appeared that plaintiffs, Barbarin & Beach, sold a carload of beans to Botsford & Barrett, but shipped them, at that firm's direction, to its order, with directions to notify Arbuckle & Co. at Pittsburgh. Botsford & Barrett were named as shippers, as well as consignees. Plaintiffs attached the bill of lading to draft drawn on Botsford & Barrett, and the papers were returned, the draft remaining unpaid. Delivery of the shipment was made by a connecting carrier on a forged bill of lading. Suit was brought by plaintiffs against the initial carrier.

Under these circumstances, it was decided that the fact that plaintiffs were not formally connected with the bill of lading as a party to it did not preclude them from holding the initial carrier liable for the connecting carrier's default in surrendering possession without production of the original bill of lading. (249 Fed. 303.)

* *

A carrier is liable to the owner of a

shipment for delivering the same to a third party under a forged order, although the carrier may have acted innocently. The carrier must, at its peril, see that delivery is made to the right party. (Pennsylvania supreme court in the case of Freedman vs. George W. Bush & Sons Co., 130 Atl. 263.)

SECTION 345. DAMAGES RECOVERABLE FOR CONVERSION

Kemper Mill & Elevator Co. vs. Hines, 239 S.W. 803, was a suit to recover damages for wrongful conversion of an order shipment by a carrier, by reconsigning it on the order of the "notify" party, who did not take up nor surrender the bill of lading. On a question pertaining to damages recoverable on plaintiff proving a right of recovery the Missouri supreme court said:

"Appellant also complains as to the admission of certain testimony concerning the value of the meal at the time of its alleged conversion at certain other places than Joliet [the original destination], but we need not pass on such objection, for the reason that the bills of lading themselves provide that the measure of damages is the value of the meal at the time and place of shipment, and not of destination. This provision of the bill is valid and binding on the parties. Georgia F. & A. Railway Co. vs. Blish Milling Co., 241 U.S. 190, 36 Sup. Ct. 541."

But see the decision of the United States Supreme Court in the case of Chicago, Milwaukee & St. Paul Railway Co. vs. McCaull-Dinsmore Co., 40 Sup. Ct. 504, fully referred to in section 356, page 444.

CHAPTER XL

CLAIMS FOR FREIGHT LOSSES AND DAMAGE*

SECTION 346. IN GENERAL

IN Blish Milling Co. vs. Georgia, Florida & Alabama Railway Co., 36 Sup. Ct. 541, the United States Supreme Court decided that a clause in a bill of lading requiring claim for loss or damage to be made in writing within four months after delivery, or, in case of failure to deliver, within four months after a reasonable time for delivery has elapsed, applies to misdelivery and is valid. However, in this case, which was brought against a railway company for converting a shipment of flour by delivering it to a "notify" consignee without surrender of the bill of lading drawn to the shipping mill's order, the mill succeeded in avoiding the effect of the decision on this point by showing that its representative, within the required time, telegraphed defendant: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment, as we cannot handle."

* *

The customary provisions in bills of lading as to the time within which claim for loss or damage must be made in case of nondelivery or delivery in injured condition have no application to a claim for damages for unauthorized delivery to some third person. And the statutes of Alabama, applicable to intrastate shipments, requiring presentation of itemized and verified statements of freight loss claims, etc., do not apply to claims for conversion. (Alabama supreme court, Harris vs. Southern Railway Co., 80 So. 101.)

But in the case of Kemper Mill & Elevator Co. vs. Missouri Pacific Railway Co., 186 S.W. 8, the Kansas City court of appeals decided that failure of plaintiff to file claim within four months after misdelivery of a shipment of bran precluded it from enforcing the claim by suit.

* *

Bill of lading provision that any claim for injury to goods in transit must be made in writing to the carrier at the point of origin or the destination, within four months after delivery of the shipment, was held by the Iowa supreme court to be enforceable by a delivering carrier sought to be held liable for damages, as well as by the initial carrier which issued the bill of lading. (Frisman vs. Chicago, Burlington & Quincy Railroad Co., 163 N.W. 627.)

* *

Applying a provision of the federal bill of lading act, the Kansas supreme court decided in the case of Stevens-Scott Grain Co. vs. Chicago, Rock Island & Pacific Railway Co., 221 Pac. 1117, that suit would not lie on a claim for loss under an order bill of lading unless the claim was presented within four months after delivery of the shipment. This was an action for loss alleged to have been sustained because defendant issued an order bill of lading incorrectly describing the quantity of wheat in a car.

* *

In the case of J. C. Hubinger Brothers vs. Chicago, Burlington & Quincy Railroad Co., 195 N. W. 762, the Iowa supreme court gave binding effect to a clause in a bill of lading covering a shipment of feed and requiring any claim for loss or damage to be made within four months after delivery, or, in case of failure to deliver, within four months after a reasonable time for delivery.

The shipment involved was carried from Keokuk to Buffalo, and was destroyed by fire while there awaiting forwarding to the destination in cars which the terminal carrier delayed in furnishing. No notice of claim was given defendant, the initial carrier, till two years afterwards, during which time the terminal carrier had become insolvent, thereby preventing defendant from enforcing any

*This chapter deals with such matters as to time for filing claims, etc. Liability of carriers for losses, delays, injuries and misdelivery is treated in other chapters of this part of the book.

claim for reimbursement against that line, which was at fault as to the loss. Under these circumstances it was ruled that the shipper's suit against defendant for damage was properly dismissed.

SECTION 347. VALIDITY OF TIME LIMITATION

It is quite well settled that a bill of lading validly may provide that claims for damages shall be barred unless presented within a stated time. Such a clause will not be enforced when it appears that the time allowed for presenting claim is unreasonably short.

The courts will enforce a provision in a bill of lading to the effect that the railway company shall not be liable for loss, damage or delay, unless claim therefor be made within four months after delivery, or, in case of nondelivery, within four months after reasonable time for delivery has expired, according to a decision of the North Carolina supreme court, announced in the case of Forney vs. Seaboard Air Line Railway, 83 S.E. 686.

As holding that suit against a carrier on a freight claim is barred unless the claim has been presented within the four-month time limit, see Dodge & Dent Mfg. Co. vs. Pennsylvania Railroad Co., 162 N. Y. Supp. 549.

SECTION 348. CHARACTER OF SHIPMENT

A shipment from a point in one state to a point in another is not deprived of its interstate character through the fact that, before arrival of the shipment in the second state, it may have been resold by the consignee for delivery at another point in the first state, according to the holding of the Kansas supreme court in the case of Andrews vs. Union Pacific Railroad Co., 161 Pac. 600.

Andrews shipped corn from Rossville, Kansas, to the Watkins Grain Co., at Kansas City, Mo., over defendant's line. While the car was in the yards at Kansas City, Kansas, the grain company resold it to a third person for delivery at Rosedale, Kansas, and it was accordingly moved through Kansas City and over the Frisco Railroad to Rosedale. The shipment being found to be short, written claim was made against the defendant by the plaintiff. The trial court found that the transaction was governed by the Kansas law relating to freight loss claims, and, finding that the shipment was of intrastate character, allowed an attorney's fee, as well as damages.

On appeal, the supreme court reversed the holding as to the nature of the shipment, declaring that the fact that the corn was returned to Kansas from Kansas City, Mo., did not avoid an instance of interstate commerce. Hence the attorney's fee was disallowed, but the judgment for damages was permitted to stand, because it was proper, whether the shipment was intrastate or interstate.

SECTION 349. WAIVER OF LIMITATION CLAUSE

So far as concerns intrastate shipments in Minnesota, a bill of lading clause requiring freight loss claims to be presented within four months is subject to waiver by the railway company. This is the gist of the decision of the Minnesota supreme court in the case of E. L. Welch Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 175 N.W. 100.

On Feb. 27, 1915, a car of oats was shipped to plaintiff at Minneapolis, from another Minnesota point. The bill of lading contained the usual clause limiting to four months the time for making claim for loss in case the carrier should fail to deliver. Defendant, the carrier, failed to deliver. No claim was made until May 17, 1916.

"This action," says the supreme court, "was brought on the theory of conversion, to recover the value of the car of oats. Defendant pleaded the limitation clause as a bar to plaintiff's right of recovery. The reply set up a waiver of the limitation clause. There was testimony in support of a waiver. At the close of the testimony the trial court directed a verdict for defendant, upon the theory that the defendant could not waive the limitation clause, as it would be contrary to the statutes of the state. A majority of the court is of the opinion that the trial court was in error. The rule is no longer an open question in this state. The carrier may waive the provisions of such limitation clause."

In Laser Grain Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 179 S.W. 189, the Arkansas supreme court decided that the courts will enforce a clause in a bill of lading which bars claims for damages unless presented within a stated time (four months in this case). But a railway company waives the shipper's failure to comply with such a clause, either as to time or manner of filing the claim, by negotiating for a settlement after claim is made.

The same time limitation was considered by the Oklahoma supreme court in the case of Pruitt vs. Chicago, Rock Island & Pacific Railway Co., 170 Pac. 1143.

Plaintiff sued for the value of grain lost out of an interstate shipment, and

admitted that no formal claim in writing had been filed within the four months' period, but the railway company conceded that there had been negotiation by correspondence for settlement both before and after lapse of the four months, and that the claim was finally rejected on grounds other than failure to present a formal claim.

Under these circumstances, the court decided that there was a substantial compliance with the bill-of-lading requirements, especially since it was decided by the United States Supreme Court, in the case of Blish Milling Co. vs. Georgia, Florida & Alabama Railway Co., that notice in writing is sufficiently given when it apprises the carrier of the character of the claim, although it may not be formally worded.

The same clause was applied by the North Dakota supreme court in the case of Shark vs. Great Northern Railway Co., 164 N.W. 39.

It was decided that this provision renders void a claim for loss of goods shipped from a North Dakota point to New York, where no claim had been filed until eight months after shipment was made. But the court held that, since the clause is designed to facilitate prompt investigation of freight claims and not to favor release of carriers from liability, the requirement for timely notice must be deemed to have been substantially complied with when, prior to expiration of the four months' period, oral complaint was made to the carrier's shipping agent of nondelivery, and the carrier acted on such complaint by attempting to trace the shipment, and asked the shipper to wait a little longer.

In Ithaca Roller Mills vs. Ann Arbor Railroad Co., 163 N.W. 934, a suit to recover for damage to flour in transit, a claim that plaintiff could not recover, because claim was not filed within the four months' limit, was ruled against the railway company, because it appeared that the railway company retained and acted upon the claim throughout a period of nearly nine months after its actual filing, and never objected to the untimeliness of filing until suit was brought. This is held by the court to have constituted a waiver of the delay in presenting the demand.

SECTION 350. ENFORCEMENT OF CLAIMS

A novel contention made on the part of a railway company was overruled by the United States district court for the eastern district of Wisconsin in the case of Chicago & North Western Railway Co. vs. E. C. Tecktonius Mfg. Co., 262 Fed. 715.

The railway company sued to recover freight charges, and the defendant sought to offset against the claim a demand covering the value of freight lost under previous transportation contracts between the same parties.

Now, ordinarily, such a demand would indisputably afford the basis of a proper counterclaim, but the railway company took the position that, if a shipper were permitted to offset against a claim for interstate freight charges a demand based on some other transaction, the door would be thrown open to collusive compromise of such counterclaims, thereby evading the provisions of the federal statutes directed against discriminatory freight rates, rebates, etc.

The court declined to discover any peril to the public in permitting a shipper to litigate his claim for lost freight in this manner, pointing out that the shipper is just as fairly entitled to file such counterclaims as a railway company is to set off against an affirmative demand of a shipper for freight losses a claim for freight charges due, and that the opportunities for collusion are just as great where the respective claims are litigated in independent suits as where they are disposed of in one action.

A contrary conclusion was reached by the United States district court for the southern district of Iowa in the case of Illinois Central Railroad Co. vs. W. L. Hoopes & Sons, 233 Fed. 135. There is, however, nothing in the decision which restricts the right of the defendant to prosecute an independent suit to recover such damages.

The theory on which the decision proceeds is that to permit such counterclaims would be to facilitate the giving of rebates to favored shippers under the guise of freight loss claims which might be promptly allowed or compromised by the carrier.

SECTION 351. CLAIMS AGAINST NONRESIDENT RAILROADS

In the case of Ithaca Roller Mills vs. Pere Marquette Railway Co., 187 N.W. 976, the Minnesota supreme court sustained the right to sue in the state a railroad having no lines in the state, but having a freight office therein.

Plaintiff sued for loss of grain in transit from a point in Michigan to points in the East. Summons was served upon a freight agent maintaining an office for the railway company in Minneapolis. The company unsuccessfully challenged the

jurisdiction of the Minneapolis municipal court under such service.

Following previous decisions to the same effect, the supreme court held that nonresident railroad companies are subject to the jurisdiction of the local courts under such circumstances, adding: "We understand that one of these cases has now been taken to the Supreme Court of the United States. Unless and until that court holds that our previous rulings were erroneous, we shall continue to adhere to them."

See, also, section 379A.

SECTION 352. RIGHT TO INTEREST

The Stevens-Scott Grain Co. shipped a car of wheat by the Santa Fe Railway from Wichita to San Antonio. It was so badly damaged in transit that the consignee refused to receive it, and it was sold by the carrier, bringing $293. The grain company brought an action against the railway company to recover compensation for its loss, and obtained a judgment for $789.17, which was found to be the market value of the grain at San Antonio, in its original condition.

The plaintiff appealed to the Kansas supreme court on the ground that it ought also to have been allowed interest on this amount from the date of the arrival of the wheat, but the court held that interest was not recoverable, since compensation for losses in such cases is necessarily a matter of general estimate and it is presumed that the jury intend their verdict to cover the full compensation to be allowed.

But, in the same opinion, the court decided that a carrier which sells property because of the refusal of the consignee to receive it is chargeable with interest on the proceeds in excess of the freight during the time that they are withheld from the shipper. (Stevens-Scott Grain Co. vs. Atchison, Topeka & Santa Fe Railway, 149 Pac. 744.)

SECTION 353. STATUTORY PENALTIES FOR DELAY IN ADJUSTMENT

A South Carolina statute prescribing a penalty of $50 against railway companies for failure to pay just freight loss or damage claims within 40 days after presentment is invalid, so far as it may be interpreted as applying to interstate shipments, according to a holding of the supreme court of the state announced in the case of Tatum vs. Seaboard Air Line Railway, 93 S.E. 123.

The Minnesota supreme court affirmed judgment in favor of the Farmers' Elevator Co., of Lansford, N. D., against the Great Northern Railway Co. for the value of flaxseed lost in transit, but denied recovery of the statutory penalty prescribed by the Minnesota laws for delay in adjusting freight loss claims, on the ground that the statute was limited in its operation to Minnesota intrastate shipments, while the shipment in question was interstate. (154 N.W. 954.)

* *

The highest court of the land has decided that a state may impose on carriers of intrastate freight a reasonable penalty and attorneys' fees for wrongfully failing promptly to pay freight loss and damage claims. In the case of Chicago & North Western Railway Co. vs. Nye-Schneider-Fowler Co., 43 Sup. Ct. 55, the court upheld a Nebraska statute providing for such fees and 7 per cent interest, excepting as it was interpretable as authorizing assessment of an attorney's fee in favor of claimant on an appeal on which an excessive claim is reduced.

See, also, section 348.

SECTION 354. FRAUDULENT FREIGHT CLAIMS

To guard against unjust discrimination in the transportation of interstate freight, an act of Congress makes it an offense, punishable by fine or imprisonment, or both, for a shipper or consignee, or his agent, to make a false statement "as to the cost, value, nature, or extent of injury" to freight, with intent to obtain an allowance for damage, whereby the compensation of a common carrier shall be made less than regularly established rates, etc.

In a case before the United States district court for the eastern district of Missouri, the Laser Grain Co. was prosecuted as for violating this statute by making fraudulent freight claims, and was convicted. But the circuit court of appeals, reviewing the case, ordered a new trial on the ground that the record of the trial failed to show a violation of the act. (250 Fed. 826.)

The higher court held that, intent to defraud being the gist of an offense under the law, an officer whose acts were sought by the prosecution to be imputed to the defendant company should have been permitted to testify fully to the circumstances under which the particular claims were made, to the end that the jury might better determine whether there was such actual intent to defraud as would warrant a conviction of the company.

It was further held that the trial judge should have directed an acquittal, on the

evidence offered, there having been no proof made that the claims in question were actually filed with the carrier. To constitute an offense under the statute, there must be not only intent to defraud, but also such filing of a claim as might bring about a consummation of such intent.

CHAPTER XLI

LIMITATION OF LIABILITY*

SECTION 355. VALIDITY IN GENERAL

THE great weight of judicial authority holds that a carrier may not relieve itself from liability for loss resulting from negligence on its part, and that a provision to that effect in a shipping contract is invalid as being against public policy, in view of the quasi-public character of common carriers. On the other hand, it is generally held by the courts that a contract of carriage exempting the carrier from its common law liability for loss as insurer of freight is valid if a consideration is allowed the shipper for the exemption, as, for example, a lower freight rate than would apply under the more strict liability.

The general rule that a common carrier may not validly contract to exempt itself from liability for negligence does not affect the validity of an agreement made by a shipper that the carrier's liability shall be restricted to the amount stated in the contract as the true value of the freight. Such terms are upheld by the courts as a proper means of securing a due proportion between the amount for which the carrier may be held responsible and the freight charges received by it as a consideration for the safe transportation of the goods shipped.

* *

A railway company having published tariffs on interstate shipments, showing different rates for a given shipment, according to whether it is carried at its full value or at a reduced valuation, and such tariffs having been approved by the Interstate Commerce Commission, every shipper is presumed to know the contents, and cannot avoid the effect of accepting a bill of lading containing a limited valuation, on the ground of actual ignorance of the provisions of the tariffs.

An agreement by a shipper to a limitation of valuation, in consideration of the benefit of a lower freight rate than would be granted on a higher valuation, is valid and enforceable against him.

These were the two main points decided by the Oregon supreme court, in Zoller Hop Co. vs. Southern Pacific Railway Co., 143 Pac. 931.

* *

Although it is a well-settled rule of law that a railway company, as a common carrier of goods, cannot exempt itself from liability for loss resulting from its own negligence by inducing a shipper to enter into a special contract releasing such legal responsibility, the Minnesota supreme court decided, in Millers' National Insurance Co. vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 156 N.W. 117, that a lease for an elevator site on a railway right of way may validly provide that the leasing railway company shall not be liable to the lessee elevator company for loss of grain caused by communication of fire from the elevator company's buildings while such grain is in the possession of the railway company within 100 feet of the elevator buildings, even though a shipping receipt covering the grain may have been delivered to the elevator company.

In the cited case it appears that a carload of wheat was badly damaged by fire while standing on defendant's track near an elevator, and after bill of lading had been issued to the elevator company, but that the fire was communicated to the car from the elevator buildings.

The railway company, without authority, sold the undestroyed wheat, and the elevator company assigned its rights against the carrier to plaintiff insurance companies, which had paid the full value of the carload, and plaintiffs sued for reimbursement. The railway company counterclaimed for the injury done the car, and pleaded exemption from liability for the loss under the lease clause above mentioned.

The trial judge decided that the plaintiffs were entitled to recover only for the damaged wheat converted by the railway company, and that the railway company was not entitled to anything on its counterclaim. Both sides appealed, but the judgment was affirmed.

* *

But as to interstate shipments, at least,

*As to marine transportation, see section 363.

it has been held that a railroad cannot avoid liability for loss of a shipment in its custody before actual transportation by showing that, in consideration of a lease of part of a right of way for elevator purposes, the shipper agreed not to hold the company liable for fire losses. Said the Kansas City court of appeals, in the case of Morrison Grain Co. vs. Missouri Pacific Railway Co., 170 S. W. 404:

"Under the federal regulations governing interstate shipments, the defendant cannot by a mere stipulation in an independent contract such as a lease of an elevator, having no connection with the contract of shipment of goods, relieve itself of liability as a common carrier. It can do this only in the mode pointed out in such regulations so that all shippers will be treated alike, which would not be the case if defendant were allowed to absolve itself by a clause in a contract leasing a piece of property to the shipper. . . . If the defendant could relieve itself of liability by a special contract to one shipper, it could in this manner make all sorts of discriminations which the interstate commerce laws are designed to prevent."

SECTION 356. PLACE FOR VALUING LOSS

A bill of lading clause, requiring any loss or damage to be computed on the basis of value of the shipment at the time and place of shipment, including freight charges, is held by the United States Supreme Court to be invalid. (McCaull-Dinsmore Co. vs. Chicago, Milwaukee & St. Paul Railway Co., 40 Sup. Ct. 504.)

Plaintiff sued for loss of grain shipped in 1915 from Montana to Omaha. The bill of lading contained the clause above referred to. The defendant railway company paid damages computed on the basis fixed by the clause,—value at the time and place of shipment,—refusing to pay the greater loss reflected by the value of the grain at Omaha when it should have been delivered there.

Affirming judgment in plaintiff's favor for the difference involved, the Supreme Court says:

"The Cummins amendment . . . provides that the carriers affected by the act shall issue a bill of lading and shall be liable to the lawful holder of it 'for any loss, damage, or injury to such property, . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed' and, further, that the carrier 'shall be liable . . . for the full actual loss, damage, or injury, . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.'

"Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods, but merely offering the most convenient way of finding the value. . . . In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law. . . . The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute, and upon that, of course, the courts must decide for themselves.

"We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates on this case. In this case it does prevent a recovery of the full actual loss, if it is enforced.

"The rule of the common law [basing damages on destination value] is not an arbitrary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based on the history of the statute or upon the policy of the later act of Aug. 9, 1916, . . . can prevail against what we understand to be the meaning of the words."

See, also, 252 Fed. 664 and 260 Fed. 835.

CHAPTER XLII

CARRIERS AS WAREHOUSEMEN*

SECTION 357. EXISTENCE OF RELATIONSHIP

IN the law there is a somewhat shadowy line between the status of a delivering railway company as a common carrier and as warehouseman. The importance in the distinction lies in the legal principle that a common carrier is held to strict accountability for the safety of goods, being exempted from liability on but few grounds, which include acts of God as reflected in storms, etc., acts of public enemies, inherent condition of goods, fault of shippers, etc., while a warehouseman is liable only for such losses as have resulted from his negligence.

The difficulty which sometimes arises is in determining the precise point at which a railway company has ceased to bear the relation of common carrier to a particular shipment, and has become a mere warehouseman. Light on this question is cast by the decision of the St. Louis court of appeals handed down in the case of Scott County Milling Co. vs. St. Louis, Iron Mountain & Southern Railway Co., 104 S.W. 924.

In that case it appeared that a carload of flour was shipped from a Missouri mill to a point in Mississippi, Yazoo City. The car arrived late one afternoon and was spotted on a house track which served the buyer's warehouse. Eight hours later the warehouse burned, and fire communicated to the car destroyed it and its contents.

To a suit by the mill, to whose own order the flour had been shipped, for recovery of damages, the defendant railway company answered that its representative, the terminal railway company, ceased to be a common carrier of the flour before the loss occurred, and that, therefore, there could be no liability, for there was no negligence on that company's part. But, deciding the case in the mill's favor, the court of appeals said:

"A carrier ceases to be liable as such and becomes liable for ordinary care, not on the arrival of the property at destination, but after a reasonable time for its removal by the consignee. According to the testimony for the railroad company this property was not set out for removal from the car, that is, for delivery to the Hyatt company, until 6 o'clock p.m., Jan. 22; at least the agent was unwilling to swear it was set out earlier.

"We cannot say that in the winter season the consignee had a reasonable time, after the car was placed for delivery, to remove the flour from it prior to the hour it was burned, even had the Hyatt company been notified it was ready for delivery. By 6 o'clock in the evening it was dark, and within eight hours later the flour had been consumed. But notice of the arrival was necessary, both because the bill of lading so declared, and because the flour did not arrive on time."

* *

Surrender of the bill of lading is not essential to this change of the railway company's relation to the shipment, under which the company becomes a warehouseman with no greater duty than to use ordinary care for the safekeeping of the freight.

There are numerous decisions to the effect that, where the actual destination fixed by agreement or custom is a siding, the railway company's relation as carrier does not terminate until spotting on that siding. The company does not become a warehouseman until the consignee has been afforded opportunity for removing the freight, or has definitely refused to receive it.

In the case of Independence Mills vs. Burlington, Cedar Rapids & Northern Railroad Co., 34 N.W. 320, the Iowa supreme court held defendant for loss by fire of a carload of wheat, although the carrier did not cause the fire, and although the plaintiff mill had been notified of the arrival of the car; it appearing the car had not yet been spotted

*For matter pertaining to warehousemen in general, see the chapter on Warehousemen in Part III. As to railway company's liability as carrier for loss and damage, see Chapter XXXVIII. See, also, sections 306, 334.

at a convenient point for unloading. The court said:

"It was its [the railway's] duty to place it in such a position on its track that it could be safely, and with a reasonable degree of convenience, unloaded by the plaintiff, and it was the right of the plaintiff to refuse to unload the car until it was so placed; and as long as the defendant, in obedience to its obligation as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease."

For a Canadian case holding that transportation is not complete until placing of the car at the proper point for unloading, see 1 Ontario Weekly Reporter, 254.

"If by custom or contract the duty of the carrier is performed when it places the car containing the goods on a sidetrack ready for unloading by the consignee, then from that time the liability as carrier ceases." 6 Cyc. 457.

There is a Canadian decision—Railroad Co. vs. Frankel, 33 Canada Supreme Court Reports, 115—in a case which arose in Toronto, holding that cars on a siding were in the railway company's hands as warehouseman, but there it appeared that the consignee had refused to receive them because of inferiority of the goods.

All of the reported cases bearing on the subject seem to proceed upon the theory that before a railway company becomes a warehouseman there must remain no service to be performed, excepting safekeeping of the freight. Movement of a car from one point in the yards at the destination station to the place of actual unloading is as much a part of the transportation service as transportation of the car from one station to another.

Congestion of the consignee's siding without his fault could not, of course, excuse the carrier's failure to make final delivery there; and I find no reason or judicial authority to warrant a view that a temporary congestion for which the consignee is responsible relieves the railway company from its continuing liability as carrier until the full transportation is completed.

* *

The Washington supreme court noted, in the case of Lagomarsino vs. Pacific Alaska Navigation Co., 170 Pac. 368, that there is an important qualification of the general rule of law that, after reasonable time has been afforded the consignee of freight in which to accept delivery, any further custody by the common carrier must be regarded as being held merely as warehouseman. This qualification is that the consignee must not only be given time in which to accept delivery, but must also be given reasonable opportunity.

So it was decided that the fact that goods had remained on defendant steamship company's dock more than 48 hours after being discharged there from a vessel, and before being destroyed by fire, did not release defendant's strict liability as carrier, if the goods had been so covered up with the goods of other consignees that the particular consignee's truckmen had been unable to get at them.

"Reasonable time in this case," said the court, "was not a question of hours, but was one to be measured by the opportunity afforded."

* *

The act of a consignee of carload freight, on being notified of its arrival, in breaking the seal on the car and in relocking the car with a padlock, retaining the key himself, constitutes such acceptance of delivery as exonerates the railway company from further liability as carrier, and places loss of the contents of the car, through subsequent fire, on the owner of the shipment, unless it can be shown that the fire was caused by some act of carelessness imputable to the railway company. In other words, these circumstances show such delivery as changes the railway company's responsibility from that of carrier to the less strict liability of warehouseman. (McEntire vs. C., R. I. & P. Ry. Co., decided by the Nebraska supreme court, 152 N.W. 305.)

SECTION 358. EFFECT OF BILL OF LADING CLAUSE

Under the familiar bill of lading clause, providing that for loss, etc., caused by fire after 48 hours after notice of the arrival of freight "has been duly sent or given," the carrier's liability shall be that of warehouseman only, the court of appeals for the District of Columbia held in the case of Peavey vs. Philadelphia, Baltimore & Washington Railroad Co., 277 Fed. 333, that the 48-hour period runs from the mailing of a properly addressed and stamped letter containing the notice of arrival. The validity of the notice is not affected by the fact that the letter may never be actually received by the addressee.

Standard bill of lading provisions concerning the liability of railway companies for losses of goods in transit were con-

sidered and interpreted by the Illinois supreme court in the case of Mark Owen & Co. vs. Michigan Central Railroad Co., 125 N.E. 767.

The precise question presented to the court was whether a consignee's acceptance of a shipment, breaking of the car's seals, and commencing to unload the contents, released the carrier's strict liability as such, substituting the milder responsibility of a warehouseman, where the 48-hour period allowed for unloading had not expired. The court answered this question in the negative, saying:

"It would seem that, if it had been contemplated that the liability as carrier was to cease under the facts here stipulated, which it is insisted constituted a delivery, the language of the bills of lading might easily have made that intention clear. The ordinary mind would understand, we think, from reading the bills of lading, that although the car may have been placed for unloading, opened and the work of unloading begun, the carrier's liability as such continued as to 'property not removed' within 48 hours, provided that was a reasonable time for unloading, and it is not disputed that 48 hours was a reasonable time for plaintiff to unload the cars."

As holding that a carrier becomes mere warehouseman where the consignee fails to remove a shipment within 48 hours after notice of arrival, as provided by the bill of lading, see Dodge & Dent Mfg. Co. vs. Pennsylvania Railroad Co., 162 N.Y. Supp. 549.

SECTION 359. NEGLIGENT STORAGE

The right of a shipper of freight to recover against a terminal railway company for negligent storage of goods pending delivery to a steamship for export was upheld by the Louisiana supreme court in the case of Coate Bros. vs. New Orleans Terminal Co., 72 So. 678.

Plaintiff sued for damage to carload lots of cottonseed cake, due to defendant's storage of the same on its docks in a condition which exposed the goods to the weather, dampness and flood, whereby the cake became unmerchantable. A trial resulted in judgment for defendant, but the supreme court reversed the decision.

It was held by the higher court that defendant was liable as a warehouseman in the interim following completion of the rail transportation, especially in view of a provision in the shipping documents to the effect that liability as carrier should terminate on delivery at the wharf; and that defendant's negligence was sufficiently proved by showing that the freight was stored in an unsafe and unsuitable place, whereby the damage was caused.

* *

In Hines vs. First Guaranty State Bank, 228 S. W. 668, the Texas court of civil appeals held a carrier liable for injury to meal resulting from its retention in a leaky car. The decision was affirmed by the Texas supreme court (243 S. W. 972).

CHAPTER XLIII

SHIPPING BY VESSEL

SECTION 360. JURISDICTION OF INTERSTATE COMMERCE COMMISSION

TRANSPORTATION of freight by ocean carriers between the United States and nonadjacent foreign countries is not covered by the interstate commerce act, and does not fall within the jurisdiction of the Interstate Commerce Commission, held the New York court of appeals in the case of Burke vs. Union Pacific Railroad Co., 124 N. E. 119, affirmed by the United States Supreme Court, 41 Sup. Ct. 283.

Said Mr. Justice Collins, speaking for New York's highest court: "Interstate rates and charges to and from ports of entry must be published and filed as independent from ocean transportation. Ocean transportation may be conducted under through bills of lading, issued at a foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be limited to inland transportation and services, and cannot relate to liability, service, or obligation of the ocean carrier."

SECTION 361. SHIPPING CONTRACTS, IN GENERAL

In dismissing the suit of United States Cast-Iron Pipe & Foundry Co. vs. Gulf & Ship Island Railroad Co., 72 So. 882, which was brought to recover damages for claimed breach of a contract to carry a shipment from Gulfport, Miss., to Colon, Panama, the Mississippi supreme court decided that under an agreement to provide ocean space for 5,000 tons of freight, a carrier is not bound to accept a shipment of 2,100 tons only; and that a quotation of a rate for water transportation is not binding until accepted.

Another interesting legal point made in the court's decision is that a naked contract to furnish space for "ocean transportation," without specifying the class of vessel to be used, does not bind the carrier to furnish a steamer, as distinguished from a sailing vessel. But nothing is found in the opinion to intimate that obligation to furnish a steamer might not be inferred from a custom applicable to particular circumstances differing from those of the case before the Mississippi court.

* *

Not long ago I was called on for an opinion as to the validity of a mill's claim against a steamship company where a contract for space in a vessel "sailing during September" was made, and the company withdrew a scheduled sailing without notifying the mill; thereby preventing the mill from completing a contract with a foreign buyer for "September seaboard clearance." In an opinion upholding the validity of the claim, I cited the following authorities:

"The carrier will be liable . . . where it accepts property for shipment knowing that it will be unable to transport it in a reasonable time." 10 Corpus Juris, 288.

"Where goods are tendered to a carrier for transportation, it is bound to advise the shipper as to any cause likely to delay transportation, which cause is within its knowledge, and not within the knowledge of the shipper; and, if it fails in its duty in this respect, a delay in the transportation of the goods will not be excused, and that, too, irrespective of the nature of the cause.

"The acceptance of the goods for shipment without notifying the shipper of the fact that they cannot be promptly delivered is tantamount to an assurance that they will be delivered within a reasonable time, except for the intervening of excusing causes of subsequent occurrence. This duty is in no way dependent on special agreement, but is a part of the duty imposed by law on carriers; and the reason why the law has imposed it on the carrier is to give the shipper an opportunity to exercise his own discretion as to the propriety of making the shipment—to choose between the different courses open to him." 10 Corpus Juris, 290.

In the case of The Prussia, 100 Fed. 484, it was decided by a federal court that promptness in transporting freight is the substantial condition of a contract of affreightment, and when shipowners

fail to deliver a cargo within the time reasonably necessary to make the voyage, and the delay is not due to a cause for which they do not assume responsibility, they are liable to the shippers for losses resulting from such delay, although no time has been fixed by the bill of lading.

In the case of New York & Cuba Mail Steamship Co. vs. Guayaquil & Quito Railroad Co., 270 Fed. 200, it was held that where a steamship company gives a shipper notice that a vessel will be ready to load about a certain date it is bound to have the vessel ready at that time.

In Dorrance vs. Barber & Co., 262 Fed. 489, a contract to carry goods by water from New York provided for their "January shipment from Galveston." It was decided that this was an essential element of the contract. The shipper, failing to ship from Galveston in January, could not enforce his contract against the steamship company.

The court decided that the quoted provision was either a condition precedent to performance of the transportation contract or was a warranty, "because it may be regarded either as a stipulation in respect of time, which is of the essence in contracts mercantile, or as a descriptive statement intended to be a substantial part of the contract which is a warranty." No reason is perceived why this rule is not to work both ways, applying to the steamship owner who fails to move freight within a certain time, as well as to the shipper who agrees to furnish a cargo by a stated time.

In another federal case (251 Fed. 222) a ship was held liable for refusal to permit transshipment on being detained by a slide in the Panama Canal. In the case presented to me the steamship company constructively prevented timely fulfillment of the mill's export sales contract when it not only failed to furnish a sailing at the time contracted for, but also withheld information from the mill that contract would not be performed.

In another case (166 Fed. 989, affirmed in 170 Fed. 937) a steamship company was held liable for damages through a fall in price of goods while delivery was delayed owing to the failure of the company to forward goods on a vessel to which they had been constructively delivered.

Numerous other cases to the same effect are to be found in the law reports. One of them closely resembles the one in question. In that case—Bridgeport Milling Co. vs. Columbia & Okanogan Steamboat Co., 148 Pac. 6—the Washington supreme court upheld judgment in plaintiff's favor, based on defendant's breach of agreement to move certain wheat during the spring of 1912. From the report of the case it seems that the court allowed damages based on the plaintiff mill's loss of the benefits of a contract for sale of the wheat at the destination, although it also appears that the defendant was informed of the existence of that contract.

* *

The superior court in Montreal awarded judgment in favor of the Ogilvie Flour Mills Co., Ltd., against the Canadian Government Merchant Marine, Ltd., on account of cancellation of a sailing of a steamer on which 2,000 bags of flour were to have been carried from St. John, N. B., to Cardiff, Wales.

The court finds from the evidence presented that on Jan. 31, 1921, defendant allotted space to plaintiff mill for the particular shipment on the Canadian Otter, scheduled to sail about Feb. 11. The flour was placed alongside the steamer Feb. 8, as required by defendant. Owing to shortage of traffic for Cardiff and Swansea the sailing was postponed and then canceled, although the mill protested both postponement and cancellation. Defendant was also notified of a decline in the market price of the flour pending delay in its exportation. The shipment went to London on another of defendant's vessels, which sailed about March 10, 1921. The mill's loss was $667.50, for which judgment was allowed. While the flour was awaiting transportation and the market was declining, the shipment remained under the control of the defendant, which never retendered the same to the mill.

In its answer the defendant unsuccessfully relied on a clause of the shipping contract providing that the engagement to furnish the space was "conditional upon continuance of the steamship company's service between the ports named," and that service might be discontinued or curtailed if at any time, in the judgment of the company, "conditions of war, either actual or threatened, make it unsafe or imprudent" to sail; the company, in such event, binding itself to "use all reasonable endeavors to obtain substituted space."

Defendant also failed in its reliance on want of notice that the shipment was required for delivery abroad "on any particular date or for any particular sale or purpose," and on a claim that provision in the contract that the sailing would oc-

cur "about" Feb. 11 indicated that "exactness in time was not of great importance." It was further contended, without avail, that by permitting defendant to carry the flour to Cardiff, via London, on a later sailing, the mill estopped itself to claim damages; and that the mill's disposal of the flour at a reduced price, without notice to the steamship company, was made on the mill's own responsibility.

The defendant deposited in court $100 by way of an offer of compromise, without admitting responsibility; the amount being estimated as exceeding somewhat the interest at the legal rate on the invoice price pending the delay in transportation.

In disposing of the case the judge decided that the controversy was governed by the laws of Quebec, since it was not pleaded that the laws of England were agreed upon and those laws were not proved.

The gist of the decision appears to be that where an ocean carrier contracts to furnish space for a sailing on or about a certain date it cannot avoid liability to the owner of the shipment for breach of the contract, on the mere ground that the sailing was canceled because of inability to book enough freight to make up a full cargo. And where a material delay results in delivery of the shipment abroad the steamship company is liable for such natural and direct loss to the owner of the goods as is reflected by a decline in market value pending the inexcusable portion of the delay in delivery. So interpreted, the decision seems to be in harmony with the holdings of the English and American courts.

SECTION 362. WHEN FREIGHT IS EARNED

A decision of the United States circuit court of appeals, second circuit, shows that it is quite possible for a shipper of ocean freight to be out transportation charges without obtaining transportation.

In proceedings against a schooner, the Gracie D. Chambers, it appeared that cargo space to Bordeaux was contracted and paid for under a bill of lading containing the clauses: "Restraints of princes and rulers excepted." "Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost."

The cargo was stowed, but clearance of the schooner was prevented by an order of the Treasury department laying an embargo on vessels sailing for a war danger zone. After some delay pending effort to secure clearance, the goods were discharged, and the vessel refused to return the prepaid freight, successfully relying upon the clauses of the bill of lading above quoted.

The court held that, except as there may be agreement to the contrary, freight is earned only upon delivery of the cargo; if the vessel sinks within one mile of its destination on a 3,000-mile voyage the freight must be repaid. But it is decided that the quoted provisions of the contract took this case outside the general rule and within its exceptions.

Interpreting those provisions, the court decided that the owner of the vessel was bound to return unearned freight prepaid only in the event that there should be a nondelivery through the carrier's fault or a peril not excepted in the bill of lading, and a governmental embargo was declared to be a "restraint of princes and rulers." (253 Fed. 182. Affirmed by United States Supreme Court, 39 S. Ct. 149.)

* *

A result of a shipping blockade in the European war zone was involved in an admiralty suit decided by the United States district court for the southern district of New York. (253 Fed. 486.) In this case it was unsuccessfully attempted to recover against the schooner Malcolm Baxter, Jr., freight prepaid under a charter party contemplating transportation of a cargo of meal from New York to Rotterdam, the contract having been abandoned.

The contract contained the familiar clause: "Full freight to be prepaid in New York when vessel loaded, without discount, and earned retained and irrevocable vessel and/or cargo lost or not lost." It also recited that the cargo should be consigned to the Netherlands Overseas Trust, although the real consignee was the Dutch firm, "The Widow Cleyndert." Permit had been issued to the latter for shipment by a shipping company affiliated with the Overseas Trust, which did not cover the schooner in question.

Negotiations by the consignee to secure proper permit for the voyage dragged from late in January, 1917, until April 4, 1917, when the attempt definitely failed. As there appeared to be no prospect of the schooner getting through the blockade, the charterer denounced the charter party March 29.

Disallowing the claim presented against the vessel, the court holds that the charterer had the obligation of procuring the necessary permit, and that the owner of the vessel could not be said to be in de-

fault as, presumably, he was willing to try to complete the voyage, and there was no evidence to show that performance was impossible; there being no satisfactory proof as to whether sailing vessels had passed the blockade.

SECTION 363. LIMITATION OF LIABILITY

A decision of the New York supreme court, appellate division, shows that the liability of steamship companies operating between ports of the United States, or to or from foreign ports, concerning goods lost or damaged in transit, is the same as applies to interstate carriers by rail. That is, where either class of common carriers has a higher freight rate applicable to carriage at full valuation than another rate applying to a limited valuation, the bill of lading may validly limit, but not exempt, liability for loss, where the shipper avails himself of the lower rate.

The Harter act, a federal statute, declares that a clause in a marine bill of lading covering interstate or foreign shipments may not validly provide that the carrier shall be "relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery," or that the obligation "to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy . . . shall in any wise be lessened, weakened, or avoided."

Following interpretations of this law promulgated by the United States Supreme Court, the New York tribunal said:

"It is now well settled that a carrier may limit its liability for damages occasioned by its own negligence by a contract fairly made with the shipper, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, but that the carrier cannot exempt itself from the consequences of its own or its servant's negligence. . . . This rule of law has been applied to cases arising under the Harter act.

"It is only where the shipper attempts to obtain an exemption from liability for negligence that the provisions of bills of lading have been declared to be void. The right by contract to limit liability has been recognized."

But the opinion leaves it clear that, where the shipper has no choice between an ad valorem rate and a rate based on limitation of liability of the carrier to an amount less than the actual value of the goods, a bill of lading stipulation for such limitation is void. Mariani Bros. vs. Thomas Wilson, Sons & Co. (177 N. Y. Supp. 335.)

SECTION 364. MISDELIVERY OF FREIGHT

In the case of Boera vs. Hijos De Jose Taya, S. En. C., the appellate term of the New York supreme court showed that ocean carriers are under liability similar to that of railway companies, by holding that where a steamship company makes delivery of freight to one other than the person entitled to receive delivery, the company may be held liable in damages for the full market value of the goods so misdelivered. (176 N.Y. Supp. 47.)

SECTION 365. FREIGHT LOSSES AND INJURIES IN GENERAL

When goods, received in good order on board vessel under a bill of lading subject to dangers of the sea, are delivered at the end of the voyage in damaged condition, the burden is on the shipowner to show that the damage was occasioned by a peril of navigation for which he was not responsible. The question of liability depends largely upon whether a seaworthy ship, properly trimmed and with the cargo properly stowed, would ordinarily go through such seas as were encountered on the voyage without material injury to her cargo. These points were reaffirmed by the United States district court for Massachusetts in admiralty proceedings against the Governor Powers, on account of damage to a cargo of sugar. (243 Fed. 961.)

* *

An exception to the general rule that a carrier of flour, grain or other goods is an insurer of the safety of the shipment in transit is illustrated in a case where the Texas court of civil appeals decided that there was no responsibility for injury to a shipment while being carried by water and due to a hurricane.

An act of Congress provided that, if the owner of a vessel exercised due diligence to make it seaworthy and properly equipped and manned it, there should be no liability for damage or loss resulting from faults or errors in navigation or arising from dangers of the seas or other navigable waters.

Applying this statute, the Texas court held that there was no right of recovery for injury to a cargo due solely to a violent hurricane which loosened a porthole through which water found its way into the hold, it being proved that the vessel was seaworthy and properly manned and

equipped. It follows that the court denied recovery against the delivering carrier of the shipment. (Erambert vs. Texas & Pacific Railway Co., 184 S.W. 274.)

* *

That the owner of a cargo is entitled to a lien against the vessel for any injury to the cargo resulting from fault of the vessel or its master was affirmed by the United States district court for the southern district of Georgia in proceedings taken against the schooner Humarock. (234 Fed. 716.)

This rule is qualified, however, as the court noted, by the provisions of the act of Congress above referred to. But it was decided in the same case that the provisions of this law do not exempt from liability for injury to a cargo, due to stranding negligently caused by the master, any interest he may have as part owner of the vessel.

* *

The decision of the Oregon supreme court in the case of Rosenwald vs. Oregon City Transportation Co., 163 Pac. 831, recognized the validity of a clause in contracts for carriage of freight by water, releasing the carrier from liability for loss accruing from dangers of navigation or unavoidable accident, but declared that where a steamship company seeks to escape liability under such provision it has the burden of affirmatively establishing loss from one of the exempted causes.

The court also interpreted this common clause as relieving the carrier from responsibility in case of loss due to collision with another vessel through no fault of the particular boat.

* *

The customary provision in marine bills of lading that the carrier shall not be liable for any loss or damage resulting from the "perils of the lake, sea or other waters, . . . or from collision, stranding, or other accidents of navigation," is broad enough to exempt from liability for loss arising from the sinking of a lighter while moored at a slip, due to some floating object striking the vessel.

It was so decided by the appellate term of the New York supreme court in the case of Feldman vs. Old Dominion Steamship Co., 176 N. Y. Supp. 183, but the court recognized the rule of law that where an owner of goods delivered to a water carrier for transportation proves that the cargo has been lost or damaged while in the custody of the carrier, the latter has the burden of proving that the loss or injury arose upon some cause against which liability was so exempted.

A custom treating injury to a cargo at sea caused by rats as a "danger of the sea" was held by the New York supreme court not to be provable for the purpose of exempting the owners of a vessel from liability, under a contract providing against liability for injury caused by dangers of the sea. Astor vs. Aymar, 6 Cow. (N. Y.) 266.

SECTION 366. NEGLIGENT STOWAGE, ETC.

It is actionable negligence for a steamship company to stow bags of goods in a compartment which has recently contained coal, where, by reason of mere sweeping of the compartment, instead of both sweeping and washing, the goods or their bags are injured by coal dust. The company is also liable for similar injury to goods resulting from coaling the vessel without taking reasonably adequate means of preventing the damage. These points were decided by the United States district court for the southern district of New York in admiralty proceedings against the steamship Koan Maru. (251 Fed. 157).

The proceedings involved a shipment of shellac, but, with stronger reasoning, the same rules would apply to space set apart for a cargo of flour.

The provision of the federal statutes exempting a shipowner from liability for faults or errors in navigation or management of the vessel, he having used due diligence to make the vessel seaworthy and to properly man and equip it, does not apply to acts connected with the stowing or handling of a cargo. Nor do the perils of the sea relieve the shipowner from liability for losses to which his fault or negligence has contributed. The burden is on him to show that a particular loss was directly caused by such perils.

An owner of a cargo contaminated by negligent failure of those in charge of the vessel to keep coal dust away from it, and further injured by their failure to repair a leaky condition and to provide sufficient tarpaulins over the hatches, is entitled to recover the amount of his consequent loss. (The Jeanie, 236 Fed. 463, decided by United States circuit court of appeals, ninth circuit.)

* *

An important and instructive opinion covering phases of the liability of carriers by water for loss of, or injury to, shipments appears in the decision of the United States district court for the northern district of California, announced in the case of Stockton Milling

Co. vs. California Navigation & Improvement Co., 165 Fed. 356.

This was a proceeding by the milling company to recover damages for injury to a cargo of flour loaded on a barge for transportation, and decree was entered in the claimant's favor, against several special defenses interposed by the respondent transportation company.

The contract between the parties called for delivery of the flour upon a wharf alongside the barge. After the agreement was entered into, claimant requested that respondent employ the Port Costa Milling Co., at the warehouse of which the flour was, to load the cargo, and the request was complied with.

Respondent's employees brought the barge to the wharf bow on, and in the course of two days 300 tons of flour were loaded. The third day the barge was found to have grounded because of ebbing of the tide, resulting in seams of the barge opening; the water being shallower under the bow than under the stern. Part of the flour was submerged, and hence damaged.

The first point decided by the court was that it was negligent to omit to take precautions against grounding of the barge, and that the negligence must be charged to respondent transportation company.

"It is undoubtedly true," reads the opinion, "that where a shipper, for his own convenience, undertakes to load his goods upon a vessel, he must himself bear any loss occasioned by the negligence of himself or servants in so doing. But the evidence does not bring this case within the rule just stated. The Port Costa Milling Co. was employed by the defendant to load the Jersey, and was paid by the respondent for that service.

"The Port Costa Milling Co. was the agent of the respondent in loading the barge, and therefore its negligence in that matter, and that of the men who were employed by it to do the work, is for the purpose of this case to be deemed the negligence of respondent. The fact that the warehouse company was so employed upon the suggestion of the claimant did not release the respondent from the obligation of its contract to attend and care for the barge and its cargo while the work of loading was being done."

It was further decided that the fact that the contract provided that claimant should bear the risk of transportation did not relieve the respondent from liability. An attempt to evade responsibility for negligence of its employees in rendering the barge unseaworthy while loading the cargo falls within the general rule of law that one may not make a valid contract to exonerate himself from liability for future negligence.

* *

According to a decision of the United States district court for the southern district of New York, in a suit against the Italian vessel, San Guglielmo, 241 Fed. 969, the customary clause in an ocean bill of lading that the carrier shall not be liable for loss or damage occasioned by causes beyond its control, or by heating, decay, sweat, breakage, leakage, or certain other specified causes, or for loss or damage arising from the nature of the goods, etc., does not relieve the carrier from liability for damage to food products due to negligent stowage by it. Judge Mayer said:

"The exception in the bill of lading casts upon libelants the burden of establishing by a preponderance of evidence that the damage was due to negligence on the part of the ship, and it is equally well settled that a carrier who accepts goods of a nature which requires special care in their stowage must exercise such care, and, failing so to do, is liable for the damage caused thereby, even where the character of the damage is within the exception from liability contained in the bill of lading."

SECTION 367. EFFECT OF INSURANCE

In the case of Stockton Milling Co. vs. California Navigation & Improvement Co., 165 Fed. 356, plaintiff sued for damages to a cargo of flour while being loaded on a barge for transportation. As one defense, respondent set up the fact that the flour had been insured by claimant to its full value and that the insurance money had been paid over to it. Respondent asserted that this reimbursement deprived the milling company of right to sue, on the theory that, if any one could sue, it was only the insurance company.

Citing decisions of the highest court of the land, the opinion holds that an owner of property lost or damaged through negligence of another is not debarred from recovering against the latter because the owner may have been made whole by insurance. It was decided, however, that the insurance company could hold the milling company for the amount recovered, the milling company being treated as a sort of trustee for the insurance company in shifting

the burden of the loss from the shoulders of the insurer to the party whose negligence caused the loss.

SECTION 368. LIGHTERING EXPENSE

A steamship carrying a cargo of grain from Duluth to Buffalo stranded on a shoal near the channel entrance to Buffalo River, and the master deemed it necessary to lighter a portion of the grain.

In suits subsequently brought by the steamship company to compel contribution to the expense of lightering, the question presented to the United States district court for the western district of New York was whether the steamer was stranded through negligent navigation, which would relieve the consignees of the cargo from contribution and general average, or through accident or perils of the sea, in which case the expense of releasing the vessel must be borne proportionately by the ship and cargo in accordance with a general average bond given.

Reviewing the evidence, the court found that the stranding was not due to negligent navigation, and hence awarded contribution.

It was also held that the recovery of a general average contribution in such cases rests upon equitable grounds, and that a vessel is barred to recover only for her fault, and not for an error of judgment on the part of her navigator, as a result of which an accident occurs, to the injury of her cargo. Pittsburgh & Erie Coal Co. vs. George Urban Milling Co., 239 Fed. 271.

SECTION 369. DEMURRAGE, ETC.

In dismissing proceedings instituted by the Acme Transit Co. against 133,000 bus of wheat to recover demurrage on account of detention of a freight steamer chartered to carry the grain from Duluth to Buffalo, the United States district court for the western district of New York made the following stated rulings:

The charterer of a vessel is bound to unload it with reasonable dispatch and in conformity to custom and usage at the port of destination, regardless of express agreement to that effect. But where the charter or bill of lading does not specify a time for unloading, the charterer or shipper may be excused for delay occasioned by a clogging of elevators at the delivery port because of rail carriers' failure to supply sufficient cars. The owner of a steamer is charged with knowledge of overcrowded conditions at important ports, and is presumed to assume risks of delay caused thereby, in the absence of agreement to the contrary. Where grain is consigned to a specific elevator, other vessels previously arriving at the same elevator are entitled to precedence in unloading. (243 Fed. 970.)

Litigation between the Ottawa Transit Co. and the Norris Grain Co. before the United States district court for the western district of New York (260 Fed. 493) involved legal questions concerning the liability of the consignee of a cargo of grain for delay in unloading.

"The rule of law applicable here," said the court, "is unlike that applied in cases of demurrage, wherein the charter party establishes the rights of the parties, but to exonerate from liability for detention it must be shown that under the circumstances due diligence was exercised to unload the vessel so as not to detain her unreasonably. The consignee was required to furnish the place of unloading, to discharge as speedily as possible after notice of arrival, and to conform to the usage of the port in relation thereto, or suffer damages for delaying the carrying vessel."

Reviewing the evidence in this case, and giving effect to usage at the port of discharge,—Buffalo,—the court awarded a decree in favor of the suing steamship company. The decree rested on a finding that the vessel was detained seven days beyond the time when her turn came to be discharged; the delay being due to the defendant consignee's failure to exert effort to obtain cars for reshipment of the grain and resulting refusal of the elevators to receive it.

SECTION 370. GENERAL EFFECT OF WAR CONDITIONS

Conforming to international law, our government has made it unlawful for American citizens to commit acts which are directly hostile to a belligerent nation with which the United States is at peace, such as enlisting for military service abroad, fitting out vessels for naval service, etc. Temporary measures have gone so far as to prohibit exportation of ammunition to countries in which domestic violence exists, as was done a few years ago in the case of Mexico.

These measures constitute the body of our neutrality laws, which, being national legislation, operate wholly within the limits of the country. Sale of foodstuffs here or their exportation do not come within such laws as they now exist, and are governable by international law applicable to contraband goods.

Citizens of a neutral nation have an

absolute right to trade with a belligerent country in noncontraband goods, unless an enemy of the latter has blockaded its ports (United States Supreme Court, 5 Wall. 28), and, as to contraband, they may lawfully export them, subject to risk and capture, as reviewed by authorities below.

SECTION 371. CONTRABAND OF WAR, IN GENERAL

Broadly defined, contraband goods are those which may directly aid belligerent operations, but accurate classification of contraband is impracticable, according to the decision of the United States Supreme Court above cited. "But," says that court, "that which is best supported by American and English decisions may be said to divide all merchandise into three classes.

"Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used in time of war or peace, according to the circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege."

SECTION 372. FLOUR, ETC., AS CONTRABAND

By both reason and authority, flour and other ordinary foodstuffs belong to the second class of contraband goods referred to in the preceding section. Foodstuffs constitute the first item of this class in the Agreement of London, which was entered into in 1909 between Great Britain, France, Germany, Russia, Austria, Italy, Spain, Japan, Holland and the United States, and in which the rights of commerce in time of war were defined.

In the case of Balfour, Guthrie & Co. vs. Portland & Asiatic S. S. Co., 167 Fed. 1010, more fully referred to below, the United States district court for Oregon said: "Flour may probably be considered as a provision prepared for immediate use, but as to whether it was designed that the product in the present instance should go to a naval or military equipment station, there is no proof except that Japan was in a state of war.

"Ordinarily, therefore, the presumption would prevail that the flour was going to Japan for civil use, and would not be contraband, except that it was declared to be so by one of the belligerents [Russia]. Perhaps a mere declaration by a belligerent nation that articles of commerce are contraband, when by the rules of international law they are not, would not make them so. But here is a proclamation touching provisions that rest upon the border line, and depend for their real character upon the particular state of the port of their destination, whether engaged in civil pursuits only, or in equipping the army or navy with war supplies.

"It would seem that, under such conditions, the proclamation of one of the governments at war would be effective to impress the provisions with the character of contraband. At any rate, I am inclined so to treat the flour concerned here."

The shipment in this case was made during the Russo-Japanese War, and while there was a proclamation in force, issued by Russia, including rice and foodstuffs in the list of contraband goods.

During the French-British War in 1793, Secretary of State Jefferson wrote our minister to England, Mr. Pinckney: "You express your apprehension that some of the belligerent powers may stop our vessels going with grain to the ports of their enemies, and ask instructions which may meet the question in various points of view, intending, however, in the meantime to contend for the amplest freedom of neutral nations.

"Your intention in this is perfectly proper, and coincides with the ideas of our own government in the particular case you put, as in general cases. Such a stoppage to an unblockaded port would be so unequivocal an infringement of the neutral rights that we cannot conceive that it will be attempted."

And when France and Great Britain later issued orders authorizing the seizure of grain, flour, meal and other provisions, Mr. Jefferson vigorously protested on the part of the United States, as recorded in Moore's International Law Digest:

He "declared that the position that provisions were contraband 'in the case where the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to reasonable terms of peace,' or in any case but that of a place actually blockaded, was 'entirely new'; that reason and usage had

established 'that, when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual; to go and come freely, without injury to molestation; and, in short, that the war among others shall be, for them, as if it did not exist.'

"Corn, flour, and meal were not of the class of contraband, and consequently remained articles of free commerce. The state of war between Great Britain and France furnished neither belligerent with the right to interrupt the agriculture of the United States, or the peaceable exchange of its produce with all nations. Such an act of interference tended directly to draw the United States from the state of peace in which they desired to remain.

"If the United States permitted corn to be sent to Great Britain and her friends, and refused it to France, such an act of partiality might lead to war with the latter power. If they withheld supplies of provisions from France, they should in like manner be bound to withhold them from her enemies also, and thus close to themselves all the ports of Europe where corn was in demand, or else make themselves a party to the war.

"This was a dilemma into which no pretext for forcing the United States could be found. Great Britain might, indeed, 'feel the desire of starving an enemy nation; but she can have no right of doing it at our loss, nor of making us the instrument of it.'"

Speaking on the same subject, Edmund Randolph, Jefferson's successor as Secretary of State, said: "If, by a circuit of construction, food can be universally ranked among military engines, what article, to which human comfort of any kind can be traced, is not registered as contraband?

"In some peculiar circumstances, it must be confessed, corn, meal, and flour are so; as in a blockade, siege or investment. There the exclusion of them directly and obviously goes to the reduction of the place; but neutral commerce is, in this instance, infringed only where the exclusion, if continued without interruption, would be decisive in its effect."

The result of the controversy was a treaty agreement that, whenever provisions becoming contraband by the law of nations should be captured, they should be paid for with a reasonable mercantile profit.

In 1885, France, then being at war with China, declared shipments of rice destined for any port north of Canton to be contraband of war. Great Britain protested the order, and announced that it would not deem itself bound thereby, but no complications arose under this controversy, since the war continued only a short time and no captures were made. Shipments of rice were suspended for fear of capture.

What is said by Dr. Wharton in connection with the last-mentioned controversy, in a report to the State department, would seem to be just as applicable to shipments of flour as to shipments of rice:

"Rice in all parts of the civilized world is a common article of food, and to many classes of persons almost indispensable for the purposes of diet; while in oriental states it is so essential to the sustenance of the community that to seriously and arbitrarily diminish the supply would be to inflict incalculable distress.

"It is true that we can conceive of cases in which rice destined for the specific use of an army in the field or a cruiser on the high seas may become contraband. But to pronounce it contraband, in a general sense, would destroy the limitations of contraband altogether. If rice is contraband, everything is contraband, and neutral commerce in time of war, already sufficiently oppressed, would be subject to an additional burden, which would be intolerable."

During the Boer War the British government adopted this position: "Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure."

During the Russo-Japanese War the American steamship Arabia, laden with railway material and flour destined for Japanese ports, was captured by Russian naval forces, and the cargo was condemned as contraband. In protesting against this action, Secretary of State Hay said:

"In view of its well-known attitude, it should hardly seem necessary to say that the government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war."

In response to this protest, which was supported by the British government, Russia qualified its position by declaring that "rice and foodstuffs shall be considered as contraband of war, if they are destined for the government of the belligerent power, for its administration, for its army, for its navy, for its fortresses, for its naval ports, or for its purveyors. In cases where they are addressed to private individuals, these articles shall not be considered as contraband of war."

But it is not to be overlooked that, to be contraband, goods must be destined to a port of the enemy of the belligerent who makes the capture. Even munitions of war going to a neutral port are not subject to capture. (Moore's International Law Digest, section 1255.)

British merchants, in dealing with the Confederacy during the Civil War, invoked this rule against the capture of shipments which were ostensibly made from English ports to West India ports, with intention that the cargoes should be there transshipped into steamers of light draft and great speed, and be carried to Confederate ports in defiance of the blockade declared against those ports by the federal government. But the courts uniformly sustained seizure and condemnation in such cases.

According to the decision of the United States Supreme Court in the case of the Peterhoff (5 Wall. 28), when a cargo partly contraband is seized by a belligerent, the whole is subject to condemnation, if it belongs to the same owner. The noncontraband must share the fate of the contraband with which it is mixed.

A neutral vessel, under convoy of a belligerent, is allied with the latter in such sense that it may be seized by an enemy, the same as if it were belligerent. (Galen vs. United States, 37 Court of Claims Reports 89.)

SECTION 373. CONTRACT TO CARRY GOODS INTO WAR ZONE

Decisions which have been announced by the United States Supreme Court establish a rule in this country that a railway or steamship company which has contracted to carry a shipment of flour or other commodity to a foreign country cannot justify a breach of the agreement on the ground of the existence of war, unless the belligerent conditions were not known at the time of the making of the agreement.

As late as 1909, the United States district court for the district of Oregon followed this rule in awarding damages in favor of Balfour, Guthrie & Co. against the Portland & Asiatic S. S. Co. (167 Federal Reporter 1010), for breach of a contract to carry 1,750 tons of flour from Portland, Oregon, to Japanese ports.

The main defense of the case proceeded upon the theory that the existence of war between Russia and Japan—the contract having been made in 1904—justified repudiation of the agreement, but it failed because the court found that, at the time the contract was entered into, both parties were fully advised as to the conditions which prevailed in respect to the war. On one hand, it appeared that Russian cruisers had previously captured one of the steamship company's vessels which was laden with flour (the Arabia case before mentioned), and that the cargo had been condemned; and, on the other hand, plaintiff's manager admitted that the company understood that it was taking the risk of losing its flour.

Defendant's first claim was that the contract was dissolved by the supposed existence of a Russian blockade of Japanese ports, although it was admitted that previous cargoes had been carried under an indication that Russia was merely harassing Japan's shipping; and defendant invoked the well-settled principle that it is unlawful for a neutral vessel to enter a blockaded port, for which offense the ship and its cargo are subject to condemnation. This claim was rejected by the court on the ground that there was no showing that an effective blockade had been established.

The second branch of the defense was based on a clause in the bill of lading to the effect that the steamship company should not be liable for loss "occasioned by arrest or restraint of princes, rulers, or people." It was asserted that the proclamation which had previously been issued by Russia declaring flour to be contraband brought the case within this clause in such sense as to justify defendant in repudiating its contract. But this defense failed, because the condition of restraint was known to the steamship company when the contract was entered into. The court said that if "the charter party had been entered into prior to the prevalence of any war conditions affecting Japan and her ports of entry, there could be but little question that the respondent could have legitimately declined to carry the flour," but that, construed according to defendant's claim, the contract, having been made with knowledge of the existence of con-

ditions, would be unfair as giving defendant the right to carry the flour or not as it might see fit.

Accordingly, plaintiff was awarded judgment for the excess of the freight which it paid another carrier to deliver the flour at its destination, via Seattle, above the rates at which defendant had promised to make delivery. Plaintiff showed that it did not contract for sale of the flour in Japan until it had been assured space in defendant's vessel.

Incidentally, it was claimed by defendant that there was no valid contract for transportation in this case because the reservation of space was general, without specification of ports of delivery, but the court decided that, in view of the previous course of dealing between the parties, of reserving space generally and of designating the ports of delivery when the ship was ready to receive cargo, there was an implied contract to carry so much of the cargo for which space was reserved to the ship's regular ports of call in Japan as plaintiff might specify when she was ready to receive cargo.

Returning to the general rules applicable to cases of this kind, the court said in the above-cited case:

"A citizen of a neutral country may, however, lawfully contract to carry contraband of war, and his undertaking will be enforced by the courts of a neutral state. While, by international law, trade by neutrals in contraband of war with belligerents is inhibited, and subjects the unlawful commerce to seizure and condemnation by a belligerent, and while neutral states recognize the right of imposing this restriction upon the action of its subjects, yet it has been judicially determined that this law is not inconsistent with the right of neutrals to trade in contraband with citizens of belligerent states, and to make contract to that end, and to have the same enforced. The proposition may seem anomalous, but it appears to be sound, nevertheless."

Doubtless the decision in the Oregon case was influenced by the earlier decision of the United States Supreme Court in the case of Northern Pacific Railway Co. vs. American Trading Co. (195 United States Reports 465), wherein the railway company was held liable for breaking a contract to carry a shipment of lead from Newark, N. J., to Yokohama, Japan, during the Chinese-Japanese War. In that case the Supreme Court said: "It may be assumed that the lead was a contraband of war, but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband of war, but the articles and the ship which carries them are subject to the risk of capture and forfeiture."

The contract in this case required the shipment to go forward from Tacoma on one of defendant's vessels on a certain date, and it was duly loaded, but, on the subcollector of customs refusing to give clearance with the lead aboard, because it was contraband, it was unloaded, and, before the collector gave permission for export of the lead, the vessel had departed. As a result, transportation was delayed six weeks, at the end of which time peace had been declared between the warring nations, and, the price of lead having dropped, the cargo was sold at a loss

But the rule that a carrier may refuse to perform a contract which did not contemplate the risk of capture was applied by the Supreme Court in the case of the Styria (22 Supreme Court Reporter 731). An Austrian vessel loaded a cargo of sulphur at a Sicilian port the day before war was declared between the United States and Spain, and, on the master of the ship hearing that Spain had confiscated a similar shipment, he landed the cargo, and refused to carry it. The Supreme Court upheld this course on the theory that the contract of transportation was made without contemplating the risk of capture in passing near the shores of Spain, and that the owner of the sulphur might well have asserted that the master would have been guilty of gross negligence in undertaking the voyage after discovering the danger of capture.

Coming to cases where the carrier attempts to make delivery, and is prevented from doing so by existence of an effective blockade, the United States district court for the southern district of New York said, in the case of the Spartan (25 Federal Reporter 44):

"In case of a blockade of the port of destination, especially where, as in this case, the very place of discharge is subject to the major force of the blockading squadron, and in the absence of any alternative provisions in the charter, the English and American authorities apparently sustain the contention that the obligations of the charter party as a strict common law contract are dissolved.

"If the major force were temporary only, the effect would be only a suspension of the obligations of the contract till this superior force were withdrawn,

as in the case of an embargo of the port of departure, where the vessel, as it is held, may retain the cargo unless perishable, till the embargo is removed, and then complete her voyage and earn the stipulated freight. But by the English and American law a blockade of the port of destination is regarded as a permanent obstacle to the completion of the contract on either side.

"This distinction between the effects of an embargo and of a blockade is well settled in the English and American law, though not in accord with the provisions of the majority of the continental codes on the same subject. The effect of such a blockade under our law is, therefore, to relieve each party from the obligation to deliver the cargo, or to receive it at the specific place designated in the charter, without any liability for damages by either to the other; and this, in substance and effect, is a dissolution of the specific contract as a common law obligation."

In the same opinion the court cited a New York case wherein it was held that, where a vessel found its port of destination blockaded and returned to the port of departure, no freight was recoverable. Another opinion is cited on the point that a contract insuring a contraband shipment is valid. An English case was referred to as holding that, if the port of destination be blockaded after execution of a charter party, the charterer may refuse to load.

On the question of the validity of insurance, it was decided by the Massachusetts supreme judicial court more than 100 years ago, and it seems to be the law today, that an insurance policy covering a voyage from the United States which is forbidden by the laws of this country is void, but that valid insurance may be effected upon a shipment which is merely violative of the trade laws of a foreign country, or upon contraband goods, if in either of the latter cases the facts are known to the insurer, and the risks are not excepted in the policy. (Richardson vs. Maine Insurance Co., 6 Mass. 101.)

* *

A decision which has a bearing on controversies concerning the effect of war on contracts for export of grain and flour, and particularly agreements entered into before hostilities began, was handed down by the United States district court for the district of Maryland, in the case of Furness, Withy & Co. vs. Louis Muller & Co., 232 Fed. 186.

Plaintiff sued to recover damages for breach of a contract, made in May, 1914, to furnish a cargo of grain for one of its ships in August, and to pay the agreed freight thereon. The charter called for loading at an Atlantic port and delivery at Avonmouth, London, Antwerp, Rotterdam, Havre, or Dunkirk, as the charterer might direct.

The defense asserted was that outbreak of the European war made performance of the contract impossible, or at least so changed existing conditions as to justify either party in rescinding the agreement. In overruling this defense, and in permitting plaintiff to recover the excess of profits which would have been earned by the vessel, under performance of the contract, over the earnings of a substitute charter obtained, the court said:

"None of the ports to which the charterer had the right to send the grain were blockaded. The traffic was as legal in August as it had been in May. It is true that the charterer, by no fault of his own, found in its way many difficulties which had not been foreseen when the charter was made. These difficulties do not appear, however, to have been of a character which would excuse performance."

The difficulties referred to pertained to the obtaining of insurance on cargoes in August, 1914 (The court says: "Such insurance was hard to get, and could be obtained, if at all, only at rates which seemed then unreasonable, and which later events have demonstrated to have been so"), and the inability of securing payment for the grain in the way in which American grain exporters had previously done—by selling to American banks drafts on the European consignees, attached to the shipping documents. These grounds were, however, held by the court to afford no excuse for refusal to carry out the charter.

It must follow from the decision, as a necessary converse proposition, that, under the circumstances stated, the steamship company would not have been justified in refusing to carry the cargo.

SECTION 374. EFFECT OF GOVERNMENTAL REQUISITION

When a contract for ocean space in a particular vessel for an export shipment contains a clause to the effect that the carrying steamship company shall not be liable for loss or damage occasioned by "arrest and restraint of princes, rulers or people," the contract is released on the vessel being requisitioned, before loading, by the government the flag of which the vessel flies. This is what the

United States district court for the southern district of New York decided in the case of the Athanasios, 228 Fed. 558.

Oct. 16, 1915, at New York, the Greek steamship Athanasios was chartered to James Carruthers & Co., a Canadian corporation, to carry a cargo of grain from a port in the United States to a port in Europe, but the contract provided that the bills of lading should contain the clause: "It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by . . . arrest and restraint of princes, rulers or people."

Several days later, and on arrival of the vessel for lading at New York, the master was advised by the Greek consul general that the vessel had been requisitioned by the Greek government under orders received from the Greek legation at Washington. In consequence of these orders the vessel did not load the grain, and the Canadian charterers brought proceedings to hold the vessel and the owner liable in damages for breach of the contract. Bowring & Co., agents for the owner, having signed the original contract, were joined as defendants.

In dismissing the proceedings, Judge Hough said that he need not decide whether the agents were personally responsible, through having failed to disclose the name of the owner in signing the contract, or whether a proceeding to hold the vessel itself as security for damages would lie in any event, it appearing that the vessel had not proceeded to the loading berth, because these questions were rendered unimportant in this case through decision that performance of the contract was relieved by "restraint of princes." Proceeding, Judge Hough said:

"This Greek steamer cannot fulfill her charter without lawfully clearing from this port; she cannot clear without papers; the Greek consul has them, under orders from his government to see to it that the vessel loads for governmental purposes, and he has authority to put on her a captain who will obey these orders, if the present master does not. In the phrase now current, the sovereign of the ship's home and owner has 'commandeered' or requisitioned the steamer for government account.

"There is certainly no power in any court of the United States to prevent or undo this act of the Greek king and his consul. It is of no moment whether the Greek municipal law is being correctly interpreted by the various Grecian officials concerned—the restraint is actual and is governmental. Restraint need not be by physical force. . . . It is unnecessary to parade the opinions; the essential holding is that restraint which fulfills the exception must be actual, not potential or probable, and must emanate from recognized authority, not, e. g., the brute power of a pirate. I am quite unable to conceive any more actual restraint than is here present. The Athanasios has been in effect seized by the Greek consul, evidently much against the will of her owner and master."

Having reached the conclusion above stated, Judge Hough added that any further decision would be mere dictum, and hence not of binding force as a judicial precedent, because not called for by the facts of the case; but that, in view of the probability of other similar cases arising during the present war, he was of the opinion that there is nothing to compel a domestic court to entertain a suit at the instance of a Canadian citizen to subject a foreign vessel, presently used by the government to which it belongs, to liability for breach of such a charter as was involved in this case; and that "it is advisable to decline jurisdiction, for political reasons." Concluding, the opinion said:

"It may also be noted that, under existing treaties and what has hitherto been considered accepted international usage, it would be the duty certainly of the executive, and probably of the judicial, branch of the United States government to assist the consul general of Greece in carrying out the orders of his king in respect to the Athanasios, inasmuch as such orders in no wise interfere with the peace, order, or dignity of the United States, however destructive they may be to a private contract between subjects of Greece and Great Britain. This consideration would (even if the charter party had not contained the usual exemptions) result in denying process . . . against the steamship."

* *

An opinion announced by Judge Rose, of the United States district court for the district of Maryland, throws light on the merits of unadjusted claims against steamship companies growing out of frustration of voyages through requisitioning of vessels and embargoes during the war. Summarized, the main points decided by Judge Rose are as follows:

Under a contract chartering a British vessel for a specified term, but containing the usual clause making the agree-

ment subject to restraint of princes, etc., a requisitioning of the vessel by the British admiralty in a Spanish port released the owner's obligation to furnish the vessel to the charterer. And this is so without regard to the validity of the British government's right to make the requisition under the particular circumstances. The owner was not bound to resist the requisition for the benefit of the charterer, especially since a man-of-war might have seized the vessel on its putting out to sea.

But where the admiralty paid a higher rate than that fixed in the charter, the charterer became entitled to the difference accruing during the remainder of the time for which the charter was to have run.

The owner of a vessel chartered to another properly refuses to permit it to proceed to an enemy port. But an owner of a British vessel chartered for general voyages had no right to refuse to permit it to proceed to Rotterdam at a time when that was a safe port.

CHAPTER XLIV

VARIOUS RIGHTS AND LIABILITIES

SECTION 375. BREAKING CONTRACT FOR INSPECTION AT INTERMEDIATE POINT

A RAILWAY company is liable to a grain owner for loss directly resulting from breach of the company's contract to permit inspection at a given point, held the Kansas supreme court in the case of Bruce Bros. Grain Co. vs. Hines, Director General of Railroads, 193 Pac. 339.

Plaintiff bought a car of corn and had it shipped with privilege of inspection at Wichita, an intermediate point in transit from Valley Center, Kansas, to Oklahoma City. Plaintiff sold the car to another dealer subject to inspection at Wichita, and that dealer, in turn, sold to a third person on the same condition. The carrier failed to stop the car at Wichita, whereupon plaintiff reimbursed its customer, on demand, for the price paid for the corn.

On arrival at destination, the corn was found to have heated and deteriorated in transit, although it was in good condition when shipped and when it reached Wichita. As a result, plaintiff sold the car at a loss, to cover which it sued the carrier. Affirming judgment in plaintiff's favor, the supreme court said:

"The case does not turn on the damage to the corn during shipment, but on the loss or damage sustained by the plaintiff because of the lack of inspection. Plaintiff's sale was made on the basis of inspection near the origin of the shipment at Wichita, and it appears that the National Grain Co. turned back the bill of lading and demanded the return of its money before it had even learned of the condition of the corn at Oklahoma City. The return was not made by reason of the condition of the corn, but because there had been no inspection at Wichita as stipulated in the contract of sale.

"The defendant must have known of the common practice of stopping cars for inspection, and that grain shipped in this way was bought and sold on inspection and the rights of the dealers were determined by it. There was reason, therefore, for the defendant to anticipate that loss might result to some dealer because of a lack of inspection, and we think that the plaintiff's loss was the direct and proximate result of defendant's breach of contract."

SECTION 376. SALE OF PERISHABLE GOODS

Where a carrier sells freight as being perishable, but omits to give the statutory notice of intention to sell, it thereby becomes liable for the full value of the shipment, according to a decision of the Texas court of civil appeals, involving a shipment of corn. (Patterson & Roberts vs. Quanah, Acme & Pacific Railway Co., 195 S.W. 1163.)

SECTION 377. SEIZURE OF FREIGHT UNDER LEGAL PROCESS

"In an action by a shipper against a carrier to recover for failure of the carrier to divert, carry, or deliver goods or merchandise, the fact that the property was taken from the carrier by virtue of legal process, fair on its face, of which the shipper was given prompt notice by the carrier, and in which the shipper was either a party, was heard, or had an opportunity to be heard, is a complete defense and bar to the action."

This general proposition of law was stated by the New Mexico supreme court in the case of Pecos Valley Trading Co. vs. Atchison, Topeka & Santa Fe Railway Co., 174 Pac. 736, in which the defendant company was exonerated from liability concerning a shipment which was attached at its destination, and sold under court order as the property of a third party.

From this decision, and the general body of law on the subject, it is quite clear that where a railway company is guilty of no bad faith or fraud in permitting freight to be seized under legal process, and where the process is not void on its face, the company incurs no liability to a shipper for failure to make delivery according to the contract under which the goods were received for transportation.

In such case the common carrier discharges its full duty to the shipper by giving prompt notice of the seizure, to

the end that the shipper may take such steps as he desires to recover possession of the property. That the court having jurisdiction of the proceedings in which the shipment is seized may commit an error of law in rendering a decision is not attributable to the railway company.

SECTION 377a. RECOVERY OF GOODS IMPROPERLY DELIVERED

An inadvertent or unauthorized delivery of a shipment without surrender of an order bill of lading will not vest title in a contract buyer of the shipment, as against the delivering railroad company or the shipper, holds the Massachusetts supreme judicial court in the case of New York Central Railroad Co. vs. Freedman, 133 N. E. 101.

An Illinois company contracted to sell Freedman a bill of goods, and shipped them under an order bill of lading attached to draft for the price. Through oversight of railway employees, notation of the outstanding bill of lading was omitted from waybills covering the transit of the goods over the lines of connecting railway companies. As a result of this omission, defendant was enabled to get possession of the shipment by merely paying transportation charges. He did not disclose to plaintiff, the delivering railroad, that there was an outstanding bill of lading and that he had not taken it up.

The shipper's claim against plaintiff for delivering the goods without surrender of the bill of lading was allowed, and suit brought to recover reimbursement from defendant. Holding that judgment was properly allowed against defendant, the supreme judicial court said:

"A verdict in the action for conversion was justified if, as could have been found, the defendant knew that he was not entitled to the possession, that the plaintiff could not deliver the merchandise to him without a breach of its obligation to the light company [the selling shipper], that he took possession of it knowing that the delivery to him was unauthorized, and that it would not have been made except for an innocent mistake of fact on the part of the plaintiff.

"Under these circumstances the defendant's possession of the goods was in reality unauthorized and wrongful, and no demand was necessary before bringing the action or before the disposal of the property by the defendant. . . . Even if the defendant believed that his receipt of the goods was justified because of the plaintiff's surrender of its actual possession, that belief was no defense. . . . Having the right to immediate possession, the plaintiff can maintain an action . . . for the value of the goods, although it was not the general owner of the property."

SECTION 378. INJURY TO EQUIPMENT

Negligence claims involving railroad companies are so generally made against them that one is apt to overlook such a thing as a railroad company having a valid damage claim against a mill, or other shipper or consignee. But a legal question raised reminds me that the rule that one is liable for injury to property of another caused by negligence, personally or through employees, applies in favor of carriers as well as against them.

A hypothetical case may be stated as follows: While a car is standing on a mill's private switch track it is destroyed by fire. Is the milling company liable to the railway company for the value of the car?

The law appears to be clear to the effect that, in the absence of some sort of special contract insuring the safety of the car while in the custody of the mill, the question of liability is to be solved by determining whether the loss was due to carelessness on the part of the mill or not. If the fire originated through negligence of a mill employee, in the course of his employment, the mill is liable. Or should it appear that the mill failed to take such steps as an ordinarily prudent man would have taken under the same circumstances,—as by pushing the car away from exposure to fire,—liability might be adjudged.

But, excepting as the obligation may have been assumed by special contract, the mill is not a guarantor of the safety of railway equipment while on its premises. The only guaranty (raised by implication) is that the equipment will not be exposed to injury through negligence on the part of the mill.

SECTION 379. INTERFERENCE WITH SPUR TRACKS

A contest in the California courts between the Southern Pacific Co. and the Los Angeles Milling Co., involving the right of the latter to interfere with continued use of a spur track serving numerous industries, was terminated by an opinion of the supreme court affirming judgment in favor of the railway company. (170 Pac. 829.)

For about 40 years there had been uninterrupted use of the track across land now owned by the milling company, and

it was found by the court that numerous warehouses and other buildings of great value were built adjacent to the track at various points on the faith of continued switching service. In this view it was decided that the milling company was estopped to deny the right of the railroad company and its other shippers to utilize the track.

Claiming the right to do so by virtue of ownership of a parcel of land crossed by the track, the milling company had threatened to take up the rails on its land, and the railway company sued to enjoin execution of the threat.

One of the questions raised in the case was whether use of the track for the benefit of abutting shippers constituted such "public" utility as would sustain the condemnation of a right of way across the land, and the question was answered by the court in the affirmative.

It was further decided that, even if the maintenance of the track constituted a trespass upon defendant's land, any right to recover damages on that account was barred by lapse of time on suit not being brought within three years from the commencement of the continuous trespass.

SECTION 379A. ATTACHMENT OF RAILWAY CARS

In the case of Clark Milling Co. vs. St. Louis Southwestern Railway Co. (127 S. E. 783), decided by the Georgia court of appeals, it was decided that where a railroad company in Georgia receives from a road in another state a freight car, under a contract whereby the domestic company has the right to carry the car loaded to its destination in Georgia and unload it and then to reload and return it to the other road beyond the limits of the state, paying for the use of the car, the right of the domestic company to the use of the car is superior to the right of an attaching creditor, who, without any other lien, seeks to attach the car. This decision follows an earlier holding by the Georgia supreme court to the same effect in the case of Southern Flour & Grain Co. vs. Northern Pacific Railway Co., 56 S. E. 742.

See, also, section 351.

SECTION 380. SEIZURE OF FUEL

An opinion of the United States district court for the southern district of Ohio defines the right of a railway company to seize coal shipments, as against a third person to whom the shipper intended to make delivery. The decision answers questions affecting the right of a mill for redress against a railway company which has intercepted fuel designed for the former.

In the Ohio case—Springfield Light, Heat & Power Co. vs. Norfolk & Western Railway Co. (260 Fed. 254)—it was decided that where a railway company accepts a shipment of coal destined for delivery to the shipper's customer, the company cannot seize the coal without becoming liable in damages as for wrongful conversion.

But it was held that where a shipping coal operator is in default under a contract to furnish the railway company's fuel requirements, the company may refuse to accept for transportation coal loaded on its cars, for delivery to the company's intended customer, and retain the fuel for application on its contract with the operator.

SECTION 381. DRAYMEN, TRANSFER COMPANIES, ETC., AS COMMON CARRIERS

In the case of Arkadelphia Milling Co. vs. Smoker Merchandise Co., 139 S.W. 680, the Arkansas supreme court said: "In order to constitute one a common carrier, the mode of transporting the goods which he employs is immaterial. Persons who engage in the business of transporting goods from place to place in a city in drays or transfer wagons may be common carriers. . . . But, in order to constitute one a common carrier, the business as such must be regular and customary in its character, and not casual only. An occasional undertaking to carry goods will not make one a common carrier."

The court concluded that a drayman's liability as common carrier commences when he takes possession of a car for unloading, and continues until actual delivery to his customer.

CHAPTER XLV

STOPPAGE OF GOODS IN TRANSIT*

SECTION 382. RIGHT IN GENERAL

EVEN when there is no fraud on the buyer's part, the seller's discovery of the buyer's insolvency while the goods are in transit to the buyer entitles the seller to reclaim possession of the goods and hold them as security for the amount due him. To exercise this right, however, the seller must not have known of the insolvency when the goods were shipped, and they must remain in the hands of the carrier, undelivered to the buyer.

The right of stoppage in transit cannot be asserted as against a third person to whom the bill of lading has been transferred for value and in good faith. The transit is not terminated, within these rules, by mere arrival of the freight at its destination, until the carrier has parted with possession; so long as the goods remain on board car, in the carrier's warehouse, or on the carrier's wharf, the seller may exercise his right of stoppage in transit.

Recognizing that a seller of a shipment has a limited control over it before delivery to the consignee, although the goods be shipped under a straight bill of lading, the North Carolina supreme court held, in the case of A. E. Myers & Co. vs. Norfolk Southern Railroad Co., 88 S.E. 149, that where a shipment was made on condition that the buying consignee would promptly pay draft drawn for the price, and the draft was not paid, the seller was entitled to divert the shipment to another customer.

It was decided that, although a railway company ordinarily acts at its peril in refusing to make delivery to the consignee after the shipment has been placed in transit, the carrier is within its rights in conforming to the consignor's directions to withhold delivery where, at the time the shipment was made, delivery to the carrier was qualified by notice from the shipper not to make delivery without production of the bill of lading and draft drawn on him for the price. In such case the consignee acquires no title to the shipment until payment of the draft, and the shipper may order its return or divert it in transit.

* *

Legal questions concerning the right of a consignee of grain to hold the carrier liable for misdelivery were involved in the case of Bell vs. Chicago & North Western Railway Co., 159 N.W. 914, decided by the Wisconsin supreme court.

A carload of oats was shipped from Iowa to plaintiff at Milwaukee. Plaintiff deposited the bill of lading with defendant's agent at his office in the Milwaukee Chamber of Commerce. The next day the car was sold to one Glavin, who gave plaintiff his check in settlement, and order for delivery of the car to him was signed by plaintiff, but through mistake it was directed to the Milwaukee road. The last-named road issued a new bill of lading to Glavin. The day following, plaintiff discovered that the check had been dishonored, and immediately directed defendant to withhold delivery, but the car was afterwards delivered by defendant on the order of the other road.

In holding defendant liable to plaintiff for the value of the shipment, the court decided that, under the circumstances, no valid title to the grain had passed to Glavin before plaintiff exercised the right of stopping delivery for dishonor of the check, and that defendant was guilty of converting the shipment by disregarding plaintiff's order to hold the same.

SECTION 383. CARRIER'S RIGHT TO EXACT BOND

The courts have frequently declared that a common carrier's wrongful refusal to deliver freight to the person entitled to possession thereof constitutes such conversion of the property to the carrier's own use as entitles the aggrieved person to recover the full value of the shipment from the transportation company.

Applying this principle in Wilson vs. International Railway Co., 160 N. Y. Supp. 367, the Niagara County, New York, county court decided that, since plaintiff was plainly entitled to reclaim

*See, also, Chapter XXIII.

a shipment, defendant was guilty of a wrongful conversion in refusing to redeliver unless plaintiff should give bond to indemnify the railway company against any liability to a firm to which the goods had been contracted for sale.

It seems that the goods were sold on condition that title was not to pass until payment of the purchase price, although the freight was loaded in a car furnished by the buyers, and that, on the buyers failing to make payment, plaintiff was prevented by the carrier from unloading the shipment, except upon the condition stated. Finding that defendant had been duly notified of the retention of title, and was given reasonable opportunity to investigate the question of ownership, the court awarded judgment against defendant for its refusal to surrender the goods to plaintiff.

SECTION 384. RIGHT TO SHIPMENT PROCEEDS

In the case of Northern Grain Co. vs. Wiffler, 119 N.E. 393, the New York court of appeals upheld the right of the plaintiff to recover the proceeds of a carload of grain disposed of by a railroad company on the consignee buyer refusing to accept delivery.

Wiffler, buyer of the grain, accepted a draft payable at a deferred date and attached to a bill of lading covering the shipment. He surrendered the bill of lading to the railroad company, which stamped it, "Canceled by delivery." Immediately afterwards, and upon examining and being dissatisfied with the grain, Wiffler induced the railway company to erase the cancellation and to return the bill of lading to him. He then returned it to plaintiff, refusing to accept delivery of the grain, on the ground that it was not in proper condition.

The railroad company, after holding the shipment for several months, sold it to satisfy its charges, and controversy arose over plaintiff's right to recover the excess proceeds. Wiffler having failed to pay the accepted draft, plaintiff sued and obtained judgment against him, and served notice on the railroad company of exercise of its right to stop delivery of the oats or its proceeds to Wiffler or his trustee, on account of his intervening insolvency.

The court of appeals, in passing final judgment in the case, permitting the grain company to recover the excess proceeds in the hands of the railway company, decided that the mere fact that title to the grain constructively passed from seller to buyer on the former obtaining judgment on the draft covering the purchase price did not prevent the seller from exercising the right to claim the grain or its proceeds while remaining in the hands of the common carrier. It was also decided that, since Wiffler immediately withdrew the bill of lading after surrendering it to the railway company, there was no such delivery of the grain to him as precluded the grain company from asserting a right to the proceeds remaining in the carrier's hands.

PART III

Various Relationships

CHAPTER XLVI

CORPORATIONS

SECTION 385. ADVANTAGES OF INCORPORATION

FOR the benefit of those members of the trade who are operating mills as individuals or as partners, let us first emphasize some of the chief advantages of incorporation.

Such a miller runs the risk every day of losing every dollar's worth of unexempt property owned by him, through injury to his employees, or some unfortunate business venture, or through fraud or bad business judgment of a partner. This risk arises from the fact that all of the property owned by one engaged in business in his own name or as an associate in a partnership may be held to discharge the debts of the enterprise, whereas the holder of stock in a mill corporation usually risks only the investment represented by his stock.

Corporate organization has the additional advantage of perpetuity, against inevitable dissolution of a partnership through death or withdrawal of a member, with resulting disturbance of the business in the adjustment of the firm affairs.

A holder of stock in a corporation can readily sell or mortgage it without obtaining the consent of his associates, but there can be no succession to the interest of a partner for the purpose of continuing the business, without the consent of all the members of the firm.

* *

An advantage of the incorporation of a milling business is suggested by the decision of the California district court of appeal in the case of Riedy vs. Bidwell, 233 Pac. 995.

Defendant's brother at the time of his death owned and operated a feed mill in San Diego. His will did not provide for continuation of the business while the estate was being settled. But defendant, as executor, contracted with plaintiffs, employees of decedent, to operate the mill. It was agreed that the excess of net profits above 6 per cent should be divided among plaintiffs. Recognizing plaintiffs' right to enforce the contract, the court remarked:

"The law appears to be well settled that it is no part of the duty of an executor to carry on for the benefit of the estate a business formerly conducted by the testator in his lifetime. Exceptions to such rule may exist where the will of the testator expressly creates the power so to do, or where the carrying on of a business would be cast upon the executor as a necessary means for the preservation of the estate. If, in the absence of such authority, or other compelling reason, the executor assumes to conduct the former business of the testator, it must be at his own risk as to losses incurred, but all net profits derived therefrom become the property of the estate."

SECTION 386. POWER TO INCORPORATE

Although corporations may be formed for such purposes only as are authorized by statute, the laws of every state of the Union are no doubt broad enough to comprehend the milling business, whether denominated specifically or under the general head of "manufacturing," which has been judicially defined as including milling.

In the early Illinois case of Cross vs. Pinckneyville Mill Co., 17 Ill. 54, it was decided that a statute authorizing the formation of corporations for "manufacturing, agricultural, mining or mechanical purposes" enabled incorporation of a company to manufacture lumber, flour and meal.

A Kansas statute providing for corporations for the "conversion and disposal of agricultural products by means of mills, markets, and stores, or otherwise," was held to authorize a corporation to build and operate a flour mill.

SECTION 387. POWERS OF CORPORATION IN GENERAL

A point often overlooked is that a corporation has no power to do any act not comprehended by the purpose for which it was organized, including acts which are directly appropriate to the exercise of powers expressly given by the articles of incorporation.

For instance, it is usually held by the courts that a company may borrow

money and give security therefor to secure funds for the conduct of the corporate business, the same as an individual might do, but that a manufacturing corporation cannot lawfully lend its funds to outsiders, excepting surplus funds, unless authorized so to do by charter or statute, and excepting that loans may be made to customers when fairly expedient, considering advantages to accrue to the company. Nor may a milling corporation ordinarily guarantee the payment of another's obligation, or become an accommodation indorser.

Statutory authority is necessary to enable one corporation to hold stock in another, excepting for the purpose of securing payment of some obligation due from the latter to the former. This rule applies with greatest force when it is attempted to acquire control of a competing corporation.

It is a general rule that a company may not hold property excepting such as is reasonably necessary or convenient for the conduct of the corporate business. Thus, I believe that it may be safely said that a milling company, while entitled to hold all land and waterpower rights for which it has present and prospective need, cannot validly hold such property for purely speculative purposes. This rule does not, however, preclude a corporation from taking land to save a debt due it and holding it until an advantageous disposition can be made of it, if it is not needed or convenient for use in the company's business.

Much of the force of the rule which disqualifies a corporation to hold property for purposes foreign to the authorized object of the company is lost in the equally well-settled rule of law that, even when it appears that a corporation holds property in excess of that permitted by law, the company's title is good until questioned in a proceeding brought by the state; private individuals having no legal standing to question the validity of a conveyance to a corporation on the ground of want of corporate power to hold certain property.

* *

In the case of Getty vs. C. R. Barnes Milling Co., 19 Pac. 617, it appeared that defendant was chartered to convert and dispose of "agricultural products by means of mills, elevators, stores or otherwise." Question was raised as to whether or not the company had a right to buy flour for resale. It was decided that, in a sense, flour is an agricultural product, but that the buying of it was not expressly authorized by the articles of incorporation. However, the court added that "a corporation may carry on the business for which it was chartered, in the usual and ordinary manner. . . .

"There might be instances in which a corporation formed as the defendant was could purchase flour, and still not be in violation of its chartered rights. For instance, its mill might be disabled, and for the purpose of holding and controlling its trade during the time of repairs, flour might perhaps be properly purchased by its officers or agents for the purpose of carrying on the legitimate object for which the corporation was organized. . . . Under peculiar circumstances the defendant might have purchased flour to sell again, to meet some temporary want, or to supply and protect its trade, yet it could not engage in this class of business as a business, under its charter."

* *

A company incorporated to engage in "milling corn and wheat; buying and selling of all kinds of farm products and elevator storage business," may sell seed wheat, according to the holding of the Texas court of civil appeals in the case of Itasca Roller Mill & Elevator Co. vs. Wooten, 246 S. W. 678. In that case the company sought to avoid liability on account of its manager having sold seed wheat as being spring wheat, whereas it was of a winter variety. It was held that the transaction was not beyond the scope of the company's business, nor beyond the authority of the manager.

* *

Sometimes the precise wording of the object clause raises a controversy as to whether or not it renders the stockholders subject to "double liability." An example is afforded by a decision of the Minnesota supreme court.

The Minnesota constitution exempts corporations organized to carry on "any kind of manufacturing or mechanical business" from a provision to the effect that stockholders shall be liable to the amount of stock held or owned by them, respectively, in addition to any amount unpaid on their several stock subscriptions.

In the case of Carnegie Dock & Fuel Co. vs. Kensington Mills, et al., 188 N. W. 270, the Minnesota supreme court decided that stockholders in defendant milling company were entitled to the benefit of the exemption. The object clause in the corporation's articles read:

"The manufacture of all kinds of flour, cereal products, feed and milling stuffs, and to acquire by purchase, lease or

otherwise, and to own, sell, lease, mortgage, convey, improve and operate such real estate, factories, elevators, buildings and manufactories for the production and storage of all kinds of goods that may be produced from or in conjunction with grain or cereals of any kind, and such machinery, grain and other personal property as may be necessary and proper to carry on the above business, and do all things necessary and proper to fully carry into effect the above powers."

The supreme court ruled that this paragraph could not fairly be construed to authorize business other than manufacturing; that it did not authorize an engaging in the real estate business. The holding of property, grain, etc., was authorized only as an incident of the business of manufacturing flour, feed, etc.

But the court noted that, "if stockholders wish to come under the exception, they must see that express terms are inserted in the articles of incorporation which limit the business to that of manufacturing or such as is properly incidental thereto."

SECTION 388. POWER TO DEAL IN GRAIN

The right of a mill and elevator company to engage in selling grain, as well as to buy for purposes of manufacture, was upheld by the United States circuit court of appeals, eighth circuit, in the case of Strong vs. Manchester Mill & Elevator Co., 231 Fed. 876.

Defendant resisted proceedings to declare it a bankrupt, asserting that contracts for sale of grain, breach of which was relied upon by petitioning creditors, were both beyond the corporate powers of the company and beyond the authority of its officer who made them. But this view was rejected by the United States district court for Kansas, and by the circuit court of appeals on review of the case.

The company was organized under the laws of Kansas, which permit formation of corporations for the "conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise," and which require corporate names to indicate the character of business to be carried on. It was unsuccessfully claimed that these provisions were not broad enough to authorize a mill and elevator company to contract for sale of wheat; the court holding that such contracts are within the scope of business reasonably permitted to be done by such companies.

In the case of Scandinavian Import-Export Co. vs. Bachman et al., 186 N. Y. Supp. 860, plaintiff unsuccessfully sought to recover from defendant brokers money deposited to margin cotton futures. The main contention made before the appellate division of the New York supreme court in this case was that the plaintiff's corporate powers were not broad enough to enable it to enter into future trading. But the court decided that, since it appeared that bona fide purchases were intended and not a mere gambling in market prices, the transaction fell within the scope of plaintiff's charter power to buy and sell any kind of personal property.

In reaching its conclusions the court cited the decision of the United States district court for the western district of Missouri in the case of Medlin Milling Co. vs. Moffatt Commission Co., 218 Fed. 686, wherein it was decided that a flour milling corporation acts within its legitimate corporate powers in making bona fide contracts for future delivery of wheat, and hedging, to protect itself against market fluctuations. In that case the court said:

"The Medlin Milling Co. had the undoubted right to buy grain for future delivery, and to hedge such bona fide contracts when necessary to protect itself against the fluctuations of the market. It had no right under its charter to gamble in futures, as that term is used and understood in this discussion. Such dealings were clearly ultra vires [beyond the power of] this corporation, and were prohibited, both because of the restrictions of its charter and the policy of the law. Any acts of its officers or agents, of the kind thus forbidden, are not binding upon it. To this extent they are strangers to it. Neither has the corporation power to ratify such acts, because illegal and immoral in the eyes of the law. . . .

" 'The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.' "

SECTION 389. PLEDGING CREDIT FOR ANOTHER

Quite frequently a business corporation enters into a contract which is lack-

ing in legal obligation because not within the scope of the company's charter powers. Sometimes the undertaking appears in the form of a suretyship or guaranty for the benefit of some customer sought to be accommodated.

The law applicable to such case was thus summed up by the Texas supreme court, in holding that a corporation organized to deal in lumber could not bind itself by signing a bond given by a customer to secure performance of a construction contract:

"Every corporation is created with certain express powers. Being endowed with those express powers, it has the implied power to do whatever is necessary or reasonably appropriate to their exercise. It has, in a word, the authority to do whatever will legitimately effect the express purposes of its creation.

"A corporation formed for the prosecution of a business may foster that business by necessary or appropriate means —those means which are direct, in their nature related to the objects of the corporation, and by the employment of which those objects will be directly furthered.

"Under the pretense of fostering its own business, or even for that avowed purpose, it cannot, however, entangle itself in engagements or enterprises not necessary or reasonably appropriate to the advancement of its interests, from which it will receive only an indirect or remote benefit, if any, and with which, therefore, as tested by its charter powers and their objects, it can have no true concern.

"The pledging by a corporation of its credit for another's benefit as a means simply of enabling him to purchase its goods is not a direct, and hence not a legitimate, means of promoting its own business. It is a means purely indirect, and any benefit derived by the corporation from the transaction is equally indirect.

"It is not a fostering of the business of a corporation to pledge its capital as security for the debts of prospective customers for the purpose of enabling them to buy its wares. The creation of custom by such a method is only a delusive benefit to the corporation at best, for the price of it is to jeopardize its capital, not for its own direct benefit, but for the private advantage of another. Such use of its credit is clearly beyond the power of an ordinary business corporation." (221 S.W. 930.)

* *

But it seems that a corporation validly may guarantee payment for materials furnished to a contractor performing work for it. At least it appears to have been so assumed in a Kansas case. The plaintiff, a manufacturer, refused to furnish machinery to a contractor to be installed in an elevator owned by an association, unless the association would guarantee payment of the agreed price. The secretary of the association wrote plaintiff that he was instructed by the directors to give such guaranty, and the corporate minutes show that the secretary was so instructed. A bylaw of the association provided for monthly meetings, at which the officers were required to report transactions occurring since the preceding meetings. No attempt was made to repudiate the secretary's action until the association was called upon to make the guaranty good.

Under these circumstances, the Kansas supreme court held, in the case of Great Western Mfg. Co. vs. Porter & Farmers' Union Co-operative Association, 172 Pac. 1018, that the corporate records could not be impeached by testimony of directors who did not remember that the board had authorized the secretary to make the guaranty; and that the association was estopped by its corporate minutes and inaction of its directors, after the minutes were recorded, to deny the authority of the secretary in this regard.

Incidentally, the court decided that, in order to make the guaranty binding, it was not necessary that notice be given by the plaintiff to the association that the guaranty was accepted; by selling the machinery on the faith of the association's guaranty, the plaintiff sufficiently manifested its acceptance.

See, also, Chapter LVI on Bonds and Guaranties.

SECTION 390. RELEASING CLAIMS

A decision of the Alabama supreme court affects the validity of agreements by mill and elevator companies to release a railroad company from liability for fires, although negligently caused by the latter company, in consideration of the former companies being permitted to use parts of the railway right of way.

The decision was handed down in the case of Alabama Great Southern Railroad Co. vs. Loveman Compress Co., 72 So. 311, and the court, after examining the compress company's charter, decided that it was not sufficiently broad to authorize the company to relieve the railway company from liability for negligence, and, hence, a clause in a right-of-way lease purporting to have that effect

was held to be invalid. The railway company sought to avoid this result by showing that the compress company's officers and stockholders had ratified the agreement, but the court declared that the agreement was so far beyond the corporate powers as not to be subject to binding ratification.

SECTION 391. LIABILITY FOR WRONGS COMMITTED

The ancient doctrine that a corporation, being without a soul, could not commit an actionable wrong, has long been obsolete, and it is now well-settled law that incorporated companies may be held liable in damages for any malicious or negligent act committed by a representative of the company within the scope of his authority, such as assault and battery, false imprisonment, malicious prosecution, libel or slander, fraud, etc. But, of course, there must be some reasonable connection between the act and the scope of authority of the company's representative actually committing it, before the corporation is chargeable with responsibility.

SECTION 392. LIABILITY OF RELATED CORPORATION

The Hart Milling & Power Co., of Flushing, Mich., won a suit in the Michigan supreme court against A. B. McCrillis & Son, a Rhode Island corporation, growing out of breach of a contract to buy 10 carloads of flour. It appears that the same persons who owned substantially all of the stock of defendant company also owned the stock of a Massachusetts company with which the contract in question was made, and the court permitted recovery against the defendant on the theory that the evidence sufficiently established plaintiff's claim that the Massachusetts corporation was a mere sales agent of the defendant, as against the claim interposed by defendant that the companies were independent of each other. (152 N.W. 973.)

SECTION 393. LIABILITY OF SUCCESSOR CORPORATIONS

When one company absorbs another, taking over all its assets and good-will, and paying most of its obligations, it may be inferred that there was such assumption of the merged company's obligations as renders the consolidation company liable on the merged corporation's contract to buy goods specially prepared for it. (Texas Seed & Floral Co. vs. Chicago Set & Seed Co., 178 S.W. 731.)

RIGHTS AND DUTIES OF NON-RESIDENT CORPORATIONS

SECTION 394. POWERS OF FOREIGN CORPORATIONS IN GENERAL

Incorporation of a company in one state gives it no right to transact intrastate business in another; the right to do business in the latter state depends upon the laws thereof. But, since Congress is vested with exclusive power to control interstate commerce, state laws fixing the terms on which foreign corporations may transact business are uniformly held to be inapplicable to contracts involving interstate business.

"Sales of goods by a corporation situated without a state, to a resident of the state, even though made through travelling salesmen or agents sent into the state, to be shipped to him into the state, belong to the operations of interstate commerce, and are, consequently, not subject to a prohibition of the state constitution or statute against foreign corporations doing business within the state without having an agent or place of business therein, or otherwise subject to prohibition or regulation by the state.

"The same is true of the purchases of goods within a state by a foreign corporation, where the goods are to be shipped to the corporation in another state. The interstate commerce clause, however, has no application to business done wholly within a state, or where a foreign corporation maintains a resident agent in the state to solicit orders for the purchase of goods and to deliver goods to purchasers." (19 Cyc. 1230-31.)

The terms upon which the different states permit nonresident companies to transact domestic business vary in the several states, but common conditions are payment of a license tax, filing a copy of articles of incorporation, appointing an agent for service of process against the corporation, maintaining a local place of business, obtaining a permit, making periodical reports of financial condition, etc.

As to the penalty for doing business in a state without obtaining permission to do so, no fixed rule applicable throughout the country can be stated, it being held, under differing language of the laws of different states, in some cases that the foreign corporation is not entitled to enforce its domestic contracts in the courts

of the state, while in other states there is a more favorable ruling which merely subjects the offending corporation to a fine.

But it is generally held that, although a contract may be invalid so far as concerns the right of the corporation to enforce it, the company's own neglect to obtain the necessary permit to do business in the state will not deprive the other party of the right to enforce his side of the agreement, he being a resident of the particular state.

It is reasonably safe to say that many a mill has jeopardized its rights under contracts made in other states through failure to take notice of and comply with the laws of those states governing intrastate business. As to mills, however, the question can ordinarily arise only where a stock of flour is kept in a foreign state and deliveries are made from that stock on contracts made in that state, for, as already indicated, receipt of an order from another state for a shipment of flour, and shipment from the mill in the company's home state, would constitute an interstate transaction not affected by the laws of the other state.

SECTION 395. LOCAL AND INTERSTATE BUSINESS DISTINGUISHED

Often difficulty arises in determining whether a foreign corporation's activities in a state have become so far separated from interstate character as to constitute local business and thereby render the company amenable to a penalty for having failed to secure a permit to do so. The difficulty is well illustrated by supposing that a Kansas mill sells a carload of flour to a Mississippi baker, but that the shipment is made to a third concern, which receives the flour, stores it, later delivers it to the baker, receives payment for the mill's account, and remits. The situation becomes still more complex when we suppose that the mill's salesman borrows flour from the bakery to make quick deliveries to other customers, repaying the loans later by securing shipments direct from the mill to the baker.

In my opinion the transaction just supposed shows a doing of such business in Mississippi as to subject the mill to the laws of that state governing foreign corporations. It seems that the first transaction, however, is protected as being of interstate character. There there is an interstate shipment, pursuant to an order sent from one state and accepted in another. The mere fact that the flour is temporarily stored with a third party, who makes delivery for the mill and receives payment, does not deprive the transaction of interstate character, because these acts of agency do not differ essentially from similar services rendered by railroads and banks in everyday transactions between mills and their customers. The case falls within the Minnesota supreme court's decision referred to in 9 Fletcher's Cyclopedia of Corporations, 10,001-2:

"Where a foreign corporation, engaged in the business of manufacturing and dealing in farm machinery in the state of its domicile and other states, maintains an agency in a state other than that of its domicile for the purpose of receiving, storing and delivering goods to purchasers in the state where such agency was maintained, to whom sales were made by orders taken by travelling salesmen, subject to the approval of the foreign corporation at its home office in the state of its domicile, and the agent in the state where such agency was maintained had no authority to make sales of property stored with it or to take orders therefor, but his authority was limited exclusively to delivering goods previously sold by the foreign corporation through its travelling salesmen, it was held that the foreign corporation was not doing business in the state within the meaning of the statutes of the state imposing certain conditions precedent to the right of foreign corporations to do business in the state, as the business constituted interstate commerce."

But the second transaction which we have above supposed—a sale of flour borrowed from a baker—falls within the following rules laid down by a standard legal authority as being supported by numerous appellate court decisions:

"A foreign corporation is doing . . . business in a state, within the meaning of such statutes, by making and completing, or by making and performing, contracts therein for the sale of goods, although such goods were shipped into the state from without, where at the time the sales or the contracts of sale are made the goods are within the state and the interstate character of their shipment has ceased, provided their delivery to the purchaser in consummation of such sales or contracts does not require further transportation from one state to another." 14 Corpus Juris, 1287-1288.

"But a foreign corporation is doing . . . business in a state . . . where . . . it performs or is required to perform therein acts of purely local character

which are not essential to the making of the sales and the delivery of the goods." 14a Corpus Juris, 1286.

Buying goods in a state is no less doing business there than selling them. And I believe that when a nonresident mill "borrows" flour in a state to fill orders there it in effect buys it, and does business there just as much in a legal sense as if it had manufactured the flour there.

In passing, it is interesting to note some of the leading decisions in cases involving the status of milling company transactions as to being interstate or intrastate.

* *

In the case of Sleepy Eye Milling Co. vs. Hartman, 184 Ill. App. Ct. Rep., 308, it was decided that a foreign milling corporation by employing a general broker to sell its products in Illinois did not thereby engage in local business without a license in such sense as to preclude it from suing in the courts of the state on a contract of sale negotiated by the broker.

* *

One of the decisions supporting the proposition that consignment of goods to a commission merchant does not constitute doing business in a state by a foreign company, where the goods are shipped in interstate commerce, is that handed down by the Texas court of civil appeals in the case of Lasater vs. Purcell Mill & Elevator Co., 54 S.W. 425. It was there decided that shipment of flour into Texas by a nonresident milling company for sale by commission merchants was no less interstate commerce because shipped in sacks in carload lots and sold by those merchants by the sack.

* *

The decision of the Mississippi supreme court in the case of Saxony Mills vs. Wagner & Co., 47 So. 899, is an authority on the point that mere sales through travelling salesmen under orders to be accepted and filled by a nonresident corporation in another state do not constitute "doing business" in a state. Referring to a nonresident milling company, the court said, in part:

"It has no office or place of business in the state of Mississippi. It has its place of business elsewhere, and sends its travelling salesmen into this state, who take orders which are transmitted to the home office and filled by shipment direct to the purchaser. . . . It is well settled that a corporation like the appellant company cannot be held to be 'doing business' within the state, in the absence of a statute enlarging the usual significance of this well-known expression. It is hardly necessary to cite authority in support of this conclusion, as there is no intelligent dissent among the authorities." To the same effect, see the decision of the Springfield, Mo., court of appeals in the case of Bauch vs. Weber Flour Mills Co., 238 S. W. 581, referred to in section 397.

* *

It is also interstate commerce for a nonresident company to sell and set up mill machinery in a state where it has no agency or office, held the Tennessee supreme court in the case of Milan Milling & Mfg. Co. vs. Gorton, 26 L.R.A. 135.

In the case of Hess Warming & Ventilating Co. vs. Burlington Grain Elevator Co., 217 S.W. 493, plaintiff sued to enforce a judgment for compensation for installing grain drying apparatus. Defendant objected that plaintiff, an Illinois corporation, had failed to secure a license to do business in Missouri, where the apparatus was installed. But the Missouri supreme court held that the transaction was interstate in nature and did not constitute a doing of intrastate business in Missouri, where the contract was made in Chicago, and the apparatus was constructed there, although the installation in Missouri was effected by workmen employed in the vicinity of the plant; the work being done under the supervision of the corporation's experts sent there for the special purpose.

SECTION 396. PURCHASE OF RAW MATERIALS

The Dahnke-Walker Milling Co., Union City, Tenn., won an important decision before the United States Supreme Court in a suit brought against C. T. Bondurant, Hickman, Ky. (42 Sup. Ct. 106). The opinion established the right of a milling corporation of one state to buy raw materials in another state, for shipment to it in interstate commerce, without being regarded as doing business in such other state in such sense as to require a permit from the authorities of that state.

Defendant contracted to sell the mill a crop of wheat estimated at 14,000 bus, to be delivered on board cars at Hickman, where payment was to be made. Plaintiff company intended to ship the wheat to its mill in Tennessee. Defendant delivered a small part of the crop as agreed, but declined to make further delivery. The market value of the grain having advanced, plaintiff sued for damages.

The only defense urged before the Kentucky supreme court was that plaintiff milling company had not complied with the Kentucky statutes, prescribing conditions on which corporations of other states might do business in that commonwealth, and that therefore the contract was unenforceable by it. To this plaintiff replied that the only business done by it in Kentucky consisted in purchasing grain there for immediate shipment to its mill in Tennessee, and that this amounted to interstate commerce beyond the control of the state of Kentucky.

Before the case reached the Supreme Court of the United States it was twice tried in a Kentucky circuit court and twice appealed to the court of appeals of the commonwealth, which decided the case against the mill on the ground that it had failed to comply with the Kentucky statutes relating to nonresident corporations.

After considering at some length a question of court procedure, which will be of no interest to the miller, the Supreme Court said on the merits of the case:

"The commerce clause of the Constitution (article 1, sec. 8, cl. 3) expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse.

"Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. . . . On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. . . . This has been recognized in many decisions construing the commerce clause. . . .

" 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. . . .

"In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last.

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. . . .

"There is no controversy about the facts bearing on the character of the transaction in question. It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and be used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bus of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be made on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was interstate commerce.

"The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing, and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. . . .

"The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it was also improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the state of its origin might be halted by the shipper in the exercise of the right of stoppage in transitu before it got out of that state. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. . . .

"For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and

that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid, because repugnant to the commerce clause."

SECTION 397. SUITS AGAINST NONRESIDENT CORPORATIONS

Getting a nonresident corporation into court occasionally proves to be a difficult matter, as shown by a case before the Mississippi supreme court, Brand vs. Columbia Star Milling Co., 76 So. 557.

Plaintiff was discharged as flour salesman for the mill, before expiration of the term of his employment, as claimed by him, and sued to have his damages assessed and credited on a mortgage note he owed Edward F. Schoening, who was asserted to be virtually sole owner of the company. Summons against the company was served on a travelling salesman of the mill, the company being organized under the laws of another state, but a copy of the summons was not sent by registered mail to the home office of the corporation, as required by the Mississippi statutes.

The company made no appearance in the suit, and attempt was made by plaintiff to have default judgment entered, but the court refused to do this, on the ground that the company had not been validly summoned.

There is a rule of law, however, that one who appears in a suit as defendant waives any defect in service of summons upon him, and plaintiff claimed that, because the attorney for Schoening as an individual defendant made an argument showing why judgment should not be entered against the company, this amounted to an appearance on the part of the mill. Not so, said the court, because the attorney was entitled to make the suggestions either as attorney for the individual defendant or as a "friend of the court," in which latter capacity any attorney may be permitted to appear.

* *

The Middlewest Grain Co., Minneapolis, won a victory before the North Dakota supreme court on a defense that no valid service of summons had been had on this Minnesota corporation. (173 N. W. 468.) Plaintiff, one Kluver, relied upon a service of summons made on Jourgen Olson, at Minot, as president and managing agent of the grain company, but the company established the fact that Mr. Olson had ceased to represent the company in that capacity some time prior to the service of summons.

Applying North Dakota statutory provisions, the supreme court held that, in order that service validly may be made on a nonresident corporation which has no established place of business in the state, summons must be served on a person "found within this state acting as the agent of, or doing business for, such corporation." The decision makes it clear that the person upon whom service is made must not only be an agent of the defendant corporation, but he must also be in the state on company business. It is to be inferred that the presence of a Minnesota corporation's president or other officer in North Dakota on a hunting trip would not afford basis for service of valid summons against the company.

* *

The Weber Flour Mills Co., Salina, Kansas, defeated a suit brought by one Bauch to recover damages on account of a deteriorated shipment of flour. The case was decided by the Springfield, Mo., court of appeals (238 S.W. 581). It is held that the plaintiff never secured valid service of summons in the suit.

After the parties had failed to reach an adjustment of the controversy arising out of the damaged shipment, E. E. Reed, the mill's salesman, visited plaintiff's place of business at Cabool, Mo., to secure another order. While there, summons in an action before a justice of the peace and against the mill was served on Reed, as agent for the mill.

The mill did not appear at the time set for the trial, and judgment for the amount claimed by plaintiff was entered as by default. The judgment was docketed in the circuit court, and some time afterwards execution was levied under it against a car of flour shipped by the mill to another dealer in the same county. Then the mill appeared, and contested the validity of the proceedings on the ground that there had been no valid service of summons.

The circuit judge refused to vacate the proceedings, but his decision was reversed on appeal, on the ground that the mill had not done business in the county within the meaning of the Missouri statute (R. S. 1919, sec. 2746), which permits service of summons on an agent or employee of a nonresident corporation "doing business in this state."

The salient parts of the opinion on appeal are as follows:

"On the hearing of the motion to quash, defendant introduced evidence which established conclusively that it was a Kansas corporation; that it was not licensed to do business in this state; that it had no place of business in this state, no office in this state, and did no business

in this state, except to solicit and take orders. There was not a word of evidence to the contrary.

"Defendant introduced in evidence a letter dated July 9, 1920, written by it to plaintiff advising that Mr. Reed 'will hereafter represent us in the Missouri territory.' This letter did no more than advise that a different travelling salesman than theretofore would call on the trade in Missouri and solicit orders. On March 21, 1921, defendant wrote plaintiff, announcing the death of its travelling salesman, Mr. Reed. In this letter defendant inclosed an original and copy of a proposed telegram in the event plaintiff wanted to use it. This proposed telegram was addressed to defendant, and, if used, would have asked for the price of a certain brand of flour.

"These letters and this proposed telegram in no manner tend to show that defendant was doing business in this state, within the meaning of that language as used in section 2746. Sections 9790, 9791, and 9792, R. S. 1919, dealing with foreign corporations as to license, etc., are not wholly pertinent here, yet the proviso to section 9792 is significant, we think. This proviso is as follows: 'Provided, that the provisions of this article are not intended to and shall not apply to drummers or travelling salesmen soliciting business in this state for foreign corporations which are entirely nonresident.'

"The courts of this state have uniformly held that a foreign corporation which carries on a business in this state as was defendant is not 'doing business in this state' as that expression is generally used in our statute. . . . The state cannot place such restrictions on interstate commerce as would be attempted in the event we were to hold that, under the facts here, defendant was doing business in this state. Sending a travelling salesman into the state by a foreign corporation and soliciting orders through him is not 'doing business in this state' as that language is used in section 2746, R. S. 1919, the section under which service was attempted."

POWERS AND DUTIES OF CORPORATE OFFICERS*

SECTION 398. PRESIDENT

Merely being president of a corporation does not empower one to bind the company by contracts, although such authority may be generally or specifically conferred. He may be given such general authority by charter or bylaw, or the power may be inferred through course of dealings. Management may be intrusted to him by resolution of the directors.

If he be permitted to carry on the corporate business for a long time, making contracts on behalf of the company, the corporation will be bound by such agreements made by him in the course of the company's business, whether they have been authorized by bylaw or formal action of the directors.

The foregoing legal principles were laid down by the Georgia court of appeals in the recent case of Hart vs. Doss Rubber & Tube Co., 123 S. E. 751, which involved a contract of employment made by defendant's president.

* *

Apart from his functions as presiding officer at directors' and stockholders' meetings, the president has only such powers to represent the company as have been expressly conferred upon him, or are fairly to be implied from a customary course of dealing. These powers are affected largely by the question whether the general management of the business has been conferred upon another officer or agent or has been reserved by the board of directors.

In cases where presidents have been intrusted with general management, it has been held by the courts that they had implied power to make contracts for sales of goods dealt in by their companies, to arrange for bringing or defending suits, to indorse commercial paper in the ordinary course of business, give the company's notes in evidence of debts, to purchase supplies needed in the business, etc.

In other cases it has been decided that a president had no power to employ an architect to prepare plans and specifications for a proposed building, or to contract to buy building materials, or to sell treasury stock, or to mortgage or sell the company's property, or to release debts due the company.

Outsiders, in dealing with the head of a company, are ordinarily bound at their peril to ascertain the scope of his authority, especially when his acts are manifestly prejudicial to the interests of the corporation. Persons dealing with him

*See, also, Chapter LXII on Agents and Employees.

may, however, rely upon the powers apparently conferred upon him by his customary dealings not disaffirmed by the board of directors. Like other officers of a corporation, the president is liable to it for losses resulting from his careless or fraudulent mismanagement of the company's affairs, but not for honest errors of judgment.

See, also, section 402.

SECTION 399. MANAGER'S POWERS IN GENERAL

The general manager of a milling company is presumed to be vested with all such broad powers as are usually exercised by such managing agents. Basing my opinion on what the courts have frequently decided, I should say that the manager may, in the absence of information to the contrary to persons dealing with him, concerning his authority, bind his company by contracts for the purchase of all grain, machinery, and other things useful or necessary in conducting the mill business, by taking leases for storage purposes, employing mill hands, salesmen and office assistants, approving orders and making contracts for sale of flour, conducting litigation, making advertising contracts, etc.

It has been held that a general manager has no implied authority to mortgage or lease the company's personal or real property, or do other things not usually done by persons in similar positions.

But a mortgage executed by a baking company's manager on behalf of the company, to secure payment for flour purchases, was not invalid because not given or authorized by the directors. The Alabama statute, authorizing directors to mortgage their corporation's personal property, does not preclude a mortgage by officers to whom the management of the company's affairs may have been intrusted. (In re Grocers' Baking Co., 266 Fed. 900.) In this case a United States district judge said:

"The evidence is convincing that the directors of the Grocers' Baking Co. had committed the entire management and conduct of the affairs of the corporation to Shaw, and he had apparent authority to execute the first mortgage. However, if the mortgage was not authorized, it was subsequently ratified (1) by the formal resolutions adopted by the board of directors; (2) by the giving of the second mortgage, expressly approving the first; (3) by the acquiescence of the corporation in receiving and restraining the proceeds acquired under the first mortgage; and (4) by the failure to disaffirm and to return such proceeds."

This decision was affirmed by the United States circuit court of appeals (277 Fed. 1015).

SECTION 400. MANAGER'S POWER TO MAKE CONTRACTS

Where a corporation holds one of its officers out to the public as being its general manager, by acquiescing in his acts on the part of the company, it will be estopped to deny his authority to make contracts within the scope of his apparent authority. It was so decided by the United States circuit court of appeals, eighth circuit, in the case of Strong vs. Manchester Mill & Elevator Co., 231 Fed. 876.

In the case of Michie Grocery Co. vs. Martin, 188 Pac. 615, the main point in issue was whether there was sufficient showing of authority in the general manager of plaintiff company to bind his corporation by a contract for the purchase of 500 bags of beans. The California district court of appeals said:

"The contention of defendants is that, in the absence of a resolution adopted by the board of directors authorizing Powers to execute the contract, his act could not be deemed that of the corporation, in support of which they cite authorities to the effect that the president of a corporation merely by virtue of his position has no power to bind the company by a contract.

"Conceding this, it is nevertheless true that where the general manager of a corporation, for and on its behalf, in its name and in the usual course of business conducted by it, executes a contract, his authority so to do, in the absence of any showing to the contrary, will be presumed. Powers' admitted relation to the corporation, and the fact that in conducting the business he had theretofore acted for the company in executing all contracts to which it was a party, warrants the inference that his act was in accordance with rules adopted by the board of directors for guidance in the transaction of its corporate affairs."

* *

The effect of shipping instructions given to a corporate seller's department manager concerning a transaction belonging to another department was considered by the Michigan supreme court in the case of Hage et al. vs. E. L. Wellman Co., 187 N.W. 404.

Defendant company, dealing in grain, feed, etc., maintained four departments (beans, grain, feed and bags). Its grain

manager, A. N. Sheffield, confirmed a sale to plaintiffs of two cars of corn. Later, Manager Rudolph of the feed department called plaintiffs up by phone, asking how they were "fixed for feed." It is found that in the same conversation plaintiffs, referring to the corn contract, told Rudolph that they had two cars of corn coming from defendant, and directed that the same be shipped. Rudolph replied that he would call the "grain man's" attention to the matter. Still later the defendant notified plaintiffs that the corn contract had been canceled, relying on plaintiff's failure to give shipping instructions.

When plaintiffs sued for damages for nondelivery of the corn, the principal point in controversy concerned the authority of Sheffield to receive shipping instructions under a contract belonging to another department of defendant's business. The court holds that the jury was justified in finding that it was within Sheffield's apparent authority to receive such instructions. Part of the opinion reads:

"This was a long-distance telephone transaction, a method of communication by which a vast volume of the world's business is now transacted. The persons speaking for the negotiating parties neither saw nor knew each other. Each represented a business concern called for and answered from its office in the usual way. . . .

"This communication was clearly relevant to his employer's business, naturally suggested by the inquiry as to feed in a telephone call from defendant, of whom plaintiffs had bought corn for delivery that month. If defendant had in its organization privately so restricted the authority of its managers in doing business with the public that none of them could accept or recognize for it a telephone communication touching defendant's business from a customer he called up from its office during business hours for business purposes, unless the communication related to his exclusive department, it can well be urged that defendant must at its peril so advise the mistaken or inquiring customer through its answering manager or otherwise.

"Rudolph not only failed to undeceive the uninformed customer in that particular, as he admits, but, as Hage testified, apparently accepted the message for defendant and said he would call the attention of the grain man to it. The manner in which this telephone conversation arose and was conducted fairly gave color to his apparent authority in that particular. Private instructions or limitations on his apparent authority not known to plaintiffs were not binding upon them. Agency and authority are questions for the jury when material facts are in dispute."

SECTION 401. UNAUTHORIZED ACTS OF MANAGER

The South Dakota supreme court has held that an elevator company was not bound by the unauthorized act of its general manager in using funds of the company to buy bank stock, for that was obviously beyond his apparent authority, even if it was within the corporate powers of the corporation to deal in such stock.

"He was the secretary of that company," says the court, "and had authority to draw and sign checks in the name of the company, and the officers and directors of the company did hold him out to the public as the general manager of the company's business; but that company's business was the buying and selling of grain, lumber and coal, and there was nothing in the conduct of the officers to imply that he had authority to deal in other commodities."

It is further decided in the same case that failure of the company for two years to repudiate the transaction cannot be regarded as a ratification, in the absence of proof that it acquired knowledge thereof within that time. (Porter vs. Lien, 153 N.W. 905.)

See the Kansas supreme court's decision in Mitchell Grain & Supply Co. vs. Maryland Casualty Co., 195 Pac. 978, holding that a manager's unauthorized speculation in grain constituted embezzlement. This case is mentioned in the chapter on Bonds and Guaranties.

SECTION 402. MANAGER'S OBLIGATIONS TO CORPORATION

Acceptance of the management of a mill impliedly imposes obligation to use common honesty and a reasonable degree of care to avoid losses. The manager does not insure the millowner that the business will be profitably operated, but he does insure that he will use all proper efforts to make it profitable. The law on this point has been authoritatively summed up as follows:

"Where the president of a corporation is vested with the general care, oversight, and management of its concerns, and is paid a salary for his services, he is bound, in return for the confidence thus reposed in him and the compensation thus paid to him, to exercise good

business diligence in the discharge of the duties thus assumed. He is therefore answerable to the corporation for the want of the reasonable or ordinary care bestowed by a good business man in the oversight of a similar business under similar circumstances.

"The president's obligations as a fiduciary rest upon the same footing as those of the directors. . . . He is bound to exercise his official powers in the utmost good faith for the benefit of the company, and he is not allowed to prostitute them for his own private gain and advantage." 10 Cyc. 918, 919.

The leading case on this subject in the milling industry was decided by the Missouri supreme court (247 Mo. 212). Plaintiff, a milling company, sued defendant, its former president and manager, to recover damages for injuries to its business through claimed misfeasance on his part, and also to recover money said to have been lost to the company through speculative transactions in grain.

The case was disposed of by the supreme court on questions as to whether the petition filed by plaintiff stated facts which, if true, must be regarded as a matter of law as entitling the mill to recover. The point as to whether the petition sufficiently charged defendant with liability for losses in grain speculations was ruled by the supreme court in favor of defendant, the court saying:

"Flour cannot be made without wheat. Plaintiff produced no wheat. It had to buy it. With a capacity of 500 bbls per day, it was doubtless necessary to make purchases somewhat in advance in order to insure at all times a supply of grain for use in manufacturing flour. It was defendant's duty to do this.

"The petition does not proceed on the theory of negligence, in attention or poor judgment in buying, but upon the theory that there had been no purchases at all, merely pretended purchases. The evidence, in so far as it indicates anything, indicates purchases were made. Defendant had authority to buy. It is not contended he had no authority to sell grain previously purchased, nor that loss resulted from injudicious sales."

The main question in the case was whether the petition stated a good cause of action for mismanagement in the manufacture and sale of flour. On this point the petition alleged that defendant had been plaintiff's president and manager for about four and one half years; that the mill manufactured several grades of flour under specified brands, and had achieved an excellent reputation for fair dealing, as well as an extensive and profitable trade; that "during the aforesaid period, as such president and manager, and in the management and control of plaintiff's business, defendant knowingly and willfully and without any right or authority repeatedly manufactured and sold and caused to be manufactured and sold inferior flour as and for plaintiff's high grade flour"; that defendant "knowingly, willfully and without any right or authority, repeatedly caused to be ground into flour unsound wheat, uncleaned wheat, and dirt and foreign substances with wheat, and sold and caused to be sold such flour as and for clean, sound, pure flour"; and "that, as a direct result thereof, plaintiff's reputation for fair dealing and the reputation of its finer grades or brands of flour were greatly impaired, and its business was wellnigh ruined, and its capital stock and assets were seriously impaired, all of which defendant knew and must have known would be and all of which was the direct consequence of his said conduct," etc.

Holding that the petition stated a good cause of action, the supreme court said in part: "The court takes judicial notice that special skill and knowledge are necessary to the proper performance of the duties devolving upon one who assumes to conduct and manage the business of manufacturing and marketing large quantities of flour, and from the fact of defendant's acceptance, for compensation, of the management of plaintiff's business, nothing more appearing, the law implies an obligation on his part to bring to the discharge of such duties the usual degree of skill commonly possessed by others in like employment, and also implies an obligation to act in good faith in the transaction of plaintiff's business in so far as it was intrusted to him. . . .

"In this case neither incompetency nor negligence is charged. The allegation is that defendant 'knowingly, willfully and without right or authority' manufactured inferior flour and sold it 'as and for' plaintiff's higher and finer grades. This is equivalent to an allegation of bad faith, intentional deception of customers. . . .

"While it is possible plaintiff might knowingly employ an incompetent or negligent manager, and therefore might not ordinarily, in such circumstances, be permitted to recover for losses resulting from ignorance or inefficiency, yet it cannot be presumed plaintiff contracted with defendant on the theory that he

would cheat and defraud its customers. . . . The obligation to act in good faith is added by presumption of law to the allegation of the acceptance of employment and compensation therefor, and defendant's disregard of that obligation is actionable. . . .

"Let it be conceded that a mere allegation that defendant manufactured inferior flour would not suffice, since such a product might be nevertheless wholesome and marketable, though relatively inferior. The willful and unauthorized substitution, however, of the inferior grade for the higher, and the intentional sale of the inferior under the brand of the higher grade, would be in violation of plaintiff's duty to its customers and, consequently, of defendant's duty to plaintiff. It is not specifically alleged that buyers were deceived, but the allegation that the inferior product was sold 'as and for the superior' implies as much, and is, in itself, the statement of a fact which could not exist if the buyers were aware of the substitution. Defendant's obligation and its violation are, in view of what has been said, sufficiently set forth to withstand the general objection taken.

"The remaining question respects the allegations as to damages suffered. This, according to defendant's counsel, seems to have been the particular in which the petition was deemed defective. It is contended the purchasers of the inferior flour could not have recovered for deceit, the sales being in the open market, and that this conclusion demonstrates the insufficiency of the petition.

"The case cited as decisive of the question [Harrison vs. Walden, 89 Mo. App. 164] was a suit on a note, and is grounded on the general principle that 'when parties are on an equal footing, representations and exaggerations of the value of the property will not be considered fraudulent. The law will presume that a man will take care of himself,' etc.

"Whether or not this rule might be pertinent in a suit by a customer to recover from plaintiff the difference between the value of the flour delivered and an equal amount of the quality indicated by the brand, it is inapplicable to the case made by the petition. This is not an action by a customer, nor is there any allegation of repayment or liability on plaintiff's part to repay to any customer the purchase price or any part of it on account of sales of inferior flour. Recovery is not sought on grounds of that kind. The damages claimed are for injuries to plaintiff's business, reputation, etc. The effect of the allegation is that defendant's course practically destroyed the good-will of the business. Good-will is a species of property. . . .

"The first count of the petition is far from being a model. It is doubtful whether the allegations as to grinding into flour unsound and uncleaned wheat are sufficient to warrant the admission of evidence in their support, it not being specifically alleged that defendant did so in plaintiff's service, or sold the flour so made for anything other than it was."

* *

In the case of Ogallah Elevator Co. vs. Harrison, 154 Pac. 1016, passed upon by the Kansas supreme court, plaintiff was defeated in an attempt to compel defendant, its former manager, to account under certain transactions occurring during his management.

The court ruled that plaintiff had no claim on earnings of defendant derived from sales of flour for another employer while he was managing plaintiff's coal and elevator business, it appearing that the side line did not conflict with the performance of his duties to the elevator company, which was not engaged in the flour business and which made no objection to his employment in selling flour, although advised thereof.

The supreme court decided that the rule that an employee must account to his employer for earnings received from outside employment ordinarily relates to employment in the same kind of business in which the employer is engaged, and does not relate to earnings in another kind of business in which the employer is not interested or prejudiced.

It was further decided in the same case that ordinarily the manager of a business is not a guarantor of credits extended by him to customers, nor an insurer against loss to his employer through business mistakes, and that he is not liable for allowing credit on an uncollectable claim, in the absence of fraud or carelessness.

SECTION 403. MANAGER'S LIABILITY TO THIRD PERSONS

An opinion of the Kansas supreme court in the case of Swader vs. Kansas Flour Mills Co., 191 Pac. 312, imposed $10,000 liability personally against R. W. Hoffman, as manager of the company's mill at Enterprise, Kansas.

Plaintiff's husband was fatally injured while in the milling company's employment when a defectively constructed floor in a grain bin collapsed. The su-

preme court found that the evidence sustained a conclusion reached by the jury that the accident was due to negligent construction for which Hoffman was at fault, and that the accident should have been foreseen as a likely result of constructing the floor in a weak and insecure manner.

SECTION 404. TERMINATION OF EMPLOYMENT

The fact that one is employed to manage the affairs of a business corporation, or in other capacity, at a stated annual salary, does not imply an agreement that he is to be retained a full year, no duration of employment being expressly agreed upon. So held the New York court of appeals in the case of Cuppy vs. Stollwerck Bros., 111 N.E. 249.

But the court so held that where a definite contract is made for a year, or other period, it may not be terminated without cause within that time, although the employing corporation may have in force a bylaw authorizing the board of directors to remove a director or officer at any regular or special meeting. The court of appeals observed:

"While the bylaw empowered the board of directors to remove a director or officer, it did not authorize them to terminate a contract with one whom they had employed for a definite term. . . . The plaintiff held his place, like any other agent or servant, subject to the terms of the contract under which he was employed. If no stated term was fixed, he was subject to removal by the board of directors, even in the absence of a bylaw giving the directors this power."

Under a contract for the employment of a person as local manager for a milling company for the period of one year, his continuation in the service after the expiration of the year is presumed to have been on the same terms, in the absence of any express agreement to the contrary. And any disloyalty on his part which became known to the company within the first year of his employment will be deemed to have been forgiven by the company, where no effort was made to discharge him, and the offense could not afterwards be relied upon as a ground for his dismissal. (Indiana appellate court, Akron Milling Co. vs. Leiter, 107 N.E. 99.)

SECTION 405. ASSISTANT MANAGERS

See the case of Rock vs. Petty Store Co., 224 S. W. 5, referred to in the chapter on Breach of Contract by the Buyer, holding that, if an assistant manager of a store had no authority to buy flour, his contract was not binding on his company.

SECTION 406. DIRECTORS

The Missouri supreme court once had occasion to discuss quite fully the point of the responsibility of the directors of a business corporation as to successful management of the company's affairs. In the case before the court, these conclusions are reached:

In general, directors are governed by the same rules applicable to trustees and agents, being regarded as trustees and agents for the corporation and its stockholders. Failure to discharge their obligations in this fiduciary capacity renders them liable for resulting losses. The power vested in directors to control corporate business implies obligation to exercise ordinary care, to the end that the assets of the corporation shall not be lost or dissipated.

Directors are liable for losses resulting from negligence as well as from actual misfeasance. The degree of care required "is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account."

Speaking of the importance of the question whether a director was compensated or not for his services in that capacity, as bearing on the measure of his duty, the court adds:

"For this he was paid an adequate salary. His course is, therefore, not to be judged by the same rule applicable to an uncompensated director, whose duties with respect to the finances and oversight of the business of the company arose solely from the fact that he was a director. A higher degree of vigilance was required of him, because of the very fact that he was chosen and paid for the purpose of having him devote his entire time to the management of the business and finances of the company."

* *

The Wichita Mill & Elevator Co., Wichita Falls, Texas, won a suit before the Texas court of civil appeals fixing the liability of one Durham and others for damages sustained by the milling company in extending credit to a general mercantile corporation of which defendants had been directors. The judgment is based upon a finding that defendants falsely represented their company as being in sound financial condition, as a basis for the extension of credit to it, whereas the company was insolvent.

"Ordinarily, a director of a corporation is not responsible individually for the

corporate acts," declares the Texas court. "But such directors may be personally liable for damages sustained by reason of the insolvency of the corporation when a person is induced by false representations, either knowingly made or when in the exercise of ordinary care the directors would have and should have known said representations to be false, to rely on said representations in his dealings with said corporation, and suffers loss by reason thereof."

The evidence in this case showed that defendants were responsible for untruthful financial statements made to mercantile agencies from which the milling company received information concerning the mercantile company's credit rating. (202 S.W. 138.)

Trustees, named in the articles of incorporation of a milling company to manage the corporate affairs up to a certain date, could bind the company by the purchase of supplies in the ordinary course of business after that date, on their holding over with the consent of the company; they being properly regarded as the managers of the corporation's affairs until the election and qualification of their successors. This is the gist of the decision of the Washington supreme court in the case of Barnard Mfg. Co. vs. Ralston Milling Co., 160 Pac. 309.

* *

Matters pertaining to milling corporations were considered by the Texas court of civil appeals in the case of Blewett vs. Denton Milling Co., 254 S. W. 236. Plaintiff sued to recover damages on account of being discharged as manager of the company and to enforce notes of the corporation.

The court held that a contract purporting to employ plaintiff as manager of the company for five years was valid only as to one year's employment, because the directors were not legally empowered to make a contract extending beyond their own term of office. The decision, however, was influenced by the fact that the bylaws expressly provided for annual election of directors and a manager. The court said:

"We are of the opinion that under the bylaws of the appellant the board of directors had no authority to enter into the contract employing the appellee for a term of five years as manager of the corporation. It is unimportant that the same members were repeatedly elected as directors. The validity of their action is to be determined by legal rules, and not by particular conditions that may exist. The fact that a new board is composed of the same individuals as the old board did not enlarge the legal authority of the old board. It follows, then, that the appellee, having no valid contract entitling him to hold the place of manager for five years, has no cause of action because of his discharge."

* *

The following is a summary of holdings of the United States circuit court of appeals, eighth circuit, in the case of Stuart vs. Larson, 298 Fed. 223:

The authorities are not altogether uniform as to the power of directors of insolvent corporations to protect themselves. Transactions between directors, made in the capacity of officers of the corporation, and themselves as individual entities, are closely scrutinized by the courts, and if there is any element of bad faith the courts are quick to remedy the situation. Courts have quite generally held that there is no sound reason why directors should not assist a corporation in need of assistance, by lending money or credit and taking security therefor.

Directors are not compelled to wait and see a corporation go down, where they are not able to secure credit elsewhere, and are willing for the sake of the corporation, and to keep it a going concern, to advance money thereto and take security therefor. If the advances are personal ones, to be used by the corporation as an assistance in its emergency, and with the expectation that it will continue in business as a going concern and meet its obligations, the mortgages made to secure the same, even to an officer of a corporation, have generally been held not invalid.

The courts are not agreed as to the power of directors of insolvent corporations to prefer themselves, and while directors may in good faith advance money to keep a corporation a going concern and take security therefor, yet the great weight of authority in this country is that the directors of an insolvent corporation, who are also creditors thereof, have no right to grant themselves preferences or advantages in the payment of their claims over other creditors, and such rule is merely applied common honesty. A director occupies a certain fiduciary position toward the stockholders and the creditors. He has better facilities for knowing the condition of the company than have the other creditors, and he ought not to be permitted to use that position to benefit himself at their expense.

See, also, the first section of the chapter on mortgages, Chapter LVII.

STOCKHOLDERS' RIGHTS AND LIABILITIES

SECTION 407. IN GENERAL

That one holds shares of stock in a corporation of itself gives him no status as a representative of the company, and, except as he may act with the authorization or ratification of the governing authorities of the corporation, his acts can have no binding effect against the company. In fact, it has been decided in several cases that a deed to corporate property, although signed by all the members of the company in their personal capacity, is not a valid conveyance, unless formally authorized by the corporation.

A shareholder not being the legal representative of his corporation, it follows that he does not stand in the fiduciary relation that exists between the directors and officers, on one hand, and the corporation. Transactions in which directors or officers profit personally at the expense of the corporation will be scrutinized carefully by the courts to discover any existing fraud, but, as a shareholder, one may deal with the company the same as a nonstockholder might.

* *

Although formation of a milling corporation may be contemplated, those who actively participate in business operations before the incorporation is completed may render themselves personally liable, jointly and severally with their associates, for debts incurred in such operations. The point is illustrated by the decision of the Kansas City court of appeals in the case of Commerce Trust Co. vs. McMechen, 220 S. W. 1019.

SECTION 408. RIGHT TO INSPECT RECORDS

The right of a stockholder to inspect the books or papers of his corporation has been the subject of litigation in thousands of lawsuits, resulting in the statement of a general rule that the right exists when the inspection is sought at proper times and for proper purposes, subject to statutory regulation and subject to reasonable bylaws of the corporation limiting the right. There are numerous decisions, however, holding that a shareholder may not compel permission to him to inspect the corporation's documents for speculative purposes or to gratify mere curiosity.

When he may make a personal inspection, he is entitled to exercise the right by his agent or attorney.

* *

The following summary of the rights of shareholders was made by the Kentucky court of appeals in a decision handed down by that tribunal:

"A stockholder in a corporation has, in the very nature of things, and upon the principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted, and whether the capital, of which he has contributed a share, is being prudently and profitably employed, and to inspect the books of the corporation for the purpose of obtaining such knowledge.

"The right of inspection rests upon the facts of ownership. The books and property of the corporation really belong to the shareholders, and the reality cannot be overthrown by the fiction of law that a corporation is an artificial person or entity, apart from its members. Those in charge of its affairs are merely the agents of the shareholders, who are the real owners of the property, and when one of them seeks an inspection of the corporate books, records, or property, he is but seeking an inspection of his own.

"Indeed, with reference to the right of inspection, the relation of a shareholder to the corporation has been likened to that of a partner to the firm. . . . A stockholder, as such, has a right to inspect the books and records of the corporation where his sole object is to inform himself as to the manner in which the corporate business is being conducted. . . . And this right, if denied by the officers of the corporation, may be enforced by mandatory injunction." (219 S.W. 191.)

* *

In a suit brought against the principal officers of the Equity Co-operative Exchange, the North Dakota supreme court held that the statutory right of a stockholder of a corporation organized under the laws of North Dakota to examine the books of the company during office hours was not affected by the fact that he may desire to make use of the information, to be so acquired, in aid of a rival of the company, or in aid of a suit which he contemplates bringing against the company. (Schmidt vs. Anderson, 150 N.W. 871.)

SECTION 409. RIGHT TO VOTE

Generally, the right to vote at a corporate meeting is limited to those who are registered as stockholders on the company's records. A holder of hypothecated stock is still entitled to vote it, unless the shares have been transferred

on the company's books, or unless the right to vote has been expressly vested in the pledgee. A deceased stockholder's executor or administrator is entitled to vote, by establishing his representative capacity, although the shares still stand in the name of the decedent.

The common law did not recognize the right to vote by proxy, and such right may be exercised now only when specially accorded by statute or bylaw.

SECTION 410. RIGHT TO DIVIDENDS

Numerous instances in which minority stockholders have questioned the right of their corporations to declare or withhold dividends have led to a well-settled rule of law that, subject to control by stockholders' meetings, the board of directors is vested with exclusive discretion as to the advisability of declaring a dividend. Unless the directors are shown to have acted arbitrarily or in bad faith, a court will not substitute its judgment as to the propriety of a dividend, or as to the amount which should be declared, for the judgment of the board.

* *

Until a dividend is declared, there is no debt due a shareholder, no matter how large the net profits of the corporate business may have been. But when one is once declared, the corporation becomes directly indebted to each shareholder according to the amount of stock held by him; and, subject to such reasonable provisions as the board may have made as to time and place of payment, the stockholder may maintain suit to recover the amount due him as his share of the declared profits. Debts due the corporation from a shareholder may be offset against his dividend.

* *

As between sellers and buyers of shares, a dividend belongs to the holder of the stock at the time the dividend was declared, regardless of the time of payment. Inasmuch as the law regards the capital of a corporation as a trust fund for the benefit of the company's creditors, a dividend may not be validly declared out of it to the prejudice of such creditors.

* *

Dividends are payable only out of net profits, excepting for the purpose of liquidating the corporate affairs. Subject to controlling statutes, dividends may be paid by issuing additional shares of stock; no discrimination being made between different persons within the same class.

* *

The opinion of the Iowa supreme court, handed down in the case of Sexton vs. C. L. Percival Co., 177 N.W. 83, contained some observations on the right of a stockholder to insist upon distribution of corporate profits. The court approved the following statement appearing in a decision of the Pennsylvania supreme court:

"As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit. The wisdom of such distribution must of necessity rest with the corporation itself.

"From motives of prudence and self-interest it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by an appeal to the ballot at the election of directors."

The Iowa court held that the directors of a corporation, acting in good faith for the best interest of all concerned, had discretion to divide accumulated profits among the stockholders, to capitalize the surplus, or invest it in the works and plant. Exercise of this discretion will be controlled by the courts only on proof of fraud or bad faith on the part of the directors.

SECTION 411. RIGHTS AGAINST INSOLVENT CORPORATIONS

Rights of an owner of stock in an insolvent milling company were considered by the Kansas supreme court in the suit of La Salle Street Trust & Savings Bank, et al., vs. Topeka Milling Co., 167 Pac. 1036.

Mrs. Shepard bought $4,500 worth of stock in the milling company in 1910, and sued in 1913 for damages, asserting that her purchase was induced by misrepresentations, later recovering judgment for $3,037. Just before the suit was brought, the mill entered into a composition agreement with plaintiffs, its creditors, under which the company's property was to be transferred for the protection of creditors and stockholders, and to secure payment of all the mill's debts.

Because of Mrs. Shepard's suit, the mill refused, at first, to carry out the agreement, but when suit was brought by the plaintiff, consent to appointment of receivers was given. When the mill's assets were converted into cash, Mrs. Shepard intervened in the suit, asking that the receivers be directed to pay her judgment, but the district court at Topeka ruled that, as she was a stockholder, she had no right to participate in the distribution of the funds to the detriment of plaintiffs, creditors of the mill.

Reversing this ruling and ordering allowance of Mrs. Shepard's claim, the supreme court held that when a stockholder has satisfied all his obligations as such, and there remains nothing by way of unpaid subscriptions or liability growing out of his relation as stockholder, and he is in good faith a creditor of the corporation, he stands on an equal footing with other creditors, and has the same right to treat the corporation as a stranger and adversary as they have. Under such circumstances, he is not required to stand back until other creditors are satisfied, but may proceed along with them on equal terms.

See, also, the chapter on Bankruptcy and Insolvency, Chapter LX.

* *

In the case of Helberg vs. Eastern Iowa Flour Co., 171 N.W. 586, the Iowa supreme court affirmed a decree of the district court at Cedar Rapids dismissing plaintiff's claim of right to a cancellation of shares of stock in defendant corporation, on it becoming insolvent.

The suit proceeded upon a theory that the general manager of the company induced plaintiff to buy the stock through fraudulent misrepresentations bearing upon the value of the shares. But at the trial there was a direct conflict in the testimony on this point, and the supreme court applied to the decree in defendant's favor the well-settled rule of law that an appellate court will not disturb a finding of fact made by a trial court on a matter as to which the evidence is directly conflicting.

SECTION 412. STOCK SUBSCRIPTIONS

In the case of Equity Co-Operative Association vs. Equity Co-operative Milling Co., 206 Pac. 349, plaintiff sued to cancel notes given for stock in defendant company, alleging that the notes were given under misrepresentations. Disposing of the case on appeal, the Montana supreme court lays down the following stated propositions:

"A subscriber to the stock of an existing corporation is prima facie liable on notes given for the price of the stock. He has the burden to prove that the notes have been vitiated by fraud which induced their execution or through want of consideration. Issuance of stock in a fully organized corporation forecloses any defense of want of consideration for notes given for the price.

"If false or fraudulent representations were held out to the plaintiff as an inducement for execution of the notes in suit, upon which it acted, and in consequence of which it was imposed upon, or on account of which the notes were executed and delivered, the obligation becomes a nullity."

One of the principal allegations of the complaint seeking cancellation of the notes was that they were executed under unfulfilled assurance "that the said defendant corporation would immediately proceed to secure a site and begin construction and have completed a flour mill adequate for state purposes within one year from the date of said notes," etc.

* *

The Canyon Creek Elevator & Milling Co., Yegen, Mont., lost a suit before the Montana supreme court in which it was attempted to hold one Allison on a conditional agreement to subscribe for a share of stock in the company. The case turned on the following terms of the subscription agreement signed by defendant:

"It being an express condition of this subscription that, . . . if a committee appointed from our number to inspect such a plant in operation shall report unfavorably, then these subscriptions may be, at our option, declared null and void; otherwise, to be in full force and effect."

The subscribers, as an entire body, never selected an investigating committee, but a self-constituted group of subscribers made an investigation and reported favorably. A majority of the judges of the court held that this report was not binding upon defendant, and that he terminated his liability by giving oral notice to the company of the withdrawal of his subscription.

With all respect for this decision, I think that Mr. Justice Holloway, of the supreme court, who dissented from the holding, took the sounder view of the case when he said:

"Defendant could avoid liability only in the event that the report of the committee was unfavorable. No such report was ever made. Though the committee which investigated the plant was selected

in the most informal manner, it nevertheless made an investigation and reported favorably. The defendant does not object to the personnel of the committee, does not contend that it was not fairly representative of the subscribers generally, and does not challenge the correctness of the report." (165 Pac. 753.)

SECTION 413. CORPORATION'S OPTION TO BUY SHARES

An agreement between all the stockholders of a business corporation that, whenever a stockholder desires to sell any of his stock, the corporation shall have the exclusive right to purchase it for a period of 60 days after notice of the desire to sell, is valid, and not an unlawful restriction on the power of alienation, according to the decision handed down by the Minnesota supreme court in the case of Model Clothing House vs. Dickinson. The court holds that, where stock is sold in violation of such contract to a business rival having notice of it, an action will lie to cancel such sale and enforce specific performance of the contract. (178 N.W. 957.)

SECTION 413A. SALES OF SHARES

In the case of Kirch vs. Oakdale Milling Co. et al., 232 Pac. 784, the Wyoming supreme court dealt with the validity of an agreement between the parties with respect to certain stock in an elevator company.

Plaintiff sued to recover the par value of shares in the elevator company, relying upon an agreement on defendants' part to purchase the stock from him at par, should he so desire within a period of about 13½ months, as an inducement for his buying the shares in the first instance.

Defendants pleaded that there was coupled with this agreement an understanding that plaintiff was to be employed by the elevator company as manager at a stated compensation, including a monthly salary and a commission on business done; and further pleaded that the whole agreement was invalid as being against public policy.

Reversing a decision entered in a lower court in favor of defendants, the supreme court said:

"We think a stockholder may make a promise in consideration of the acceptance by another of an office that has been regularly tendered him by the corporation. . . . Such a promise, no doubt, may be held to be opposed to public policy if made for a dishonest or fraudulent purpose, but the burden of proving that purpose would rest on the party alleging it. . . .

"The effect of the writing is yet to be considered. It was at least an option given for a consideration, and therefore an offer or conditional promise that could not be withdrawn before July 15, 1922 [the date when the option expired]. If, before that date, the plaintiff exercised the option, or accepted the offer, the defendants became bound to buy plaintiff's stock as promised in the writing. . . .

"The question is whether plaintiff was precluded from recovery because he did not before suit communicate to defendants notice of his election to exercise the option. It is, of course, true that the contract for purchase of the stock became binding only when it had the mutual assent of the parties. The defendants' assent was manifested by the writing, and could not be withdrawn. Before the contract was complete, the plaintiff also must have assented thereto by manifesting to defendants his intention to sell. . . .

"The action was commenced and actually tried before the expiration of time given plaintiff for the exercise of the option. . . . The filing of the action made manifest to defendants the plaintiff's intention to exercise the option, and it is clear that an earlier notice would have been useless."

SECTION 414. COMPELLING STOCK TRANSFER ON BOOKS

A preliminary phase of the suit of Baer vs. Waseca Milling Co. was considered by the Minnesota supreme court. (173 N.W. 401.)

Defendant was a corporation organized under the laws of South Dakota, and plaintiff sued to compel a transfer upon the books of the company of certain shares of stock bought by him from the original holder.

The supreme court held that defendant was properly required to set up in its answer the substance of a bylaw relied upon by it as entitling the company to refuse to register the transfer until full payment of the original stock subscription. It was decided that a transferee of corporate stock is not presumed to take constructive notice of the terms of the company's bylaws.

The principal defense interposed to the suit seems to be a claim that a Minnesota court has no jurisdiction over a corporation organized under the laws of another state, to compel a transfer of shares on the corporate books, although the company may be doing business in this state.

On this point the opinion said:

"The relief does not involve the exercise of visitorial powers or the management of the internal affairs of the corporation. It merely involves whether a citizen of this state, who has bought stock from one to whom the corporation has issued it, is entitled to have it transferred on the books of the corporation. The corporation is duly licensed to do business in this state. If there is any amount due the corporation from the seller of the stock which is a lien thereon, the courts of this state should have no difficulty in protecting and enforcing the same as against the holder of the stock."

The opinion cited an earlier decision of the court as supporting the propriety of a suit of this kind.

SECTION 414A. STOCKHOLDER'S LIABILITY

In the case of Carnegie Dock & Fuel Co. vs. Kensington Mills, Inc., 188 N. W. 270, the Minnesota supreme court held that a milling company was a "manufacturing" corporation and that therefore its stockholders were not subject to double liability. See section 387.

CHAPTER XLVII

PARTNERSHIP

SECTION 415. PROOF OF PARTNERSHIP EXISTENCE

RIGHT to hold defendants individually liable as partners in the purchase of mill products was considered by the Wyoming supreme court in Big Horn Milling Co. vs. Sneider & Wallace, 200 Pac. 1011.

Defendants arranged with plaintiff mill for a line of credit as partners in the retail feed business at Thermopolis, Wyo., but when suit was brought on accounts for purchases made within the first half of the year defendants denied personal liability, insisting that the true debtor was a corporation, the Stone Front Grain Co., mistakenly named "Stone Barn Grain Co." on letterheads used by the firm.

After disposing of a question arising under the statute of frauds the supreme court said: "The next contention of defendants is that the court should have directed a verdict in their favor, for the reason that it is shown by the undisputed evidence that delivery of the goods was made to the Stone Front Grain Co., a corporation, and not to defendants. The force of this contention is considerably weakened by reason of our determination that the testimony regarding the arrangements made on Jan. 10 and regarding the statements of defendants then made is admissible.

"We do not think the point well taken, but, on the contrary, think that there was sufficient evidence to warrant a finding against defendants. As we stated before, delivery to and acceptance by a partner is delivery to and acceptance by the partnership. A person may be liable to a third person if he is an actual partner of another or holds himself out as such. If a person holds himself out as a partner of another, and credit is extended to the partnership on the strength thereof, he is estopped from claiming that he is not in fact a partner. . . .

"In the case at bar the evidence shows without dispute that there was at least a holding out by both defendants as to a partnership in future. In fact, we think that it may be said that the holding out was as to a partnership then existing, or at least as to one then commencing. The defendants stated on Jan. 10 that they were going to be associated together in the feed business, wanted to buy goods from plaintiff for that purpose, and desired an extension of credit.

"Now it is often necessary for a partnership to arrange for the purchase of goods and for an extension of credit. To do so is frequently one of its important business transactions, and, when goods are subsequently bought and credit extended pursuant to such arrangements, it may well be said that the proof thereof shows an actual working partnership or at least the commencement thereof. . . .

"Invoices or bills showing these two shipments as so made were also sent and received. During this time nothing had been said to plaintiff concerning any corporation, and no notice of any kind changing the arrangements made on Jan. 10 appears to have been given to plaintiff.

"The books of accounts of the plaintiff were introduced in evidence. These showed that credit was extended to defendants as co-partners, and they were admissible for the purpose of showing who were the actual purchasers . . . and, in connection with the other evidence in the case, that delivery was made. . . . The manager of plaintiff testified that credit was extended at all times only to the partnership, and this evidence was admissible for the purpose of showing the intention of the parties in regard thereto. . . .

"We think that this evidence was sufficient to justify the lower court in finding that the defendants were co-partners as to the first two shipments, which we have mainly considered so far, and that these two shipments were made, received, and accepted pursuant to the arrangements made on Jan. 10. . . . The shipments other than the first two were made in the name of the Stone Barn Grain Co., on the supposition of

plaintiff, as testified to by the witness Long, that defendants were doing business under that name, and that making these shipments in that manner would be convenient for the defendants. The books of accounts of plaintiff, in view of this explanation, were still admissible in evidence in regard to the shipments. . . .

"So, after it appeared in evidence that defendants had engaged in business as partners up to and including Feb. 10, the time of the second shipment of goods, and that credit was extended to them as such, then the burden was on the defendants, and not the plaintiff, to show that they were absolved from liability as partners for their subsequent transactions, and that a corporation was liable therefor instead. . . .

"The burden has not been sustained by defendants. No notice of any kind appears to have been ever sent that plaintiff could no longer rely upon the arrangements made on Jan. 10. There is nothing to show that the partnership was ever dissolved, that notice of dissolution was given, or that the business of the partnership was transferred to the Stone Front Grain Co. The Stone Barn Grain Co. was not a corporation; it was nothing but a name under which defendants conducted their business; the letterheads of defendants containing that name did not convey information that the Stone Front Grain Co. was doing business; it does not appear that during the time of any of the shipments plaintiff even heard or knew of such corporation.

"The corporation had no capital stock subscribed or paid for. Its directors mentioned in the certificate of incorporation were not stockholders, as required by section 5051 of the statute. In fact, there is no evidence that the corporation ever engaged in any business whatever, except only the testimony of Wallace, given many months after these transactions, that he acted as manager thereof in connection with the orders and shipments in question, without showing that the plaintiff had any knowledge of what appears to have been his secret intentions at the time. Such secret intentions cannot transfer liability from a partnership to a corporation."

* *

In the case of Manor vs. Hindman, 97 S.E. 332, decided by the Virginia supreme court of appeals, Hindman being plaintiff in the lower court, and having been engaged in business under the name "C. C. Hindman & Co.," it was objected by defendants that he could not maintain the suit in his own name, but should have joined his co-partners. The court held, however, that the evidence failed to disclose that his business was a partnership enterprise. It is said in the decision on this point:

"He had two clerks who were paid salaries and, in addition to this, were allowed a share of the net profits, in case the concern should earn such profits; but they were in no event liable for any losses. Their contingent interest in the net profits was merely a means of measuring their salaries."

Another point made by the defendants was that, although their partnership consisted of four persons, no process was served on one of them, and that, therefore, judgment against them all was void. But the court decided that the judgment was merely vitiated as against the defendant not served, remaining valid as against the remaining parties defendant.

* *

A decision of the Minnesota supreme court applies to an unusual state of facts certain principles of the law of partnership bearing on one's liability on contracts made by an associate. Suit was brought against several defendants to recover on a flour advertising contract entered into by one of them, on a theory of the existence of a partnership between the defendants for the purpose of operating a mill. Trial of the action resulted in a judgment in favor of two defendants on their defense of nonexistence of partnership relations binding them on the contract which was not authorized by them.

In affirming the judgment, the higher court held that whether the agreement between the defendants was limited to the purpose of leasing a flouring mill and fitting it for operation, with a further provision that when it was ready for operation they would then join in forming a company to operate it, or whether such agreement contemplated that defendants should lease and repair the mill and thereafter operate it themselves, was a question for the jury; and that the jury's finding to the effect that there was no present agreement for operation of the mill was conclusive, absolving the resisting defendants from liability on the contract.

The supreme court ruled that if the agreement between the defendants had contemplated operation of the mill, the making of a contract to advertise the flour to be manufactured was within the scope of such agreement, and would have

bound all the co-partners, although made by one of them only, but that they were not bound if they merely participated in leasing and repairing the mill. The opinion recognizes the point that members of a business enterprise may become liable on an unauthorized contract entered into by a managing associate, but finds that there was no such ratification in this case. (Miller Publishing Co. vs. Orth, 157 N.W. 1083.)

SECTION 416. MEMBERS AS AGENTS FOR FIRM

A case where a retail partnership seeks to repudiate a purchase of mill products contracted for by one of the firm's members may be affected by the holding of the Minnesota supreme court in the case of Kenyon Co. vs. Johnson, 174 N.W. 436.

It was held in this case that where one partner who has exclusive management of the partnership business makes a contract on behalf of the partnership, the other partner cannot relieve himself from liability thereon by showing that he had no knowledge of the making of the contract, unless he also shows that it was outside the scope of the partnership business.

* *

According to a decision of the South Carolina supreme court, which seems to state good country-wide law, one selling goods to a partnership is entitled to recognize shipping instructions given by one member of the firm only; each member of the firm being its agent for the purpose of transacting business within the scope of the partnership enterprise (103 S.E. 30).

* *

The power of one member of a milling partnership to bind his firm by a disposition of its property was a point in issue in the case of Cleburne Roller Mills Co. vs. Leonard, 229 S.W. 605, decided by the Texas court of civil appeals at Fort Worth.

Three brothers named Anderson composed a partnership which was plaintiff's predecessor in business. John Anderson, defendant's brother, induced defendant and her husband to move to Texas, where the latter was given employment in the Anderson mill. The Leonards occupied a house and lot which formed part of the mill firm's real estate, and they claimed title to it, as against plaintiff, who received a deed covering all the mill property. The Leonards claimed the property under a verbal gift to them by John Anderson, and long-continued possession.

Holding that, although John Anderson could part with his undivided interest in the house and lot as one of the members of the firm, but that his verbal gift not shown to have been assented to by his associates could not bind them, the court said, among other things:

"The alleged gift by John Anderson being beyond the scope of his authority to bind his co-partners, if effective at all, could not in any event have conveyed more than his undivided interest in the property."

This case later reached the Texas supreme court (239 S.W. 605). The supreme court held that the case is governed by the following stated rules of law:

"One member of a partnership has no implied power to make a gift of the firm property, and any attempt on his part to do so will not bind the nonconsenting members, but him only, to the extent of his interest. Neither are nonconsenting members charged with notice of acts done by a member outside the scope of his actual or apparent authority."

There is no presumption of law that, because he was employed by the firm, Leonard's occupancy of the house was merely permitted as part of his compensation.

It is found that a jury might reasonably conclude that the Leonards were in possession under a claim of ownership which had ripened into title by adverse possession.

See, also, the last case cited in section 415.

SECTION 417. INDIVIDUAL LIABILITY OF PARTNERS

The John F. Meyer & Sons Milling Co. won a case before the Arkansas supreme court involving phases of the individual liability of partnership members. The company sued a real estate firm on a note given for the price of an automobile bought from the company, and one of the partners who did not sign the note denied personal liability on the ground that the purchase of the machine was not within the scope of the partnership business (it being a general rule of law that a member of a partnership is not liable individually on an obligation assumed by an associate in the firm name unless the transaction was within the scope of the firm's business).

The supreme court, however, upheld a finding of the jury to the effect that the objecting partner consented to the purchase, thereby eliminating all questions as to whether or not the purchase was

within the scope of the partnership affairs. (185 S.W. 276.)

SECTION 418. LIABILITY ON NOTES

Judgment in favor of the Ortonville Elevator & Milling Co. was affirmed by the Minnesota supreme court, in a case involving liability on a note. (162 N.W. 885.)

Defendants, as partners, executed a joint note to the milling company to evidence an accrued debt. Defendant Luff was not interested in the company, but his associate, Sanborn, was general manager of the mill. For convenience the cashier of a bank, where it was expected that the note would be negotiated, was named as payee.

Three months after the note was given the partnership was dissolved and Luff purchased the firm assets and business, agreeing to assume certain obligations, not including the note in question. At the same time Sanborn stated that the firm owed no other debts to the bank or its cashier than those specified. The note was never intended to belong to the bank, nor to the cashier named as nominal payee, and he indorsed it to the mill.

Under this state of facts, the supreme court, in affirming judgment in favor of the mill on the note against Luff, held that the mill was not estopped to collect the note by reason of the statement made by Sanborn concerning the outstanding debts, since the statement was made to Luff in the capacity of a co-partner, and not as the mill's manager.

SECTION 419. COMPENSATION OF MEMBERS

Since a partner, by attending to the firm business, is but conducting his own affairs, he is not entitled to any extra compensation for services unless a special agreement to that effect has been made, or unless extra trouble has been caused to him by his co-partner's neglect of duty. In the absence of special agreement to the contrary, each member of a firm takes the risk of illness of his associates resulting in loss to the firm, although extra services may thereby be required of him.

It is even held by the courts generally that where one of two co-partners dies, the survivor is not entitled to compensation for services in winding up the firm's affairs. And, if after the death the business is continued without dissolution, the survivor has no valid claim for services, except as it may have been agreed upon with the representatives of the deceased member.

A decision of the Nebraska supreme court (181 N.W. 552) drew attention to the general rule of law that a managing partner is not entitled to compensation for services, in the absence of agreement therefor. The court said:

"In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for his individual services, or to an increase of authorized compensation, unless it is allowed by contract. . . . The rule that a partner is only entitled to such compensation for individual services as is authorized by contract applies to the services of a managing partner while he is engaged in winding up partnership affairs. . . .

"A managing partner in control of partnership property conducts his own business as well as that of the other partners. His advantage, his exposure to temptation in such a relation, and the duties of all partners toward the joint enterprise forbid compensation for personal services, or for the increase of a salary formerly allowed, unless authorized by contract. Hardships sometimes result from the enforcement of these rules of law, but they are founded on the protection of property rights, business integrity, confidential relations, and the inducements to unite individual capital in a joint enterprise, and should not be relaxed in the present case."

SECTION 420. DISSOLUTION

Holding a retiring member of a business partnership to be liable for debts incurred after dissolution of the firm in transactions with one who had dealt with the firm before its dissolution and had no notice of the dissolution, the North Carolina supreme court said:

"An outgoing member of a firm should take his name out with him, for if he leaves it behind he will be considered as still holding himself out as a partner, whatever may be his real relation to the firm, unless he gives notice to those who dealt with the firm or were its customers while he was a partner, of his withdrawal."

But it is also declared in the same opinion that notice to a travelling salesman employed by a house selling goods to a firm of the withdrawal of one of the partners is notice to the house, within the general rule of law that notice to an agent in reference to business in which the agent is engaged by authority from his employer, and concerning so important a fact as to make it the agent's duty to communicate the information to his

employer, is, in contemplation of law, notice to the employer. (88 S.E. 484.)

* *

Legal angles of partnership dissolution were involved in the case of Burns vs. Treadway & Webb, 191 S.W. 868, before the Kentucky court of appeals, wherein it appeared that one member of a milling firm sold out his interest in the going business to his associate, but retained his interest in outstanding accounts collectible by the mill.

The court decided that the partnership must be regarded as continuing to exist for the purpose of collecting the bills; that either member was empowered to compromise and discharge one of the accounts the same as if there had been no dissolution for other purposes; and that since there had been no agreement that one should attend to the collections, neither could deprive the other of authority to make settlements with debtors by telling the latter that they should not settle with the other.

* *

In the suit of White Cloud Milling & Elevator Co. vs. Thomson, 175 S.W. 897, the supreme court of Missouri recognized the rule of law that, in settlement of partnership affairs, obligations of the firm are entitled to preference of payment out of the partnership assets, as against debts due from the firm to its members.

CHAPTER XLVIII

RIGHTS AND LIABILITIES OF BANKS*

SECTION 420A. DUTY TO HONOR CHECKS

"THE general rule is that a bank is bound to honor checks drawn on it by a depositor, if it has sufficient funds belonging to the depositor when the check is presented, and the funds are not subject to any lien or claim; and for its refusal or neglect to do so it is liable in an action by the depositor. This rule is well settled in this state as well as elsewhere." It was so declared by the Arkansas supreme court in the case of Marshall vs. State Bank of Siloam, 260 S. W. 431.

SECTION 420B. STOPPING CHECK PAYMENTS

Recognizing the right of a bank depositor to stop payment on his checks, so far as the bank is concerned, the Pennsylvania superior court notes:

"As a check is merely an order on the bank to pay from the maker's account, it may be revoked any time before it is paid or accepted. Where a check is issued and afterward the maker decides to recall it, he may notify the bank not to pay it, and this instruction the latter is bound to observe if the notice be in time." (Wall vs. Franklin Trust Co., 84 Pa. Super. Ct. 392.)

SECTION 421. DUTIES IN MAKING COLLECTIONS

Banks, and particularly those in the country, frequently overlook some of the important legal obligations assumed by them in accepting drafts for collection. They forget that they are agents for the owners of the drafts and, as such, are bound to use all reasonable diligence to make collection, and to promptly report results. They are apt to wrongfully favor the drawee when he happens to be one of their customers, and I do not believe that it is by any means a rare instance when a collecting bank deliberately holds back proceeds of a draft at the request of the drawee or some other customer to enable bringing of a garnishment suit. Such acts are plainly violative of the bank's legal obligations to its employer—the holder of the draft.

A case in point on the question of liability for loss resulting from unreasonable delay in attempting to secure payment of a draft is to be found in the decision of the Kansas supreme court in the case of Feeders' Supply Co. vs. First National Bank of Sedan, Kansas, 176 Pac. 129.

Plaintiff sold a carload of meal to one Leniton for delivery at Lowe, Kansas, near Sedan. Draft for the contract price was sent to the defendant for collection, Oct. 28, 1914, with written instructions: "Hold no item, unless we so instruct; but protest and return at once all not promptly honored," etc.

The draft was held by the defendant bank without presentation or demand for payment until Dec. 14, when it was returned with this indorsement: "Our information is that this shipment has been received by Leniton. Car been fed to his cattle. Mr. Leniton died two weeks ago."

When plaintiff sued the bank for damages on the ground of negligent handling of the collection, defendant replied that Leniton lived 12 miles away and that the draft was held pending his recovery from the illness which proved fatal. It was further claimed in defense against the suit that the shipment was so made that Leniton was enabled to unload the shipment on its arrival, and that the bank could not have reported on the draft before unloading.

The shipment was made to the seller's order, and the contract contemplated attachment of the bill of lading to the draft. The bill was not so attached, but there was attached a memorandum indicating that a bill of lading had been issued.

Trial of the action resulted in a judgment in the bank's favor, but the supreme court reversed the decision on appeal, saying:

"Whatever the effect of attaching to the draft another instrument than the original bill of lading, the bank could not help understanding that the draft

*See, also, the next chapter, on Drafts and Notes.

was sent to it for collection, that the feed had been shipped, and that the collection would be due on its delivery, which would naturally be prompt upon its arrival. It certainly owed the plaintiff the duty of using reasonable diligence to carry out the agency it had been called upon to exercise, and it is difficult to see on what theory the practical inaction during all those weeks until some time after the death of Leniton can be justified.

" 'The collecting bank must act in good faith, exercise reasonable skill in performing its duties, and use due care and diligence in making prompt presentment, demand, and protest, in giving notice of dishonor and in taking whatever steps are necessary to protect the customers' rights, or it will be liable for loss. It must forward the check for presentment by a direct route, and not indirectly by circulation through branch banks or otherwise.' 7 Corpus Juris, 610.

" 'When commercial paper is delivered to a banker for collection, the banker becomes the customer's agent to make collection, and he undertakes the duty of an agent for all purposes of making the collection. As in the case of other collecting agents, the bank is required to use ordinary or reasonable diligence and care in making the collection; and if, from its failure to do so, loss results to its customer, it is liable to him in damages therefor.' 3 Ruling Case Law, 610.

"It is claimed that, even if negligent, the defendant bank did not cause the plaintiff any loss which it would not otherwise have incurred. It appears, however, that Leniton was a man who handled cattle, having mortgaged a number of head to the bank; that the consignment of the meal in question was somewhat promptly taken from the railroad station and fed to Leniton's stock; that after an illness of some weeks and a stay in the hospital at Winfield, Leniton passed away, and afterwards there was collected upon this claim from his estate only $127.82, leaving a balance at the time of the trial of $433 unpaid.

"It is hardly possible that had the plaintiff been handling this collection for itself it would have permitted all these things to happen before requiring payment, and it is unreasonable to believe that the delay of the defendant bank did not occasion the loss or a considerable portion thereof. The undisputed facts render the defendant liable as a matter of law.

"The judgment is reversed, with directions to grant a new trial for the one purpose of ascertaining the extent of such liability."

* *

The appeal of Kehlor Flour Mills Co. vs. Reeves Grocery Co., 73 So. 866, decided by the Mississippi supreme court, presents a situation of peculiar interest to millers.

The mill shipped shorts to the grocery company and drew draft on the latter for the price, attaching the bill of lading. The draft was taken up before arrival of the shipment, but the collecting bank was instructed by the grocery company to retain the funds until arrival of the goods. On delivery of the shorts the buyer claimed that they were below the quality contracted for, and filed garnishment proceedings against the funds still lying in the collecting bank. The litigation resulted in the grocery company's favor.

The questions directly involved in the proceedings relate to court practice, and are therefore not worthy of note by the miller, but rather by attorneys.

But the facts of the case do suggest a practical question as to the liability of collecting banks in such instances. The bank, as agent or subagent for the collection of the draft, was legally bound, not only to promptly present the draft for collection according to its terms, but also to account for the proceeds promptly.

As I understand the law, the bank was not bound by any "instruction" given the drawee of the draft concerning disposition of the proceeds, but was bound to account for them in the ordinary course of business, and it seems that by holding the funds until the buyer was afforded an opportunity for garnishing them, the bank rendered itself liable to an action by the holder of the draft for damages. A bank's breach of duty in such case does not differ essentially from the act of an attorney who may aid a garnishment of funds in his hands belonging to his client.

* *

The Texas court of civil appeals, in the case of Terrell vs. Commercial National Bank of El Paso, 199 S.W. 1133, drew attention to the point of law that a bank undertaking to collect a draft is under legal obligation, to the customer for whom the collection is undertaken, to use due diligence in presenting the draft and in notifying him of its dishonor. But it was also noted that breach of this duty does not subject the bank to liability in excess of nominal damages, unless the complaining holder of the

draft sustains a burden resting on him to prove that he has been actually damaged by the bank's neglect of duty.

Unless it be shown that the holder would have been able to have taken other steps to protect his claim against the drawee, as by garnishing funds which might have been reached had prompt notice of dishonor of the draft been given, but which were taken beyond reach by the drawee before the holder was notified by the bank that the draft was not paid, the holder is in no position to complain of an allowance of only $1 damages.

* *

In Fort Worth Elevator Co. vs. Tradesmen's State Bank, 214 S.W. 656, the Texas court of civil appeals laid down these important rules of law relating to a bank's liability in handling drafts and attached bills of lading for collection:

An indorsement on a draft, "Pay any bank or banker or order," does not make the indorsee bank to which the draft is delivered for collection liable on the paper in subsequently indorsing it in furtherance of collection. But the indorsement may be sufficient to entitle the bank to maintain suit on the draft against the drawer or acceptor.

Where draft accompanying a bill of lading covering a shipment of wheat, or other goods, is indorsed, "Pay any bank or banker, all previous indorsements guaranteed," by a bank receiving the draft for collection, the bank does no more than to guarantee the genuineness of prior indorsements. Such an indorsement does not guarantee payment of the draft nor the existence of the goods described in the bill of lading.

Indorsement in blank of a bill of lading merely transfers the right held by the transferor in the property mentioned in the bill. An indorsement restricted to a particular person or bank transfers such rights as the indorser held in such property, but does not guarantee the quantity or quality of the goods, their existence, or the genuineness of the bill of lading.

SECTION 421A. RESPONSIBILITY OF FORWARDING BANKS

That defendant bank accepted from plaintiff for collection a draft, on condition that the bank assumed no responsibility "for any failure or delay in collecting or remitting," did not relieve it from liability for negligence of one of its correspondents in delivering a bill of lading without payment of the draft, to which it was attached. In reaching this decision in the case of Isler vs. National Park Bank of New York (147 N. E. 66), the New York court of appeals observed that for many years it has been settled law in that state "that a bank receiving commercial paper for collection is, in the absence of some special agreement, liable for a loss occasioned by default of its correspondents or other agents selected by it to make the collection."

Referring to the condition under which the bank received the draft,—an exemption from liability for failure or delay in collecting or remitting,—the court ruled that, although the condition would exempt from responsibility on account of the bank's correspondent's failure to present the draft, or collect the money, or to remit it after having collected, it did not exempt from responsibility for the correspondent's act in wrongfully delivering property—the bill of lading—to the drawee of the draft, without payment. The opinion adds:

"When, as in this case, a bank is liable for the acts of its agent in the absence of some special agreement, the agreement exempting it from liability should be so clearly stated that its customers may know, in the exercise of ordinary intelligence, the extent of the exemption. The contract in this case would not indicate to a fairly prudent business man that failure to collect included a wrongful delivery of securities or merchandise."

* *

A mill was denied the right to establish a preferred claim against an insolvent trust company on account of the proceeds of a car of flour represented by a draft that was collected by the trust company before it was closed, in the case of Hecker-Jones-Jewell Milling Co. vs. Cosmopolitan Trust Co., 136 N. E. 333, before the Massachusetts supreme judicial court.

The mill sold a carload of flour to a Boston customer and drew draft on the buyer for the price, through the trust company and to the order of a Buffalo bank. The buyer deposited enough cash and checks with the trust company to cover the draft, and took it up. The trust company sent a remittance letter to a New York bank, pursuant to collection instructions, but failed to inclose the remittance referred to in the letter. A few days later the trust company was closed by Massachusetts authorities, and the mill unsuccessfully sought to impress a trust upon the assets of that company. The following is an abstract of the

points decided by the supreme judicial court:

A bank undertaking to collect a draft for the owner is liable for any loss sustained by latter through negligence of the bank. At the same time the bank is vested with such title as is necessary to enable it to make the collection, and when the draft is paid the bank ceases to be the draft owner's agent and becomes his debtor to the amount of the proceeds. This relationship of creditor and debtor is not altered by the fact that the draft owner may have directed remittance of the proceeds to a designated bank.

Owners of drafts sent for collection are presumed to assent to the general practice of banks in mingling collection proceeds with their other funds. And, since the specific assets which were received by the trust company in collecting the draft had passed beyond its control, though being placed to the credit of another bank in the maintenance of a special account there carried by the trust company, it was held that the mill had no preferred claim against the assets of the trust company.

* *

See, also, sections 421, 427B, 429.

For treatment of a bank's rights as payee or transferee of drafts, see the next chapter.

SECTION 422. PAYMENT ON UNAUTHORIZED INDORSEMENT

When a check is drawn to the order of a business concern, a bank cashes it at its own peril on the indorsement of a collecting agent of the concern, held the Arkansas supreme court in the case of Schaap vs. State National Bank, 208 S.W. 309.

One Slates was found by the court to have received various checks drawn in favor of plaintiff, a wholesale dealer, in payment of accounts which Slates, as plaintiff's salesman, was authorized to collect. He cashed them at defendant bank, but never accounted for the proceeds.

Overruling a contention made on the part of the bank's attorneys that Slates's authority to collect past-due accounts, either in money or by checks, carried with it the authority to indorse the checks so received by him, the court said:

"The main purpose had in view was the collection of the accounts. This was accomplished when Slates had received the various checks payable to his principal. When Slates received them in payment of a debt due his principal, his duty as collector ceased except to transmit the checks to his principal. The indorsement of the checks was not a necessary incident to the collection of the accounts, and his power of receiving checks, instead of cash, did not confer power to indorse the checks."

It is decided that when Slates presented checks to the bank, bearing indorsements signed "per E. H. Slates," the bank was put on inquiry as to his authority to make the indorsement and receive the proceeds of the checks, and that the bank took the risk of assuming that plaintiff had authorized him to cash checks under such circumstances.

SECTION 423. LIABILITY ON FORGED OR ALTERED CHECKS

The liability of banks to depositors on account of checks paid on forged indorsements was considered by the Oregon supreme court in the case of Joseph Milling Co. vs. First National Bank of Joseph, 216 Pac. 560.

The opinion recognizes that there is a well-established rule of law that a depositor is bound to give the bank prompt notice on discovery of the forgery, but some courts hold that delay by the depositor in giving notice does not prevent recovery against the bank, unless the bank has been injured through the delay. The opinion adds:

"The relation between banker and depositor is one of debtor and creditor, and the implied agreement between them is that the banker will pay only in conformity with the orders of the depositor. The obligation of the bank is not merely to use reasonable care to pay in accordance with the order of the depositor, but the undertaking of the bank is, stated broadly, absolute. A bank must pay a check only to the payee named, or to his order. The obligation of the bank is to pay a check only upon a genuine indorsement. The drawer is not presumed to know the signature of the payee, but the bank must at its peril determine the identity of the payee and the genuineness of his signature. A bank cannot charge against the account of its depositor any sums as payments unless those sums have been paid to such persons as the depositor has directed, and payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon the ground of estoppel or negligence chargeable to the depositor."

* *

The following observations are neither intended to retard nor to further the

cause of those industrious salesmen who flit about offering check protecting devices and insurance policies as a means of warding off losses that may follow through rogues raising checks. It is merely designed to show that the law exacts of those who draw checks a measure of care lying somewhere between the carelessness which permits one to let a check signed in blank escape his control and that extreme caution argued for by the man who sells check protectors.

Having bought a check protector under the persuasive arguments of a salesman, I felt that I was sufficiently lightning rodded against disaster to my bank account. But the sense of security was short-lived, for the next day a surety company's solicitor assured me that there is no such thing as indelible ink; and that, just as a sportsmanlike fisherman eschews still fishing for casting, the real check raiser finds delight in removing the check "protector's" irremovable ink, in ironing out its unironable performations, and in filling in a new amount conforming to his needs and the possibilities of realization. The solicitor's conclusion was that a policy of insurance is the only feasible guaranty against torpedoing of one's bank account.

Two thoughts have been derived from talks with these solicitors. One is that the absence of a safety perforation or indelible stamp showing the amount for which a check is drawn offers the crook an attractive subject for practice of his art, in that, after raising the written amount, he can add an appearance of honesty to it by using a check protector of his own. Illustrating this, a salesman took one of my canceled $10 checks, and after making a very nifty "fifty" out of it, gave it a touch of innocence by stamping it with a perforator, "Not over fifty dollars 50."

The other thought is that the fact the law may be on one's side is poor consolation if it becomes necessary to go through protracted litigation with one's bank to determine the fact that one has not been negligent in drawing a check raised by another. If a little extra care will ward off trouble, it is better to use it than to use a minimum degree of lawful care and bump into litigation.

The subject naturally leads to a query as to what is the state of the law concerning the care that the drawer of a check must use in order that the bank may be required to stand loss resulting from cashing the paper after it has been raised by some unholy person into whose hands it may have come by chance or indorsement.

All of the judicial authorities lead one to the general rule that the exercise of such care as a prudent person would use in the same circumstances is required. Most jurors deem themselves "prudent persons." Therefore, it follows that 12 bankers sitting on a jury and applying their personal notions, are apt to concur in a view that drawing a check in pencil writing is manifest negligence—that the drawer should foresee the likelihood of some one easily erasing the amount and inserting a larger one. But 12 jurors residing in a community where check raising is comparatively unknown will probably vote unanimously that the same kind of a check was written with sufficient care.

The attitude of the courts is reflected in the court decisions referred to below.

The decision of one of the Texas appellate courts in the case of First National Bank of Newsom vs. J. C. Walling & Son, 218 S.W. 1080, is one of the latest judicial expressions on the subject. Distinguishing between a case where a check is wholly forged and a case where it is only partly altered, the court said:

"A check forged as to the signature and amount and form is entirely without fault of the depositor in the bank, and such depositor is entirely innocent of any wrongdoing or neglectful act. But the question is entirely different where, as here alleged, the drawer has actually drawn his check and has prepared it so negligently that it can be easily altered in amount and the bank officers could not by proper care and diligence have detected that the true amount had been fraudulently raised by the payee in amount.

"The authenticity of the signature to the check is not involved. It is believed that the defendant [bank] is entitled to show, as a defense, that it has done all that due care and foresight would suggest, and that the real and proximate cause of loss, in making payment of a fraudulently altered check, was solely caused by the negligence of the drawer in so preparing the check as that it can be easily altered without exciting the suspicion of a prudent and cautious man."

* *

One of the leading cases is that of Otis Elevator Co. vs. First National Bank, 163 Cal. 31, decided by the California supreme court. Plaintiff's cashier caused checks to be signed by the manager, al-

tered them and obtained the proceeds for himself. The bank relied on a claim that the plaintiff was negligent in using ledger paper for its checks, instead of safety paper, and that plaintiff had been negligent, through its manager, in signing the checks before the amounts for which they had been drawn were properly perforated on the checks.

The supreme court found it unnecessary to rule on this point, holding that, whatever might have been true if the culprit had been an outsider, plaintiff, and not the bank, must bear the loss caused by the plaintiff's cashier's forgery. However, the opinion refers to "the well-settled rule that as between a bank and its customers the payment of forged or altered checks by the bank is made at its peril and cannot be charged against the depositor's account."

"This, of course," says the court, "is the general rule, and it is applied stringently in cases of simple forgery which involve no other element than that the purported check of the depositor which was paid was a forged one.

"But this rule is not applied unqualifiedly. It has its limitations and exceptions, as general rules usually have, and is modified to the extent that when some negligent act on the part of the customer has contributed to the payment by the bank, or the facts in a particular case surrounding the forgery of a check and its presentation and payment are of such character as call for the application thereto of some general principle of law or equity, they may be relied on by the bank as an estoppel against the customer precluding him from denying the correctness of the payment."

* *

In the case of Critten vs. Chemical National Bank, 171 N.Y. 219, the New York court of appeals remarked: "The relation between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. . . .

" 'The question of negligence cannot arise unless the depositor has in drawing his check left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come.' . . . Now, while the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it."

In the last-cited case, as in the California suit, it was held that a depositor must stand loss resulting from its own cashier or clerk's forgery, where the bank innocently cashes the check. But the bank was held liable in the New York case because the check there manifestly showed that it had been altered, and because the bank made no inquiry as to the reason or authority for the alteration.

* *

Perhaps the most favorable decision, from the depositor's standpoint, is that handed down by the Kentucky court of appeals in the case of Commercial Bank vs. Arden & Fraley, 197 S.W. 951, where it was decided that, under the negotiable instrument act, the writing of a complete check with a pencil and leaving spaces sufficiently large to permit insertion of figures or words is not necessarily such negligence as will charge the drawer with any loss resulting from some one into whose hands the paper may come raising the amount written in the check. The court said:

"The chief reason ordinarily advanced for this rule is that negligence in the making of a negotiable instrument could not be considered the cause of what would require the criminal act of another to perform."

I am of the opinion, however, that the few authorities which may be found for saying that it is not necessarily negligence to draw a check in pencil or in such manner that words and figures may be inserted to raise the amount specified are better as a reliance in cases where a dispute is actually pending with a bank than as a guide for a future policy in drawing checks.

* *

The courts uniformly condemn the practice of signing checks in blank as to amount. Ordinarily, where such a check escapes the control of the drawer and the bank innocently pays it for an amount filled in by a thief, the drawer is the loser. This rule was recognized by the Indiana supreme court in the case of Citizens' National Bank vs. Reynolds, 126 N.E. 234, but the court held that the rule did not apply in this case because the bank paid the check to an unidentified person.

In other words, if a check is issued blank as to payee and a thief fills in his own name and cashes it, the bank, acting in good faith, is not liable for the loss; but if it cashes the check without

undertaking to identify the payee, its negligence will be held to be the more direct cause of the loss than the drawer's carelessness in permitting a check signed in blank to escape his control.

It has been held that delivery to a stranger of a complete check properly drawn is not such negligence on the part of the drawer as will relieve the bank from liability on paying the check for an amount fraudulently raised by the stranger. The Virginia supreme court said (26 S.E. 826) that to hold otherwise "would be to release the banks from the just responsibility imposed upon them by the law as custodians of the customer's money, and expose the depositor to a risk and danger that would greatly impair the usefulness of the bank as a safe place of deposit."

* *

An attorney received a check payable to his client. Without the client's knowledge or consent, he so altered the check as to make it payable to himself as the client's attorney. He had two accounts in defendant bank, one private and one as attorney. He had no account as attorney for the particular client, plaintiff. The attorney ultimately overdrew his account as attorney, defaulting in payments due plaintiff. In the case of Charleston Paint Co. vs. Exchange Banking & Trust Co., 123 S. E. 830, the South Carolina supreme court passed upon plaintiff's right to hold the defendant bank liable, and the following is an abstract of that court's conclusions:

A bank receiving trust funds from a trustee is liable to the true owner for the defalcation of the trustee, (1) if the bank violates the terms of the deposit contract, (2) if the bank applies the fund to payment of the trustee's private indebtedness to the bank, or (3) if the bank assists the trustee to misappropriate the fund, actually or constructively knowing that the fraud is being perpetrated. But a bank, though knowing of a trust, may assume, in the absence of intimation to the contrary, that the trustee will faithfully disburse the fund.

The attorney's act in altering the check in the manner noted amounted to forgery, making the check void excepting as to holders in due course. The bank in this case was not a holder in due course, because the check bore unmistakable evidence that it had been altered.

Transfer of the check to the bank for deposit in the attorney's account as attorney passed no title, as against the plaintiff, to whom the bank became liable on paying the proceeds over to the attorney in his individual capacity. "If the check was a forged instrument it was void, regardless of the diligence or negligence of the bank in the matter of the discovery of the forgery."

That a bank's contract with its depositors provides that it accepts checks on other banks for collection only does not relieve it of obligation to pass upon the genuineness of checks received for deposit.

See, also, section 426.

SECTION 424. DEPOSITOR'S DUTY TO CHECK ACCOUNT

In the case of Hammerschlag Mfg. Co. vs. Importers' & Traders' National Bank, 262 Fed. Rep. 266, the United States circuit court of appeals, second circuit, held that "a depositor who sends his passbook to be written up, and receives it back with his paid checks as vouchers, is under an obligation to the bank to examine and verify his passbook and vouchers, and report to the bank errors disclosed."

Applying this rule, the court holds that plaintiff is not entitled to recover from defendant bank excess payments made on checks raised by plaintiff's bookkeeper, where the bank had been authorized by plaintiff to pay checks to the bookkeeper and the checks were entirely written by him, and the alterations made by him were not discoverable by the bank by the use of reasonable care, and where, although plaintiff's passbook was written up and returned with canceled checks each month, no claim was made by plaintiff until more than a year after the raising of the checks commenced.

SECTION 425. DEALING IN BILLS OF LADING

Although national banks may buy and sell drafts to which bills of lading are attached, they have no corporate power to buy and sell bills of lading covering grain or other commodities, since that would be equivalent to buying and selling the commodities themselves, according to a decision of the Pennsylvania supreme court (92 Atl. 1078).

SECTION 426. LIABILITY ON FORGED DOCUMENTS

The right of the victim of forged bills of lading purporting to cover shipments of wheat to recover against a bank which bought the documents from the forger and sold them to plaintiff was the issue involved in the case of Howe Grain & Mercantile Co. vs. A. B. Crouch Grain Co., et al., 211 S.W. 946.

To assist the defendant grain company in securing a temporary loan to meet pressing demands, the plaintiff agreed that defendant might draw against it with bills of lading attached covering wheat, it being understood that plaintiff would draw back on defendant. The defendant grain company deposited three forged bills of lading in a bank at Temple, Texas, and received unconditional credit for the amount called for by the accompanying drafts, less discounts. The plaintiff, being equally innocent with the bank of knowledge of the forgery, paid the drafts, but when it later drew back on the defendant grain company for the amount involved, the draft was dishonored and that company's insolvency disclosed.

In suing the bank, the plaintiff took the position that the bank was merely a collecting agent for the defendant grain company, and that plaintiff was therefore entitled to reach the proceeds of the forged bills of lading still in the bank's hands; but that, if the bank be regarded as purchaser of the documents, still plaintiff was entitled to recover on a theory that the bank was not a purchaser in good faith. This contention was ruled against plaintiff, it being decided that the evidence disclosed an outright sale of the drafts to the bank, and that the purchase was made in good faith.

The opinion of the Texas court of civil appeals further held that the bank was in no way negligent in failing to discover that the bills of lading were forgeries, they being apparently genuine upon the face, and the defendant grain company having previously possessed such reputation for honest dealing as created no ground for suspicion.

It was distinctly decided by the court that an intermediate transferor of a bill of lading does not impliedly guarantee the genuineness of the railway company's purported signature.

See, also, section 423.

SECTION 427. BANK AS BONA FIDE TRANSFEREE OF FUNDS

Some important legal aspects of sales were applied by the Texas court of civil appeals at Amarillo in the case of Menke vs. First National Bank, 206 S.W. 693, in which suit plaintiff failed in an effort to hold the bank liable on a certain grain transaction.

One Bishop, a grain dealer at Amarillo, bought 1,000 bus wheat from plaintiff under a written contract, which specified that the grain was to be billed "S. O." and that the terms were "demand." Plaintiff loaded the wheat on a car at a point where there was no station agent, and left it to Bishop to procure a bill of lading. The bill was drawn to Bishop's own order, with instructions to notify a customer to whom he had contracted to resell. The document was attached to a draft, and the papers were deposited with defendant bank, which gave Bishop credit for the amount in his checking account.

This occurred Sept. 5, and plaintiff knew that the car was being moved about that time, but did not ask Bishop for payment until Sept. 19. Bishop put him off until Oct. 7, when he gave him a check on defendant bank for the contract price, $1,500. The check was not definitely presented for payment until Oct. 11, when the bank refused payment for want of funds to Bishop's credit, as it would have done had the check been presented at any time between Oct. 7 and 11.

In suing the bank, plaintiff contended that he never parted with title to the wheat, and that the bank should be held liable on the theory that it applied the proceeds of the wheat to a pre-existing debt of Bishop to the bank. Trial of the suit resulted in judgment for the bank, and the decision was affirmed by the court of civil appeals.

The higher court decided the following points:

Where the terms of a sale are cash on delivery, concurrent payment upon delivery is essential to pass title, and the seller can reclaim the property, or its proceeds, in the hands of a subpurchaser, except as he may be equitably estopped to do so.

But in this case title must be held to have passed from plaintiff to Bishop, for the written contract stipulated that the terms of the sale were upon demand, weight and grade at destination, and there was no claim that its execution was induced by fraud or mistake, although both buyer and seller testified that the original oral understanding was that the wheat should be paid for on delivery to Bishop. By assenting to Bishop's shipment of the wheat in his own name and deposit of the proceeds to his own credit, plaintiff waived any reservation of title to the wheat.

If it was contemplated that possession of the grain should pass to Bishop, but that title should not pass until payment, the contract was not binding on innocent third persons, because not expressed in a writing filed of record as a chattel mortgage.

"To ingraft upon this transaction a conditional sale after the bank had in good faith given Bishop credit on his current account for the proceeds of the sale, and after he had checked it out, and that, too, when plaintiff could have protected himself if he had demanded payment at once, would be unjust, and such a rule would unsettle and make hazardous the handling by banks of such commercial transactions, which are essential to the speedy dispensation of the products of the country."

SECTION 427A. LOAN AGREEMENTS

When a bank breaks a contract to lend money to a grain dealer for the purchase of grain, what is the measure of the dealer's recoverable damage? This is the question which was presented to the Tennessee supreme court for solution in the case of Farabee-Treadwell Co. vs. Union & Planters' Bank & Trust Co., 186 S. W. 92.

The court decided that, although it is a general rule that damages recoverable for breach of a contract to lend money are limited to any excess of the prevailing rate at which money might be obtained elsewhere above the rate at which it was agreed that the particular loan should be made, subject to the aggrieved party's right to nominal damages if there was no difference in the two rates, the defendant bank in this case is liable for loss sustained by plaintiff in being compelled to make a forced sale of grain as a direct consequence of the bank's refusal to make the agreed loan, if the bank broke the contract, and it was then too late for plaintiff to procure funds elsewhere to pay for the grain within the time payment was required under exchange rules which were known to the bank.

But the court holds that plaintiff could not recover any profit which it might have made by reason of an advance in the market price of the grain, such profit being purely speculative, in that it is a matter of conjecture as to when plaintiff would have sold.

The decision furthermore holds that, if plaintiff could have mitigated its loss by borrowing funds elsewhere, it was bound to do so, and cannot recover damages so far as they were enhanced through its omission to avail itself of opportunity for borrowing the required funds elsewhere.

* *

In the case of M. M. Pittman Roller Mill vs. National Bank of Cleburne, 252 S. W. 1096, the Texas court of civil appeals held defendant bank liable to plaintiff mill for profit lost on wheat sales, through the bank's breach of agreement to lend money to the mill with which to buy wheat. But on further appeal, the Texas supreme court decided that the bank was not liable because it did not know that the money was to be used in buying wheat for resale. The gist of the supreme court's opinion appears in the following extracts (265 S. W. 1024):

"By the first assignment of error it is claimed that the court erred in allowing defendant in error to recover, as a measure of damages, the profits that it would have made by buying and selling the wheat, and in holding that such profits were not remote and contingent. Damages for the breach of a contract can be said to be too remote and contingent only when it can be said that at the time of entering into the contract such damages were not in contemplation of the parties thereto. Whether such damages were in contemplation of the parties depends upon the contract itself, and the facts and circumstances surrounding its execution. It is a fact to be determined by the evidence or a conclusion to be drawn from the terms of the contract itself. The rule that damages which are uncertain and contingent, and therefore too remote, cannot be recovered 'only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount.' . . .

"If, as found by the trial court, it was in contemplation of the parties at the time of the contract that defendant in error was to engage in the business of buying and selling wheat with the hope of deriving a profit therefrom, it would be entitled, under proper pleading, to recover whatever net profits it could show that it would have made had the terms of the contract been complied with. If plaintiff in error bank knew at the time it obligated itself to loan the $14,000 that the defendant in error intended to use this sum in purchasing wheat to be sold for a profit, it could not excuse itself from liability for its wrong in breaching its contract on the plea that at the time of the contract it was uncertain whether there would be any profits at all. If it contracted that defendant in error should reap the benefit of profits, should there be any, it should be required to pay whatever damages defendant in error could show had been sustained by being deprived of such profits.

"However, plaintiffs in error claim

that there is no evidence showing or tending to show that defendant in error was buying wheat for the purpose of sale and that there is no fact or circumstance which would even indicate that it was within the contemplation of the parties that the money to be loaned was to be used for the purpose of buying wheat which was thereafter to be sold for a profit. . . .

"All of the evidence seems to indicate that the wheat was to be purchased for the purpose of manufacture and not for the purpose of sale. This being true, of course profits from the sale of wheat could not furnish the proper measure of damages. If defendant in error was injured by reason of a breach of the contract, such injury must, under the pleadings, be measured by what damages it could show it had sustained by reason of not having the promised funds to purchase wheat for milling purposes."

SECTION 427B. CLAIMS AGAINST INSOLVENT BANKS

The Alabama supreme court appears to have stated a generally recognized rule in holding (J. Allen Smith & Co. vs. Montgomery, 95 So. 290) that to entitle one for whom a bank collected money to acquire and enforce a lien on the funds in the hands of its receiver, it having become insolvent without paying him, he must trace and identify the money collected for him by the bank, as being on hand when the receiver took over its affairs. It is not enough to show that the receiver took over a fund with which such money had been commingled.

In the case of Clark Sparks & Sons Mule & Horse Co. vs. Americus National Bank, 230 Fed. 738, the United States district court for the southern district of Georgia said:

"(a) The bank being thus hopelessly insolvent at the time that it received and collected the draft, and the officers of the bank having knowledge of this insolvency, or being presumed to have knowledge of such insolvency, the Americus bank, on account of this fraud, did not acquire title to the draft, or to the proceeds of the collection of same. . . .

"(b) Furthermore, from the facts above stated, and from other facts shown by the evidence, including the fact that this Hanesley draft was sent to the Americus bank solely for collection and remittance of proceeds, the court is of the opinion that on this ground also the title to this draft and its proceeds never left the complainant, as the Americus bank was a mere agent for the collection of the draft. . . .

"For both of these reasons, complainant is entitled to recover the proceeds of this draft from the receiver of the Americus bank, provided it is able to trace and identify the proceeds derived from the collection of same."

A standard legal authority says: "Where a draft drawn on a debtor was sent for collection to a bank in which the debtor was a depositor, and with the depositor's consent the bank issued a draft to the creditor on a bank in another city, and charged the amount thereof to the depositor, and before such charge was made the money was remitted to pay the draft, it was held that, on failure of the first bank, the creditor cannot claim that the money sent to the second bank was so separated from the general funds of the first bank that it should be applied to his draft. . . .

"Where the bank fails after paper has been paid, either through actual receipt of the money or through applying to the payment of such paper money of the maker already in the possession of the bank, the loss falls upon the owner of the paper and not upon the maker. But if, although both money and paper are received before maturity of the paper, the bank fails after the paper has matured, but without having applied the money to the payment thereof, the loss falls on the maker. Again, if the paper is not received at maturity, but the money is there awaiting application, and is kept there for that purpose, and is afterward lost through the bank's insolvency before the paper is received, the loss falls on the debtor for the reason that, until receipt of the paper, the bank is acting solely as his agent." 7 Corpus Juris, 626, 627.

If a depositor's account with a bank shows a balance in his favor, when the bank receives from him a draft made payable to its order, and credits it to his account, and thereafter the bank is closed before the depositor draws out any portion of the proceeds of the draft, there is a failure of consideration for the draft. (Minnesota supreme court in St. Paul State Bank vs. Rippe Grain & Milling Co., 199 N. W. 519.)

CHAPTER XLIX

PROMISSORY NOTES AND DRAFTS*

SECTION 428. EFFECT OF PERSONAL SIGNATURE

THAT a mill official, in signing a note for his corporation, should be careful to add to his signature his official title, when he does not intend to bind himself personally, is a warning to be taken from a suit brought in Kansas City against a Miss Truskett on a note given by the Truskett Milling Co., and signed by her. It seems that Miss Truskett was secretary of the company, but that she omitted to add the word "Secretary" after her signature, and that the holder of the note brought suit to hold her personally.

The courts have frequently been called upon to determine questions of personal liability in cases of this kind, and the appellate court decisions on the subject appear to establish the following rules of law:

When the note, read in its entirety, shows on its face that the official intended to sign in a representative capacity only, there is no personal liability, although there was no signature in an official capacity. On the other hand, when the whole note fairly shows an intention to bind the signer in his individual capacity, his personal liability will not be released by the fact that he may have added his official title to the signature. In such case the designation of his office will be treated as surplusage.

As between the original parties to a note, a personal signature could be shown by extraneous evidence to have been mutually intended as a representative signature only. But, no doubt, this proof would not be permitted in a suit brought by a bona fide purchaser of the note before maturity, when the tenor of the note indicates personal liability.

The safest way to avoid controversies of this kind is to have the note read: "The X. Milling Company promises to pay," etc; and to have it signed "The X. Milling Company, by John Doe, Secretary," or in a similar manner if executed by another officer of the company.

SECTION 429. INDORSEMENT FOR COLLECTION

Because a mill which took a note from a distant debtor and which indorsed it over to a bank failed to note that the indorsement was made for collection purposes only, a lawsuit resulted in Missouri courts.

The Craddick Milling Co., Grand View, Ind., took a note from a mercantile company at Caruthersville, Mo., and sent it to a bank at that town with the indorsement: "Pay to the Pemiscot County Bank, Caruthersville, Mo. Craddick Milling Company, by D. E. Craddick, Pres. & Treas." The letter accompanying the note showed that it was sent for collection, and the bank apparently obtained payment and remitted on it, without surrendering the note to the makers.

The bank was placed in the hands of a receiver later on, and the receiver, finding the note, sued the makers and the milling company, as indorser, on it, on a theory that the note had become the property of the bank. But it was found by the Springfield, Mo., court of appeals that the evidence sufficiently established the fact that the note came into the hands of the bank for the purpose of collection only. The case was therefore decided in favor of defendants. (210 S.W. 774.)

The "moral" of this case is: When a note is sent to a bank in a case like this, the indorsement should read, "Pay to the order of the Jonesville Bank for collection."

See, also, sections 421, 421A.

SECTION 430. LIABILITY OF SURETY

In the suit of Dunlop Milling Co. vs. Collier, 92 S.E. 296, which arose at Atlanta, the Georgia court of appeals held that where a surety had been induced to sign notes for another on the strength of the terms of an agreement between the principal debtor and the creditor, relating to the notes, he was entitled to rely upon breach of the agreement by

*See, also, the preceding chapter, on Rights and Liabilities of Banks, and section 418, concerning partnership liability. As to the validity of a note given for a defalcation, see the section on Settling with Embezzlers in the last chapter of this book.

the creditor as relieving him from liability on the notes, by showing that the creditor knew that the terms of the agreement constituted the inducement to sign as surety, and that the breach of the agreement operated to the prejudice of the surety. For this purpose it is not necessary that the surety be a formal party to the contract in question.

"It seems perfectly clear to us," said the court, "that, while neither the acts of the principal debtor nor the acts of any other person than the creditor himself, by which one is induced to become a surety, can affect the rights of the creditor, even though the acts be fraudulent, yet when the fraudulent acts of the creditor himself induce one to become a surety, the rights of the creditor are thereby affected if such acts of the creditor tend to increase the risk of the surety or to expose him to greater liability. The creditor is not responsible for the acts of another unauthorized by him, but he is responsible to the surety for the consequences of his own acts."

SECTION 431. LIABILITY OF INDORSER

Affirming judgment for plaintiff in the case of Central National Bank of Portsmouth vs. Sciotoville Milling Co., and others, 91 S.E. 808, the West Virginia supreme court of appeals decided that where a promissory note contains on its back a printed provision, "The within note is hereby indorsed and demand, notice of nonpayment and protest waived," or other similar clause, all successive indorsers, and not merely the first, who sign their names below, are bound by the waiver.

SECTION 432. RIGHTS OF BONA FIDE HOLDERS

A note given for the price of stock in an Indiana elevator corporation formed the basis of the suit of the First National Bank of Fort Wayne vs. Garner, 118 N.E. 813, passed upon by the Indiana supreme court.

The decision is that, as between defendant, the maker of the note, and the elevator company, the payee, it would be a good defense that defendant was induced to deliver the note in reliance on materially false representations made by the company's representatives concerning the value of the stock, whereas the stock was worthless.

But as against plaintiff bank, which bought the note before its maturity, it is held that the defense of false representations could not be asserted unless the bank knew when it bought the note that it had been obtained fraudulently, or was so informed as to the circumstances under which it was taken as to raise an inference of bad faith.

SECTION 433. RAILROAD AID NOTES

The Purcell (Okla.) Mill & Elevator Co. gave to a railway construction company a note promising to pay $2,000 should a certain line of railroad be constructed to the town by a fixed date. Although the road was constructed within that time, the mill company refused to pay the note, claiming that the transaction was invalid as being against public policy and as not being supported by any sufficient consideration. These claims were presented to the Oklahoma supreme court on appeal by the mill from a judgment for the amount called for by the note, but that tribunal affirmed the judgment, saying:

"A note of this character, given in aid of the construction of a line of railroad on condition that the road be built to a certain point or completed by a certain date, may be enforced when the railroad is completed according to the stipulations in the note, in the absence of fraud in the procurement thereof or circumstances that would make the same contrary to public policy." (160 Pac. 485.)

SECTION 434. OWNERSHIP OF DRAFTS

Being able to sue or defend suit on the home ground has manifest advantages. It becomes more manifest when a mill having a claim against a customer in a different state, or vice versa, finds it necessary to bring suit, or defend one, several hundred miles away. So, it is a matter of no little importance to know what limitations there are on the right of a claimant to garnish the proceeds of a shipment, or attach the shipment itself, for the purpose of getting jurisdiction of one's adversary. The subject was discussed by the Texas court of civil appeals at Austin in the case of Cairo Flour Co., Waco, vs. Provident National Bank of Waco, 226 S.W. 499.

S. J. Hawkins, Rupert, Idaho, shipped grain to the flour company, under draft in favor of a Rupert bank and against the company. The company paid the draft, but immediately garnished the proceeds on a claim again Hawkins. The Rupert bank intervened in the proceedings, asserting ownership of the garnished funds.

The trial court ruled that plaintiff flour company was entitled to hold the money on its claim against Hawkins, but the court of civil appeals overruled the decision, sustaining the Idaho bank's con-

tentions. The higher court said, in part:

"The burden of proof rested upon the plaintiff to show that the money which it had paid to the Provident National Bank [the garnishee] on the draft drawn upon it by S. J. Hawkins was not the money of the First National Bank of Rupert, Idaho, the payee named in the draft, but belonged to and was the property of S. J. Hawkins, against whom the plaintiff held an unsatisfied judgment; and the plaintiff not only failed to make such proof, but the undisputed testimony shows that the money referred to belonged to and was the property of the intervener, the First National Bank of Rupert, and therefore was not subject to garnishment in the hands of the Provident National Bank, which had collected the same as agent for the First National Bank of Rupert. . . . 7 Corpus Juris, 635. The last authority reads as follows:

" 'Where checks or drafts are indorsed and are accepted as cash they become the property of the bank, and the bank becomes the debtor of the depositor in the amount of such check, even though it is understood that the bank has the right to charge back the amount if the paper deposited proves uncollectible. So where a bank accepts for deposit a check drawn on itself, and credits the payee with the amount, this creates the relation of debtor and creditor between the bank and the payee, and is equivalent to a payment of the amount of the check to the drawer; and it is held that, under such circumstances, the bank has no right to charge back the amount credited to the payee, even though the drawer fails to pay the amount.' . . .

"The conclusion most favorable to plaintiff that can be placed upon the testimony is that the bank received the draft from Hawkins under an agreement upon its part to place the same to his credit, and the very fact that Hawkins was the drawer of the draft constituted an implied promise upon his part to pay the same, if it could not be collected from the drawee, who was the plaintiff in this suit.

"The bank placed the amount of the draft to Hawkins' credit, and thereby executed its part of the contract; the plaintiff paid the draft to the agent of the First National Bank of Rupert, thereby rendering it certain that the Rupert bank could assert no claim against Hawkins; and those facts render the contract between the Rupert bank and Hawkins an executed contract.

"Payment of the money to the Waco bank, the garnishee in this suit, was the same in law as though it had been paid to the Rupert bank, and therefore, as between the bank and Hawkins, the transaction became a closed affair; and, such being the case, the title of the Rupert bank to the fund in question is just as absolute as it would have been if the plaintiff, instead of paying the money to its agent, had paid it directly to the Rupert bank.

"Such being the case, and there being no proof that the Rupert bank acquired the draft for the purpose of defrauding the plaintiff, the latter cannot deprive the Rupert bank of title to its property by garnishment proceedings against its agent who holds the same as such agent, and not in its own right."

* *

However, it is now established law that under acts of Congress an interstate shipment under a negotiable bill of lading is not, while in the possession of the carrier, subject to levy under garnishment, attachment or execution process, unless the bill of lading be first surrendered to the carrier or its negotiation enjoined. On this proposition, see the decision of the Iowa supreme court in the case of Bell vs. Courteen Seed Co., 196 N.W. 1006.

* *

When a mill transfers shipping documents to a bank, with intent to vest in the bank title to the goods covered by them, and not merely for the purpose of collecting for the mill draft attached to such documents, and when the shipment is attached at its destination on a claim against the mill, the bank, and not the mill, is the proper party to appear in defense against the attachment proceedings. This is what the Mississippi supreme court held in the case of Weaver Grocery Co. vs. Cain Milling Co., 78 So. 769. The decision rests, however, upon the point that no service of process was had on the milling company, a nonresident corporation.

The court decided that, where there is a mere attachment of goods in a case of this kind, the proceeding becomes one only for the condemnation of the property and application of the proceeds to any just claim established by the plaintiff against the person designated as defendant, except as the latter may voluntarily appear and submit himself to the jurisdiction of the court, in which case personal judgment may be awarded against him on proper pleading and proof.

If a mill has parted with all interest in a shipment by selling the shipment documents covering it, it cannot be injured by a subsequent seizure of the goods, and for this reason it was decided that the mill has no standing to attack the attachment proceedings on the ground that it had sold the goods. This defense must be interposed by the third person to whom the property has been transferred by the mill.

It is to be inferred from numerous lawsuits reported in the decisions of appellate courts throughout the country that frequently a mill's customer orders a bill of goods shipped to him under an order bill of lading with draft attached, with intent to garnish the proceeds of the draft as soon as he has paid them over to the collecting bank, on some just or unjust claim against the mill arising under a previous transaction.

This course is pursued especially where, because the mill has no representative in the county where the customer resides, garnishment affords the only means whereby the customer can compel the mill to come to his county to defend the claim, instead of the customer being required to sue where summons can be served on the mill.

* *

A case bearing on this subject is Stallings et al vs. Claremore (Okla.) Mill & Elevator Co., 177 Pac. 373. Plaintiffs were defeated in an attempt to hold the proceeds of a draft paid by them in garnishment proceedings on a damage claim against the mill.

Defendant shipped mill products to plaintiffs at Hartshorne, Okla., under the usual shipper's order documents. Plaintiffs took up the draft, but, before the collecting bank remitted the proceeds, they tied up the funds by garnishment on a claim against the mill for damages for an asserted breach of contract for the shipment of mill products.

The First National Bank of Claremore intervened in the suit, and showed that when the draft in question was drawn it was at once transferred by the mill to that bank, and that the discount proceeds had been credited to the mill and checked out by it.

The trial judge ruled in favor of plaintiffs, but on the Claremore bank taking an appeal to the supreme court of the state that tribunal reversed the decision, holding "that the money in controversy belonged to the First National Bank of Claremore, and that the judgment of the trial court to the contrary was error."

* *

Flour shipped on an order bill of lading which has been transferred to a bank is not subject to attachment as the property of the mill, according to the holding of the Alabama court of appeals in the case of Owensboro Banking Co. vs. Buck, 77 So. 940.

The Bransford mills, of Kentucky, shipped a carload of flour on an order bill of lading, with directions to notify the T. D. Lewis Grain Co., at Bessemer, Ala. Draft covering the price was drawn on the grain company, with attached bill of lading. These papers were indorsed by the mill in blank, and delivered to the bank, which credited the mill's account for the amount called for by the draft, less exchange, and later a debt of the mill to the bank was paid by applying this and other credits.

Apparently the draft was not paid by the grain company, which, instead, attached the flour on its arrival as the property of the mill, to satisfy a claim for damages for an asserted breach of contract. The bank interposed a claim of ownership of the flour, which was overruled by the trial judge, but allowed by the court of appeals on an appeal being taken.

The higher court held that, when shipping documents are transferred under the circumstances stated, the transferee acquires a special property right in the goods covered by the bill of lading, and that this right becomes absolute on the failure of the proposed buyer to pay the draft and take up the bill of lading.

* *

Another case in point is National Bank of Ashtabula vs. Bradley, 264 Fed. 700, decided by the United States district court for the western district of New York.

Plaintiff bank sued defendant sheriff for the value of six cars of corn seized by defendant on attachment by the Buffalo Grain Co. against one Horton, a miller. The court's decision was in plaintiff's favor.

Horton shipped the corn to the Globe Elevator Co. on order bills of lading attached to drafts, and deposited the documents in plaintiff's bank, receiving a cash credit, which was afterwards completely checked against. The elevator company rejected the drafts, but accepted possession of the corn for drying purposes and storage. Later the company declined to surrender the corn to plaintiff.

Disposing of the contest between the grain company and the bank, the court says:

"The question for decision is whether the transaction and conduct of the plaintiff, at the time of discounting the drafts, proves that the bank became the purchaser of the bills of lading from Horton, or whether they were taken for collection only.

"There was testimony on behalf of the defendant tending to show that the corn had not previously been sold to the Globe Elevator Co. by Horton, but had merely been consigned to it as sales agent and, moreover, that the consignee had not authorized drawing of the bill of exchange against it; that on arrival at Buffalo the corn was looked after by the consignee at the request of Horton, who continually thereafter solicited sales at a certain price.

"The defendant claims generally that throughout the transaction Horton evidently held himself out as owner of the corn, and that the fair inference therefrom, and from other evidential circumstances, is that the drafts were credited upon the understanding that in case they were not paid they would be charged back to the account of the drawer. But I think the facts and circumstances in their entirety prove that the bank became the buyer of the grain and did not take the drafts merely for collection.

"The law relating to title to movable property in a person holding a bill of lading is clear. It has many times been held in this state that the possession of the bill of lading of the goods therein described, whether indorsed or not, is presumptive evidence as against any person not showing a better title. . . .

"'Any act of the drawer after the delivery of the bill of lading and discount of the draft does not affect the rights of the person discounting the same.'

"Hence it would seem that any communications passing between the drawer and the drawee of the bills of exchange do not affect the rights of the bank, which had previously discounted the drafts, or relieve the defendant from liability to the rightful possessor. It is urged that a form of deposit slip, in evidence, used at times by the bank, contained reservations to the effect that the bank acted as agent on out-of-town items and, considered in connection with the communications passing between the drawer and drawee of the drafts, proves an intention to charge back the amounts if they were dishonored. . . .

"The plaintiff in this case, it is true, could have charged the amounts of the drafts back to the drawer, upon the refusal of the drawee to accept the same, but it was not obliged to adopt such method of repayment of the advance.

"Upon discounting the drafts and receiving the bills of lading, it had security for repayment in the way of a special property in the corn and the right to repossess itself thereof. Indeed, the legal title passed to it, and operated to change possession of the grain from the original owner. . . . In the federal courts the rule as to delivery of discounted drafts and bills of lading to a bank making advances to the drawee is substantially the same. . . .

"In the state of Ohio, where the bill of exchange was drawn and discounted, it has been held that a bank discounting the drafts, even though the drawer has overdrawn his account, becomes a holder of the drafts for a valuable consideration."

* *

"Where a shipper of goods by rail draws a draft on the consignee in favor of a bank, and surrenders the bill of lading to the bank and receives credit from the bank for the value of the draft, and the draft with the bill of lading attached is forwarded by the bank to its local banking correspondent at the place where the goods are to be delivered, and the consignee receives the bill of lading upon payment of the draft, and thereby obtains the possession of the goods, it is held that no garnishable interest of the shipper remained in the proceeds of the draft in the hands of the local banking correspondent, as the title to the goods had passed, either absolutely or as security, to the bank which extended credit thereon to the shipper; and this rule is unaffected by any question whether the shipper had checked against the credit given to him for the draft and bill of lading." (Lampl vs. Hawkins, 188 Pac. 233, decided by the Kansas supreme court.)

It was decided by the Kansas supreme court in Ranney-Davis Mercantile Co. vs. Bumgardner, 185 Pac. 287, that transfer of the documents to a bank vested it with title to the goods and their proceeds, thereby making the funds exempt from seizure in legal proceedings against defendant.

See, also, the decision of the North Carolina supreme court in the case of

Sterling Mills vs. Saginaw Milling Co., 114 S. E. 756.

* *

A decision of the Iowa supreme court seems correctly to reflect legal principles recognized by most of the courts throughout the country.

In this case—Acme Hay & Mill Feed Co. vs. Metropolitan National Bank, 201 N. W. 129—it appeared that the Rutherford-Brede Co. drew a draft on plaintiff, attached to a bill of lading. The draft was payable to the bank, which credited the amount called for to the drawer's account. Plaintiff paid the draft when it was presented by a Sioux City bank, but immediately garnished the proceeds on a claim not connected with the transaction out of which the draft arose. The Metropolitan National Bank intervened in the suit, claiming the funds, and judgment in its favor was affirmed by the supreme court on plaintiff's appeal. That court said:

"The appellant insists that, inasmuch as the defendant [the drawer of the draft] did not withdraw the amount of its deposit with the intervener before the garnishment, the intervener did not become a holder of the draft in due course. This may be conceded, but the conclusion that the intervener was not a holder in due course is not determinative of its right to the proceeds of the draft. Appellant is not defending against the draft; that has been paid. It is seeking to hold the proceeds of the draft in the hands of the garnishee as the property of defendant [the drawer of the draft]. Of course, by its garnishment it acquired no greater right to the proceeds of the draft than the defendant had. The question at issue is one of title. The rights of the intervener depend, not upon whether it was a holder of the draft in due course, as that term is defined in the negotiable instruments act, but whether it was the owner of the draft. . . . If the intervener was the owner of the draft, the fact that it was not a holder in due course would not affect its right to the proceeds upon payment as against a creditor of the drawer. . . .

"The vital question in the case is whether the bank became the owner of the draft or merely a bailee—whether it took it as owner or for collection. . . . With a few exceptions, the rule is generally recognized that the determination of the question is controlled, in the absence of express agreement, by the intention of the parties as shown by the attending circumstances. The difference of opinion to be found . . . as to the presumption that shall obtain where nothing more appears than the mere indorsement to and deposit with a bank by a customer of a check or draft upon a third party, where the customer is given credit for the amount upon his account, and has an immediate right to draw upon it, appears, however, to be irreconcilable. . . .

"The rule supported by the very decided weight of authority is, however, that where a check or draft is deposited by a customer, and credit given therefor by the bank on his account as cash and against which he has an immediate right to draw, in the absence of any understanding as to how it shall be treated, or proof of circumstances from which such an understanding may be inferred, prima facie the title to the paper passes to the bank. . . .

"We have, then, this state of facts: The draft was drawn in favor of the intervener bank, and was deposited to the defendant's account therein and defendant given credit for it. The defendant exercised the right to check upon the account before the collection of the draft by intervener, and had by so doing reduced the account to an amount less than that of the draft before the garnishment. There is nothing whatever in the record from which there can be inferred an intention of the parties that the draft was deposited only for collection, or that the intervener was not the owner of the draft. The admission of counsel that the bank had a right to charge defendant's account with the amount of the draft if it was not paid is not alone sufficient, under the circumstances, and according to what we believe is the proper rule under the authorities cited, to justify a contrary holding."

* *

A decision on the other side of the question, turning on the fact that the evidence showed that the bank received the draft for collection only, is to be found in the case of Moon-Taylor Co. vs. Gray-Smith Milling Co., 97 S.E. 213. In this case it appeared that defendant shipped a carload of wheat to a customer in North Carolina, with bill of lading attached to a draft on the latter. On payment of the draft, plaintiff attached the proceeds in the hands of the collecting bank at Greensboro, on a claim against the defendant milling company for an asserted breach of a commission contract and for claimed inferiority of a prior shipment of wheat.

A Cleveland bank, claiming to be the

owner of the draft through indorsement of it by the mill to a Wooster, Ohio, bank, which credited the amount thereof to the mill's checking account, and through indorsement by that bank, intervened in the suit as the actual owner of the draft proceeds.

Affirming a judgment in favor of the plaintiff, the North Carolina supreme court held that the intervening bank failed to sustain the burden cast upon it by the law to prove that it was a bona fide purchaser of the draft, and not a mere indorsee for collection. It was decided that the jury was warranted in finding from the evidence that the draft passed through the bank's hands for collection only, especially as it bore on its face the words "Collection No. 1876."

In litigation between the Wichita Mill & Elevator Co. and the West Texas National Bank, involving disposition of the proceeds of a grain draft, the Texas court of civil appeals decided the following points of law:

Where wheat was consigned to the shipper's order with bill of lading attached to a draft drawn in favor of a bank, the bank was presumptively the owner of the fund arising from payment of the draft, except as the bank may have transferred its rights.

To transfer the interest of the shipper under such circumstances it need not appear that the bill of lading was formally indorsed; the fact of transfer may be proved regardless of any indorsement of the draft or bill of lading. There is sufficient assignment of the bill of lading to a bank where it is attached to a draft drawn by the consignee in favor of the bank.

That there may exist among banks a general custom to charge back to their immediate indorsers the amount of funds credited on the indorsement, when a draft is dishonored by the drawee, does not alter the legal proposition that each successive delivery of the draft from one hand to another operates as an assignment of the funds in present ownership. (194 S.W. 835.)

SECTION 435. RIGHTS AND LIABILITY OF TRANSFEREE OF DRAFT

The general proposition of law, that a bank, by discounting a draft attached to a bill of lading, does not become a party to the transaction of sale in such sense as to become jointly liable with the seller for any breach of an express or implied warranty under which the goods covered by the bill of lading were sold, appears to be settled by preponderance of judicial decision. But the Connecticut supreme court of errors held, in the case of Williams vs. National Fruit Exchange, 111 Atl. 197, that this rule is to be qualified by saying that the bank is not liable on such warranty, unless it has been guilty of bad faith.

So, as applied to an instance in which flour or grain is sold, with sight draft drawn against the buyer with shipping documents attached, the buyer could hold a bank, which discounted the draft and collected it from him, liable for return of the money paid, by rejecting the shipment as not being in conformity with the contract, provided that it be shown that the bank acted in bad faith to the extent of discounting the draft with knowledge that the goods were not as warranted; but where no bad faith is chargeable against the bank, the buyer's remedy is limited to proceeding against the seller.

As illustrating the general rule, the court cites the case of Hawkins vs. Alfalfa Products Co., 153 S.W. 201. In that case the evidence showed that defendant sold plaintiff a carload of meal for shipment from Nebraska to Kentucky, and drew on plaintiff in the usual way. The draft was discounted by a local bank, which forwarded it for collection.

Plaintiff paid the draft, and then discovered that the meal was worthless, as he claimed. Immediately he sued defendant and the discounting bank, attaching the money he had paid on the draft before it could be remitted by the collecting bank. His claim was that the discounting bank, by making the discount, became liable to him for performance of the contract, but the Kentucky court of appeals, after examining the judicial precedents, said:

"In paying the draft and taking possession of the goods the right of the buyer to enforce compliance with his contract by the party with whom the contract was made is unimpaired, and to the party with whom the contract was made he must look for damages for its breach. If the goods do not fulfill the contract, the buyer must look to the seller for compensation or recoupment, and if they are damaged in transit by the fault of the carrier, he must look to the carrier for indemnity.

"When the buyer, in a case like this, pays the draft, the transaction between him and the owner and holder of the draft is a closed incident. His acceptance of the draft creates a new and independent contract, and the only one

that exists between him and the bank, and when he has paid the draft this contract is fully executed and the bank released from all liability to him."

* *

Where a bank buys shipping documents covering goods bargained for between other parties, the law will not raise an implied warranty on the part of the bank concerning the quality or condition of the goods. So holding, the Georgia court of appeals defeated a suit brought by the Horne-Andrews Commission Co. against the Terre Haute National Bank, 101 S.E. 6.

The Prater-Mottier Co., Terre Haute, Ind., contracted to sell plaintiff a carload of corn f.o.b. destination, Milledgeville, Ga., and drew draft on plaintiff, payable to the defendant bank's order and attached to the bill of lading. The bank purchased these documents outright, not merely receiving them for collection of the draft for the seller of the corn.

Plaintiff, having no previous opportunity for inspection of the corn, paid the draft, and then discovered that the corn had so far rotted as to be valueless. Suit was brought against the bank to recover the purchase money, which was attached while still remaining in the hands of a collecting bank.

Ordering dismissal of the suit, the court said:

"No such relation between plaintiff and defendant has arisen simply upon the purchase of the draft and bill of lading by the defendant of the goods bought as will entitle the plaintiff to recover for a breach of duty imposed by law upon the seller of the goods."

But in the case of L. Marks' Sons vs. West Tennessee Grain Co., 81 So. 162, the Mississippi supreme court ruled that where a bank becomes the owner of a grain draft attached to a bill of lading, by transfer from a shipping seller of the grain, the bank becomes a co-warrantor with the shipper, warranting the soundness and merchantable condition of the grain, in tendering the documents to the buyer.

Applying this principle, the court held that where the same bank became owner of two such drafts under independent sales of grain, the buyer was entitled to attach the proceeds of the second draft to secure payment of damages arising from unsound and unmarketable condition of the shipment made under the first draft and bill of lading.

* *

The West Virginia court of appeals, in the case of Old National Bank of Waupaca vs. People's Bank of Harrisville, 108 S. E. 716, gives a comprehensive view of important legal angles of transactions under which shipping documents are transferred, dealing particularly with the buyer's right to inspect the shipment before paying the draft and his right to make a conditional payment.

Leonard, Crossett & Riley drew a draft on R. C. Marshall for the price of a carload of potatoes shipped under an order bill of lading. The plaintiff bank discounted the draft for the shipping firm and sent it to defendant bank for collection, with the bill of lading attached. The railroad agent at the destination of the shipment refused to permit inspection without production of the bill of lading. Marshall paid the draft, surrendered the bill of lading to the railroad company, inspected the shipment, and then notified the defendant bank that the potatoes were rejected for inferiority. The draft was returned to the bank, but the railroad company refused to return the bill of lading. Defendant then refused to surrender the proceeds of the draft until adjudication of the rights of the parties, and plaintiff brought suit to determine those rights. What became of the shipment does not appear. Disposing of the case on appeal, the supreme court of appeals said:

"It is very well established that, where the consignor of goods discounts a sight draft representing the purchase price thereof, to which draft is attached a bill of lading, the holder of this draft has a property in the goods, and is entitled to have the same held by the carrier until he surrenders the bill of lading. . . . The bill of lading is in the nature of a muniment of title, the holder of it being entitled to demand possession of the goods shipped when they reach their destination, and the carrier being relieved of liability on account of the carriage of said goods when it delivers the same to the holder of such bill of lading.

"That Marshall had a right to inspect these goods before receiving them is true. The bill of lading provided for this inspection, and whether it did or not he would be entitled to make it before receiving the goods (10 C. J. 253). The railroad company did not have the right to require the surrender of this bill of lading before permitting inspection of the goods. It might be proper for the carrier's agent to require that the bank holding the bill of lading direct him to permit inspection simply for the purpose

of knowing that the party making such inspection was authorized thereto by the holder of the bill of lading. The defendant bank, when it received this draft, was acting as an agent of the plaintiff. Its authority in the premises was limited to collecting the draft and delivering it with the bill of lading attached to Marshall, or returning it with the bill of lading attached upon refusal of the purchaser to pay the same. It could not deliver the bill of lading to him upon any conditions or under any agreement that it should be returned and the money repaid should he thereafter be dissatisfied with the goods. To hold that Marshall could pay this draft as he did, and upon discovering that the goods did not comply with the seller's warranty, demand his money back, would be in effect holding that the assignee of the draft with the bill of lading attached was liable to answer for the quality of the goods, while it is held with practical uniformity in this country that under such circumstances the purchaser's remedy is against the seller, and the assignee of the draft with the bill of lading attached cannot be held for a failure in quality or a breach of warranty. . . .

"These authorities clearly establish the doctrine in this country that the bank which discounts a draft with a bill of lading attached is not, in the absence of bad faith on its part, answerable to the drawee for the performance by the assignor of the contract. It is quite true, as before stated, that Marshall was entitled to inspect these goods before receiving them. This is a right, however, that he was not required to exercise. He could pay the draft and take up the bill of lading if he desired, and rely upon the seller's warranty to protect him. This right of inspection he must exercise seasonably. He could not pay off the draft and deliver the bill of lading to the carrier, and then demand his money back upon finding that the goods did not meet his expectations. When the defendant bank delivered the bill of lading to him, it passed the title to the goods, and the title to the money passed to the plaintiff bank, and when Marshall delivered this draft to the carrier's agent, and accepted the carload of goods, he cannot be said to have accepted it for any qualified purpose, for, by delivering the bill of lading to the carrier, he discharged the carrier of liability in connection with the carriage of the shipment, and received to himself not only the title, but the possession of the property. When a bank receives a draft with a bill of lading attached, as did the defendant bank in this case, it makes itself liable to the owner of the draft if it deliver the bill of lading to the assignee without requiring payment of the draft; and likewise if it does require such payment before delivery of the bill of lading, it cannot withhold the money it thus collects from the party for whom it undertook to collect it.

"The stability of commercial transactions of this character requires that the rights of the parties thereto be definitely and certainly fixed at each stage of the proceeding, and not dependent on any whim or caprice of either party. Every act done must have attached to it a definite and certain meaning and effect, regardless of what may have been the intention of either party. When Marshall, upon the refusal of the railway company's agent to permit him to examine the goods, paid this draft and surrendered the bill of lading to the carrier's agent, he became vested with the full title in the property. He waived his right to have an inspection of the goods before acceptance, and he cannot, after having waived the same, subsequently rely upon it. The doctrine of the liability of a bank, standing in the position of the defendant in this case, to the holder of a draft, for an unauthorized delivery of a bill of lading attached thereto, is fully recognized by the authorities. . . . We are of opinion that the money now in the possession of the defendant bank is the property of the plaintiff, and that it had the right to maintain this suit to recover the same upon refusal of the defendant to pay it over."

CHAPTER L

CONTRACTS RESTRAINING TRADE

SECTION 436. VALIDITY IN GENERAL

IT is well settled by the leading authorities, both federal and state, that the law does not affix the brand of condemnation upon any contract, agreement, or arrangement, unless it unreasonably and unduly restricts trade or commerce, or unduly or unreasonably restricts competition in the supply or price of an article or commodity in common use, or tends to produce such results. In other words, it must be shown that the parties who seek to control or monopolize the avenues of industry, in order to prevent free and unrestricted competition in business pursuits, have sufficient power to control or possess effective means to dominate the particular business in which they are engaged. (People vs. Baff, 164 N.Y. Supp. 709.)

SECTION 437. CONTRACTS NOT TO RE-ENGAGE IN BUSINESS

When a mill or other business is sold, how far may the seller legally bind himself against re-engaging in the same line of business? The answer to this question may be found in a decision announced by the West Virginia supreme court of appeals in the case of Boggs vs. Friend, 87 S. E. 873.

The court, adhering to the rule laid down by the courts generally, held that an agreement to sell a business may bind the seller not to engage in a rival business within the neighborhood thereof or so close as to detract from the natural patronage of the establishment sold. This principle applies to small mills having only a local trade, and the ruling is not inconsistent with the holdings of other courts under which, on sale of a mill doing a nation-wide business, the seller might validly agree not to re-enter the milling business anywhere in the country.

The test of legality of these agreements is the reasonableness of the restraint imposed against the seller, and it will be enforced as to time and space only to the extent necessary to protect the rights of the parties and any interest the public may have in the particular transaction.

Two important points adjudicated in the West Virginia case were that, even if the seller's agreement not to re-engage in the particular line of business contains no limitation as to time or space, it will be upheld for such time and throughout such territory as will protect the buyer in the enjoyment of good-will purchased; and that when the real estate on which business is conducted is sold along with the business, it will be presumed, in the absence of stipulation to the contrary, that the good-will was intended to pass too, although the contract may not specifically include it.

The following rule announced by the North Carolina supreme court is the generally recognized test of validity of such agreements:

"The good-will of a business being recognized as intangible property which the owner may sell, and it being for the benefit of the seller that it should be sold for its full value, and it being necessary for the protection of the purchaser that the seller should not after the sale enter into competition with him, contracts restraining the seller from engaging in the same business are upheld, and they are not unreasonable if they go no further than to remove the danger to the purchaser of competition with the seller."

* *

A phase of this subject was involved in a case in Michigan. Defendant sold to plaintiff partnership a completely equipped elevator and warehouse, agreeing, as part of the bargain, that he would not "build any elevator nor directly or indirectly engage in the elevator business at or near Berville, Mich., except for the purpose of buying grain to be ground at his mill."

The Michigan supreme court held that under this agreement defendant was subject to injunction against operating an elevator in the prohibited territory for the purpose of receiving and storing beans, although handling of beans was a very small part of the elevator business when it was sold.

The court also sustained the validity of the agreement, as against objection on defendant's part that it was void as being

in restraint of trade. (Bottomley vs. Brown, 154 N.W. 37.)

See, also, the case of Rogers vs. Patterson, 229 S. W. 711, decided by the Arkansas supreme court and referred to in Chapter LXVII on Sales of Mill Property.

* *

A contract by a mill or a grain company to pay a stated amount of money to another, in consideration of the latter refraining from entering upon projected competition with the former, would be void and legally unenforceable, according to the decision of the Arkansas supreme court in the case of Shapard vs. Lesser, 193 S.W. 262.

In this case one of the parties agreed with the other to pay $400 annually to secure immunity from prospective competition in the business of ginning cotton and buying cottonseed, but the court declared the contract to be so far violative of public policy, because of tendency to stifle competition, as to create no legal rights or obligations.

However, the opinion recognizes the validity of the common form of agreement under which the seller of an established business promises, as part of the consideration for the purchase, that, for a certain period he will not compete with his successor, and declares that the courts will enforce such agreements so far as is reasonably necessary to protect the purchaser in the enjoyment of the good-will which he has bought on the strength of the seller's promise not to attempt to divert back to himself what he has sold.

"In such cases," remarks the court "the vendor, by entering into and observing the covenant not to engage in his business for a stipulated time in a certain locality, secures to himself the full value of his business and its good-will, and such contract does not in any wise tend to stifle competition or work to the detriment of the public."

SECTION 438. EXCLUSIVE SALES CONTRACTS

The trend of judicial decision on the effect of state antitrust laws, as preventing contracts by a manufacturer to sell his goods to but one dealer in a town, is shown in the opinion of the North Carolina supreme court handed down in the case of Mar-Hof Co. vs. Rosenbacher, 97 S.E. 169.

In a suit to recover for goods delivered to defendant, she counterclaimed for breach of plaintiff's agreement to give her the exclusive sale of plaintiff's product at Winston-Salem for a period of two years. Plaintiff unsuccessfully sought to avoid this claim on the ground that the agreement violated the North Carolina statute which declares that it shall be unlawful to make a contract not to buy or sell commodities within the state, with intention of preventing competition or to fix prices, etc.

"Originally, at common law, agreements in restraint of trade were held void, as being against public policy," declared the supreme court. "The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are 'founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.' "

The court held that the North Carolina statute disclosed a purpose on the part of the legislature to subject contracts to the standard of reasonableness—in other words, to the "rule of reason" laid down by the United States Supreme Court a few years ago and inveighed against by some editors and public speakers who did not know what they were protesting.

Applying the rule of reason, the North Carolina supreme court decided that the particular contract involved in the litigation before the court was valid. It was held to have been reasonable in that defendant, on the strength of it, bound herself to buy a large quantity of plaintiff's goods, and, at considerable expense for advertising, etc., introduced them to the local trade.

SECTION 439. EXCLUSIVE BUYING AGENCIES

When we think of combinations in restraint of trade we are apt to center our thoughts on combinations between sellers. But this is too narrow a view of both the law of monopolies and of the reasons which brought it into existence. The antitrust acts are broad enough to comprehend combinations of buyers to depress the price of goods or restrict competition in purchasing as fully as are covered combinations of sellers having the effect of restraining competition.

Question was raised as to the right of independent manufacturing bakers to maintain joint buying agencies.

Although most of the antitrust cases which have been passed upon by the courts involved combinations to control the prices at which commodities should be sold, the laws against monopolies are

broad enough in their language to cover combinations designed to hammer down prices of raw materials bought by co-operating manufacturers, as well as combinations to raise the price of finished products. The Sherman act declares it to be unlawful to combine "in restraint of trade or commerce," and the state laws usually expressly inhibit combinations to fix or limit the price of goods bought, as well as the price of commodities sold.

So, the fundamental principles which test the validity of a combination which has the effect of raising prices of goods sold will be found to generally apply to pools to depress the price of things bought. It is just as much against public policy for bakers who control a market to injure farmers who raise wheat and millers who turn it into flour, by conspiring to hammer down the price of flour, as it is to conspire to maintain or raise the price of bakery products.

Recognizing this principle, the Texas court of civil appeals has decided that an agreement between mill and elevator companies not to buy wheat directly from growers or from any person not regularly engaged in the grain business was unlawful.

It is not meant that every agreement for joint purchase of goods is unlawful, for the contrary has been held by a New York court in a case involving purchase of equipment for apportionment among associated railroads, and the Massachusetts supreme judicial court decided that the mere fact that jobbers formed an association for joint purchase of window glass dealt in by them severally was not unlawful, in the absence of a showing of restraint of trade.

When monopolistic practices exist, liability as for violation of the antitrust laws is not diminished by the fact that they may be carried on through an association of independent interests, as distinguished from a consolidation.

The United States district court for the district of Minnesota held in the Harvester Companies case that a combination is no less unlawful because effected by agreement between manufacturers, rather than by an actual consolidation. And another tribunal has declared that courts will look through the form of an association in order to ascertain its character, and will judge of its nature, not merely by its promulgated rules, but by its actual operations, and will decide the question of its legality according to the true nature and probable effect of the arrangement.

This is in line with the decision of the United States Supreme Court to the effect that since conspiracies are not usually susceptible to direct proof, their existence may be inferred from acts done. The same court holds that in an antitrust prosecution it is no defense that unlawful restraint was not intended, if restraint is established; nor is it an exonerating circumstance that the combination may have resulted in a reduction, instead of advance, in prices.

In a case before it, the supreme court of Illinois said that the welding together of interests under a common board of trustees "could not result otherwise than in a grinding monopoly, controlling all trade in the business specified."

Among other practices by associations which have been adjudged to be unlawful are included blacklisting of wholesale dealers for making sales direct to consumers, and preventing competitors from obtaining raw materials necessary to carry on their business.

The cases wherein unlawful restraint of trade has been found to have been practiced in the sale of products through a common association are numerous. In an Illinois suit, it was decided that the antitrust law was violated by an agreement to maintain a uniform price, to restrict quantities of shipments, and to require agents to adopt uniform cartage charges. In this case the United States circuit court said:

"Combination that tends directly to lower prices to the consumer may, even as against the consumer, be restraint of trade; and combination that tends to higher prices may, as against the producer, be restraint of trade. The statute thus interpreted has no concern with prices, but looks solely to competition, and to giving of competition full play, by making illegal any effort at restriction upon competition."

The United States circuit court of appeals decided that establishment of wholesale and retail prices by the officers and central committee of a manufacturers' association was a transgression of the antitrust law.

* *

In a case before the United States district court for the northern district of New York, it was adjudged that it was illegal for independent producers of sea-green slate to place in a central body power to determine the quantity of slate to be produced by each concern represented and the prices to be charged.

And where all the product of competing coal mines was turned over to a single company to sell at not less than a

fixed price, and to account for the proceeds above a sales commission, the United States circuit court of appeals decided there was an unlawful combination.

A similar conclusion was reached where wall paper manufacturers formed a central company which bought their entire product at agreed prices and resold it, distributing the profits among the shareholders, whose stock was proportioned according to the volume of business previously done by each. The arrangement was rendered more objectionable, the court found, because manufacturers of machinery used in the manufacture agreed to sell only to members of the company, and because jobbers were compelled to agree to maintain fixed prices.

* *

Manufacturers of enameled ironware were found to have violated the antitrust laws by forming a committee which determined the prices at which their product should be sold.

The point may be summed up in this declaration by the Mississippi supreme court in the Car Service Association case:

"Not all combinations or contracts, without regard to their purpose, intent, or effect, by which the control of business is placed within the power of trustees or persons other than the contracting parties, are trusts within the statute, but the test of a trust, and the essential to its existence, is that the contract or combination be, on account of its actual result, obnoxious to public policy, or be, in itself and in its necessary effect, inimical to the public welfare."

* *

A decision bearing on the unlawfulness of an arrangement whereby consumers of flour or other commodities join in the appointment of a common buying agent for the purpose of depressing prices is to be found in the case of Pulpwood Co. vs. Green Bay Paper & Fiber Co., 170 N.W. 230, decided by the Wisconsin supreme court. The most important statements in the opinion are as follows:

"There is nothing intrinsically unlawful in two or more persons appointing a common agent to purchase a commodity which they require, or in giving such agent the exclusive right to do their buying; such an arrangement becomes unlawful only when it injures the public by unduly restricting competition or restraining trade."

But a "producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public may to some extent benefit by the depression. . . . If, under the provisions of the first section of the federal [antitrust] act, the producer is entitled to protection against combinations which unreasonably depress the price of his product, he must also, under the second section of the act, be entitled to protection against all combinations which destroy, or attempt to destroy, the competitive market for his product and compel him to sell his product, if he sells it at all, to a single concern at a price fixed by that concern, for this is monopoly."

Applying these legal principles, the supreme court declared that a combination of pulpwood agencies supplying about three fourths of the pulpwood production in certain territory, under which competition in the purchase of that commodity was depressed, was violative of the Sherman antitrust act.

SECTION 440. GRAIN BUYING MONOPOLY

Farmers jointly owning and operating elevators have no more legal right to agree among themselves to stifle competition in the buying of grain than have nonfarmer owners and operators of other elevators, according to the decision of the Colorado supreme court in the case of Wray Farmers' Grain Co. vs. Burns, 176 Pac. 487, to convince the plaintiff.

The decision annulled the following worded bylaw of the plaintiff company, on the ground that the same tended to an unreasonable restraint of trade:

"The stockholders of this company may sell grain to competitors in Wray, only, by paying to the secretary of the Wray Farmers' Grain Co. the sum of one cent per bushel for each bushel of grain so sold, as his proportionate share of the maintenance of the company; provided, grain sold to local feeders and grain sold for seed for use in our immediate locality shall be exempt from penalty. If any stockholder is found guilty of avoiding this bylaw, his stock shall be liable to forfeiture in this corporation."

Defendant was one of the 230 owners of stock in the plaintiff company; the entire stock consisting of 400 shares of $25 each. Although he had assented to the adoption of the bylaw just quoted, he had the temerity to sell 3,500 bus of wheat to a competitor of the plaintiff, presumably to some dealer who was paying a better price than plaintiff was. Defendant refused to pay the $35 tribute to the plaintiff called for by the bylaw, and plaintiff sued to recover it. The defense

interposed was that the bylaw was void, as involving an attempt to unreasonably restrain trade.

The trial judge declared that he could find nothing in the regulation that looked like restraint of trade, and entered judgment in the company's favor, but defendant appealed to the supreme court, which reversed the decision and ordered the suit dismissed. After reviewing several court decisions bearing on the subject of restraint of trade, the higher court said:

"We need not assume that the stockholders of the Wray Farmers' Grain Co. deliberately entered into a scheme or combination, by means of this bylaw, for the purpose of preventing any other grain buyer from doing business in Wray. The bylaw would be invalid without proof of this intent. Neither is it necessary to find that competition has actually been stifled. . . .

"From the agreed statement of facts filed in this case, the tendency of the bylaw to stifle competition is manifest. It is practically impossible for a competitor of the plaintiff company in Wray to secure the patronage of the 230 existing stockholders in the grain company. The number of such stockholders may increase, since there are 400 shares of the capital stock. Such stockholders may comprise all, or nearly all, of the farmers residing in the vicinity of Wray.

. "If these farmers do not want to sell grain to their own company, they are allowed to sell to any competitor outside of Wray, but not to any competitor in Wray, unless they pay the penalty of one cent per bushel for each bushel of grain so sold in Wray. It follows that they will not sell to a competitor in Wray unless they receive one cent or more per bushel more than what is offered by their own company. The competitor must offer this additional amount, or else lose the business.

"The bylaw, if enforced, unquestionably would tend to drive out of business any other grain buyer in Wray, and give the plaintiff company a monopoly. This effect renders the bylaw unreasonable.

"There is another feature of the bylaw which makes it unreasonable. That is its restriction upon the stockholders themselves. They are restricted in their right to sell their product to whomsoever they please, and there is an absence of circumstances which renders such restriction necessary for their own protection. . . .

"The unreasonableness in the two respects above noted is due to the resulting injury to the public, which injury is assumed to exist or be inflected under circumstances of this kind according to the well-settled doctrines having to do with public policy. Our conclusion in this case, as well as the conclusion of the Iowa court, is amply supported by numerous adjudications upon contracts surrounded by facts somewhat analogous to those existing in the case at bar."

The Iowa decision referred to by the Colorado court annulled a similar bylaw adopted by the Decorah Farmers' Co-operative Society in relation to the sale of hogs at Decorah, Iowa.

(NOTE.—Since this decision was announced, the attitude of the courts and legislatures has relaxed materially, as shown by the enactment and upholding of the co-operative marketing laws.)

SECTION 441. FIXING RETAIL PRICES

Reviewing previous decisions on the subject, the United States Supreme Court said in the case of Federal Trade Commission vs. Beech-Nut Packing Co., 42 Sup. Ct. 150:

"It is settled that, in prosecutions under the Sherman act, a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

* *

"It is well settled that one engaged in private business may freely use his own discretion as to parties with whom he will deal," declared the Wisconsin supreme court in the case of Singer Sewing Machine Co. vs. Lang (203 N. W. 399).

In the same case it was decided that, in the absence of intent to create or maintain a monopoly, a manufacturer may announce in advance the resale price of his goods and refuse to deal with wholesalers and retailers who do not conform to such prices.

A further point decided in the same case is that "One who maliciously induces another to breach a contract with a third person is liable to such third person for the damages resulting from such breach."

* *

The case of The Great Atlantic & Pacific Tea Co. vs. Cream of Wheat Co. is of prime importance to millers, as bearing on the right of a manufacturer to

maintain a uniform retail price at which his product is to be sold.

Although the decision, as handed down by Judge Hough, of the United States district court for the southern district of New York (224 Fed. 566; affirmed by the United States circuit court of appeals, 227 Fed. 46), was somewhat influenced by the peculiar character of Cream of Wheat, the main points of law declared by Judge Hough clearly cover all kinds of mill products sold under distinctive brands which stand for definite grades.

Any doubt that might otherwise exist as to whether the opinion is broad enough to cover sales of flour is avoided by Judge Hough's approval of the decision of the Washington supreme court in the case of Fisher Flouring Mills Co. vs. Swanson, 137 Pac. 144, to the effect that a miller who manufactures a particular brand of flour may make valid contracts with retail dealers binding them to maintain a minimum price, if such agreements are essential to the continued production of the mill, and involve less than a controlling part of that commodity in the market, and if the price fixed affords only a fair profit to the contracting parties.

The following are the principal points decided by Judge Hough:

1. A dealer discriminated against by refusal of a producer of a given commodity to sell to him cannot base right to legal relief on the ground that the producer monopolizes production of that commodity, so far as the commodity may properly be regarded as a distinct substance by reason of the trade name by which it is known. The monopoly of the creator of a trade name, such as Cream of Wheat, "is not and never has been within the prohibition of any law, antitrust or otherwise. On the contrary that monopoly is encouraged by patent, trademark and copyright statutes, and the rules of unfair competition."

2. Mere refusal of a producer to sell to a dealer cannot be regarded as an attempt by the former to fix prices.

3. Although prevention of competition is restraint of trade, "it does not follow that it is unlawful either to prevent any and every species of competition, or to restrain trade in any and every degree." It is lawful for a producer to restrain competition in the sale of his own goods arising from commercial warfare of a large buyer for retail sale against small ones, "or that of a merchant who for advertising purposes may sell an article at a loss, in order to get customers at his shop, and then persuade them to buy other things at a compensating profit. That competition, as encouraged by statutes and decisions, does not include such practices has been sufficiently shown (with ample citations) in Fisher Flouring Mills Co. vs. Swanson."

4. The provisions of the federal antitrust law embodied in section two of the Clayton act do not prevent a producer of an article that is not a necessity of life nor a staple article from refusing to sell to a middleman who refuses to respect a reasonable retail price restriction.

5. But even if it could be held that a producer's selection of customers and refusal to sell to a certain retailer amounts to an unlawful restraint of trade, the retailer discriminated against cannot require sales to be made to him, and Congress could not compel a sale to him.

6. When a producer is justified in refusing to sell his product to a certain middleman on account of the latter's refusal to observe a reasonable retail price restriction, the producer acts within his legal rights in requesting his wholesale customers not to sell that product to the particular middleman, especially if there is no coercion of the wholesalers such as a refusal to sell to them if the request be disregarded. In this case it appeared that the defendant sent out circulars to the jobbing trade pointing out the cut-rate practices of plaintiff, and asking the recipients to see to it "that no quantity [of Cream of Wheat], at any price, shall reach, directly or indirectly," plaintiff "to enable them to continue their present menace to the legitimate trade." This did not constitute an unlawful boycott against plaintiff.

Plaintiff owned a large number of retail stores known in several states as "Economy Stores," in which food products were sold direct to consumers, and, as noted by Judge Hough, the places had but a single attendant and no telephone, gave no credit, made no deliveries, and were closed whenever the manager left for meals or sleep.

Defendant sold Cream of Wheat to plaintiff at wholesale rates and in large quantities, upon condition that a mimimum retail price of 14c per package be charged. After maintaining this price for some time, plaintiff refused to longer observe it and retailed Cream of Wheat at 12c. Thereupon defendant declined to make further sales to plaintiff.

"In result," said Judge Hough, "the situation, when suit was brought, was that plaintiff could not make any money on Cream of Wheat sold at 12c because

it could not get carload rates; but no great success attended defendant's efforts to prevent jobbers selling to plaintiff,—there were and are too many men quite willing to let the Great Atlantic & Pacific Tea Co. lose some money, as long as they made a little.

"This condition of affairs still continues; and the main object of this action is to compel defendant to fill plaintiff's orders for Cream of Wheat in carload lots at $3.95 per case. Of course, the bill does not put the matter so boldly, but if the law does not warrant an order productive of the result stated,—this action is of little worth."

In form, the suit sought a decree declaring defendant's system of sales to be in violation of the federal antitrust laws, and enjoining defendant from shutting off plaintiff's supply of Cream of Wheat.

The case came before Judge Hough on an application for a temporary injunction, which he denied.

On this hearing the application for a temporary injunction was disposed of on the theory that the case is governed by the Clayton act, and not by the Sherman act.

The Cream of Wheat Co., through its counsel, filed an exhaustive brief opposing plaintiff's motion for a temporary injunction. The main points relied upon are as follows:

The Clayton act did not apply. There was no statutory prohibition against defendant's refusal to sell. Refusal to sell is not an act of "commerce." Defendant's restraint on plaintiff was not "competition."

Cream of Wheat was not susceptible to a monopoly in restraint of trade.

Plaintiff was a retailer but had been sold as a wholesaler by defendant under an exceptional agreement. Plaintiff broke the condition of the agreement by refusing to refrain from using the discrimination in its favor to the disadvantage of defendant's business and to create a monopoly.

Plaintiff did not come into court with "clean hands." It was engaged in stifling competition and destroying the business of its competing retailers and of defendant, and was establishing a monopoly of the retail grocery trade in the country.

The circular letter sent by defendant to the wholesale trade requesting that no sales be made to plaintiff did not constitute either a boycott or a combination in restraint of trade. It was not intended to injure plaintiff, but to protect defendant's business.

A temporary injunction should be denied in any event, because the question of injunction should be left for the final determination of the case, and because the defendant and the public would be irreparably damaged by a temporary injunction, whereas plaintiff's damage could be readily computed and allowed on final determination that plaintiff was entitled to relief.

After referring to the fact that Cream of Wheat is not strictly a product of original "manufacture," but rather the result of selecting and cleansing middlings, "the byproduct of a true manufacture, viz: flour making," or, in other words, purified middlings; and after pointing out that any one is at liberty to produce the same kind of goods who can obtain middlings, and that the Cream of Wheat Co. has used less than 1 per cent of all the middlings produced by the millers of the United States for the same period, Judge Hough said:

"Obviously defendant does not, and cannot, control, nor indeed does it seek to control or monopolize, the production of or market for middlings. It naturally wishes to buy its raw material wherever it can procure the same easiest, best and cheapest.

"Yet it has a monopoly,—a perfectly lawful monopoly in the trade name 'Cream of Wheat.' By the law of trademark and unfair competition, no one but defendant can sell, under the name chosen by defendant, what any one can make and sell under another and noninfringing label. The style and dress, name and package of defendant have been extensively and successfully advertised for 18 years until the public has grown accustomed to ask for and get something good to eat under the name of 'Cream of Wheat,' and an identical substance under another name would have to travel the same long, hazardous and expensive path in order to get or create a market.

"It is possible to assert that the (say) 1 per cent of middlings which when selected and purified is called 'Cream of Wheat,' is for legal purposes, at all events, a different commodity, a separate thing or entity from all other 'middlings.'

"The point is merely dialectic, for all that makes the difference or separates the thing is a name; and the substantial truth remains that defendant's business consists in lawfully monopolizing a trade name, and impressing the public with the purity, reliability and uniformity of the very common substance it sells under that cleverly chosen name. The selection of the name was quite as important as

the selection of the middlings, when business began, and after so much advertising the name or brand is by long odds the most important element in the business."

Speaking of the right of a producer of a commodity that is not a necessity of life, or a staple article, to promote success by the maintenance of uniform retail prices, Judge Hough said:

"Cream of Wheat is not a necessity; it is not even a staple article of commerce. If it be a commodity at all, the commodity and the name are synonymous. Its continued existence depends upon defendant's ability to control the marketing of its own product. The doing of what plaintiff wishes would take from every groceryman near an 'Economy Store' the last incentive to buy any Cream of Wheat, and collectively such grocery keepers are more important to the public and the defendant than is the plaintiff.

"If injunction were granted, defendant and many retailers would be injured, and the microscopic benefit to a small portion of the public would last only until plaintiff was relieved from the competition of the 14c grocers,—when it too would charge what the business would normally and naturally bear. In short, it is plaintiff and not defendant that pursues methods whose hardship and injustice have often been judicially commented upon. . . . In my judgment the prevention or limitation of practices such as plaintiff's (so far as consistent with statute law) is the reverse of unreasonable."

Section 2 of the Clayton act, above referred to, provided, in substance, that it shall be unlawful for any person engaged in interstate commerce "to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Provided, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; and provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Interpreting this section, Judge Hough declared:

"But price discrimination is only forbidden when it 'substantially' lessens competition. Coustruing the whole section together, the last exception reads in effect that a 'vendor may select his own bona fide customers providing the effect of such selection is not to substantially and unreasonably restrain trade.'

"How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such advertisement begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension."

"Turning to the second question: If it be granted that section 2 does apply, and that defendant's selection of customers results in unlawful restraint of trade,—can it be possible that such person's evil ways are to be mended, not by stopping his business, but by adding to his list of customers, one or many persons chosen by Congress?

"Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offender's trade might be, nor how greatly the general volume of trade had increased during the period of restraint. But never before has it been urged that, if I. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason,—such conduct gave Roe a cause of action.

"If the Congress has sought to give one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property.

"Using the words 'sell or sale' conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Co. is a purely private concern, except as regulated by its creating laws; it is an ordinary merchant whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for a price but against his will.

The contract and the price are legally mere surplusage,—the constitutional violation lies in the compulsion, whereby he is deprived of his property for a private purpose.

"If defendant's actual scheme of interstate business is unlawful, the United States certainly, and now perhaps an individual plaintiff, can put it out of business; but neither the nation nor any individual can take away its property, with or without compensation, for the private use of any one."

* *

In the case of Fisher Flouring Mills Co. vs. Swanson, cited by Judge Hough, the Washington supreme court upheld plaintiff's right to enjoin defendant from selling plaintiff's brand of flour at less than the retail price fixed by contract between the parties, on proof that the contract was merely intended to preserve the good will of competing retailers toward the brand, that the flour was sold in keen competition with many other brands of other manufacturers, and that the quantity of plaintiff's flour sold was only a very small part of the pure blended flour and of the quantity of ordinary patent flour sold in its markets. In the course of a long opinion, the Washington court said:

"It does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity, in a given market, in any degree, is obnoxious to public policy. . . . Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interest of the parties, and reasonable in reference to the interests of the public. . . .

"Such a contract as that here in question is of interest to the public only where the whole of a given commodity is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. . . . Fairly considered, the contract, while slightly restricting competition, is primarily intended to promote competition by enabling the appellant [the milling company] to compete with other high grade flours while maintaining the excellence of its product. . . .

"Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retail dealers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price.

"It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product.

"Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement."

* *

Expressly approving the doctrine laid down by the Washington supreme court in the Fisher Flour Mill Co. case, upholding reasonable retail price fixing by manufacturers, the New Jersey court of chancery, in the case of Robert H. Ingersoll & Bro. vs. Hahne & Co., 108 Atl. 128, had the following to say:

"A person has a property interest in his trade name and good-will, and will, even in the absence of statute, be protected against injury to that trade name and good-will. . . . The proofs before me demonstrate that, if defendant and others are permitted to pursue their practice of price cutting, the business of complainant will be ruined and thereby the volume of interstate trade be reduced, or a method of distribution will have to be adopted which will greatly increase the price to the consumer, which will necessarily result in reducing the volume of interstate traffic; that in either event competition will be effectively reduced.

"And to what useful purpose? So that retailers may make use of the trade name and good-will established after extensive advertising, to the extent that the public has associated with the article a

standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut price all other goods sold are similarly low priced; in other words, to defraud the public.

"It is no answer to say that full value is given by the retailer for each article sold. If such be the fact, a person is defrauded if he buys an article at full price for which he has no immediate need, because he is induced to believe it a bargain, and thereby deprives himself of the use of the purchase price for other purposes for which he might have used it if he did not think he was getting a bargain."

* *

The decision of the United States circuit court of appeals, fourth circuit, in the case of Frey & Son, Inc., vs. Cudahy Packing Co., 261 Fed. 65, is an additional judicial clincher of the proposition that reasonable efforts of a manufacturer to maintain uniformity of reselling prices for his products will be sustained.

Plaintiff, a jobber, dealt in defendant's product, Old Dutch Cleanser, and, like other jobbers dealing in the product, had been exhorted to maintain prices fixed by defendant. This policy of the defendant was respected generally by jobbers, although there may have been occasional underselling which defendant disregarded, and although there was no formal oral or written agreement for maintenance of prices.

Believing that, by eliminating certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price fixed by defendant, plaintiff cut the price. Defendant retaliated by refusing to continue to sell to plaintiff at a customary discount, thereby putting the latter in position where it could not compete with other jobbers. Plaintiff brought suit to recover damages, averring that defendant violated the federal antitrust law. The United States district court for Maryland granted plaintiff damages, but the circuit court of appeal reversed the award, saying:

"The vital question is whether defendant's method of business, coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices, was such co-operation between seller and purchasers as amounted to a combination in restraint of trade. . . .

"We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in United States of America vs. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, decided June 2, 1919. The court expressly held that by the announcement in advance that customers were expected to charge a price fixed by the seller, and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

"Since the defendant, under the Colgate case, merely exercised the right reserved by the Clayton act . . . to dealers of 'selecting their own customers in bona fide transactions and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price."

This decision was affirmed by the United States Supreme Court (256 U. S. 208).

Said the United States district court for the eastern district of Virginia in the case of United States vs. Colgate & Co., 253 Fed. 522 (affirmed by Supreme Court, 39 Sup. Ct. 465): "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. . . . What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting business has otherwise resulted."

In an instructive opinion the California district court of appeals defines limitations upon the legal rights of manufacturers or wholesale dealers to acquire control of competing concerns, to fix retail prices, and to refuse to sell to particular persons. The following language applies with as much force to the milling industry as to the sale of cameras and photographic supplies, the business involved in the case before the California court:

"There is no violation of the [antitrust] statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commod-

ity. The control by one person or corporation of a number of other concerns engaged in its line of business can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare.

"In other words, the statute against predatory trusts or business combinations is violated only where a combination has been formed and is maintained for the purpose and having the effect of creating and fostering restrictions in trade or commerce, or preventing legitimate competition in the manufacture and sale or purchase of merchandise, produce or any commodity. . . .

"The defendant not only has the right to fix its own prices as a manufacturer or wholesaler, but also the right to establish the price at which its goods are to be sold by retail dealers therein to whom it sells such goods for retail sale, so long as those acts are not the direct effect or result of a combination formed and maintained by it and others to create restrictions in trade or commerce, or, in short, to maintain a monopoly of the trade. . . . The defendant has the further right to sell its goods to whomsoever it pleases, and to refuse to sell to particular persons.

"In other words, it was and is within its legitimate province as a manufacturer and a wholesale vendor to select its own customers, and, moreover, to sell at higher prices to one than to another: provided, of course, that such discrimination in prices is not the result of a combination, agreement or conspiracy between it and others the object of which was or is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public, the protection of whose welfare is the first consideration of all antitrust legislation." (Munter vs. Eastman Kodak Co., 153 Pac. 737.)

SECTION 442. "FULL-LINE FORCING" AGREEMENTS

Is a manufacturer of or dealer in commodities at liberty to refuse to sell to customers, excepting upon conditions, such as that they include in their orders other goods kept for sale by the manufacturer or dealer?

A decision which serves to clarify the law to some extent on this point was handed down by the United States Supreme Court in an opinion in the case of Federal Trade Commission vs. Gratz, 40 Sup. Ct. Rep. 572, Justice Brandeis and Justice Clark dissenting. In this case the court annulled an order of the Federal Trade Commission purporting to forbid respondents from continuing a practice of refusing to sell cotton ties to persons who would not buy cotton bagging at the same time. The majority opinion says, in part:

"The complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

"Nothing is alleged which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

The dissenting opinion reads on this subject:

"A question of law is presented to us for decision, and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer, except upon condition that the purchaser will buy from him also his trade requirements in another article or articles, reasonably be found by the commission to be an unfair method of competition under the circumstances set forth in the findings of fact? . . .

"It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade, the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity may have intolerable results when done by several in co-operation.

"Similarly, what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury if done by a great cor-

poration in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of resources."

Mr. Justice Brandeis then proceeded to refer to a sustained statute of Massachusetts denouncing the practice involved, as applied to intrastate business; to a declaration by the federal Bureau of Corporations that the practice—denominated by the bureau as "full-line forcing"—was highly reprehensible; and to several decisions including injunction against the practice in decrees entered under the federal antitrust act.

Although the conclusions reached by the majority and the minority of the Supreme Court as to what should be decreed in the particular case were variant, it seems that the two opinions are fairly reconcilable on the point that, after all, the test as to right to refuse to sell, unless the buyer couples an order for other goods, is whether the seller has a monopoly or practical monopoly of a necessary commodity.

SECTION 443. BROKERAGE AND COMMISSION RATES

Combinations between brokers and commission men, fixing uniform brokerage and commission rates, are not violative of the antitrust laws, held the Missouri supreme court in the case of Harleson vs. Tyler, 219 S.W. 908. This case involved the validity of agreement between the members of the Kansas Hay Dealers' Association fixing such rates. The court held that such agreements did not violate the Missouri antitrust act, which forbids combinations fixing the price of commodities, etc. The decision is of general importance, since the language of the Missouri act does not differ essentially from that of the antitrust acts of other states. The supreme court said:

"Looking at the laws of the association as pleaded, we find that the principal subject with which they deal, and to which all else is incidental, is that of fixing and maintaining rates of commission and brokerage to be charged by its members. So far as they disclose, the only purpose of the organization was to fix and stabilize among its members remunerative rates of compensation for their services in buying, selling, and receiving and reconsigning shipments of hay and straw. Is the agreement so evidenced by the bylaws, and the combination effected thereby, within the prohibitions of the statute? We think not, for at least the following reasons:

"(1) The contract in question is one whereby men engaged in the same business have bound themselves to charge uniform rates for personal services, merely that and nothing more. The combination thus formed is not under the ban of the statute, for the reason that labor, whether physical or intellectual, or a combination of the two, is not by any fair rule of construction a 'product or commodity' that is the subject of 'importation, transportation, manufacture, purchase, or sale,' within the meaning of the words as used in the statute. . . .

"(2) While the association of which defendants are members was unquestionably organized for the purpose of fixing and controlling the rates of commissions and brokerage for the buying and selling of hay on the Kansas City market, and minimizing competition in respect thereto, nothing in its bylaws or regulations directly and necessarily tends to a restraint of the trade. Nothing therein is calculated to limit the quantity, or to fix, regulate, or control the price, nor to lessen competition in the business of buying and selling hay and straw.

"There seems to be no restraints imposed with respect to the dealings of members with nonmembers, at least none that are specifically alleged. The only inhibition of the kind that distinctly appears is the one that debars members from trading with persons who have been suspended or expelled from membership in the association for violation of its rules.

"It may be said, however, that as the commission and brokerage specified in the rules of the association are fixed charges, which must be paid, the price which the producer receives for his hay may be indirectly affected thereby. But the question is whether the production or price is directly, or to any appreciable extent, controlled or regulated by a rule which makes the charges uniform instead of variable, definite and known instead of uncertain and unknown.

"It is probable that certainty and uniformity of the charges of the selling agent, like those of the carrier and warehouseman, would tend to encourage production and foster trade rather than the reverse; but whether it would be the one way or the other, the effect would be remote or incidental, and consequently the association, which was formed for the direct purpose of protecting and promoting the interests of its members,

would not thereby be brought within the condemnation of the statute."

SECTION 444. EXCLUSIVE TRANSPORTATION CONTRACTS

An opinion of the Texas court of civil appeals authorizes the statement that where a railway company leases a tract of land on its right of way for use for mill or elevator purposes, there is no violation of the antitrust laws by incorporating in the contract a provision to the effect that the lessee will cause all freight shipments to or from the mill or elevator to be made over the particular railroad, so long as that road's rates do not exceed the charges of competing lines. (Stephenson vs. St. Louis Southwestern Railway Co., 181 S.W. 568.)

CHAPTER LI

TRADEMARKS AND UNFAIR COMPETITION

SECTION 445. NATURE OF TRADEMARK RIGHTS

"THE primary and proper function of a trademark is to identify the origin or ownership of the article to which it is affixed. Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy. Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." (Hanover Star Milling Co. vs. Metcalf, 36 Sup. Ct. 357.)

* *

It is to be first noted that a "trademark," such as will be protected by the courts, includes any distinctive name, word, mark, or design used to identify a given product as that produced or marketed by a particular manufacturer or dealer, although usually it need not show his name or place of business; and that right to exclusive use of a mark or brand is acquired by its prior adoption and continued use.

SECTION 446. VALIDITY OF TRADEMARKS IN GENERAL

A brand is invalid and, hence, not subject to exclusive appropriation if it involves any misrepresentation or imposition upon the public, such as a misstatement as to the quality of the product or as to the place of its manufacture. Nor is a mark subject to monopoly if it is merely descriptive of the product or the business to which it is applied. Thus it has been declared by the courts that such words as "Best," "Standard," and "Favorite," cannot be exclusively used to designate a particular product, though, as noted below, the words "La Favorita" have been sustained as a valid flour brand. Arbitrary, fanciful or foreign words, numerals, letters, initials, devices, pictures, mythological or noted names, and newly coined words ordinarily may be monopolized, if they are not merely descriptive of the product; but a geographical name indicating a locality or section of country cannot be exclusively appropriated as a technically valid trademark, as against other dealers and manufacturers doing business there.

* *

The words "La Favorita" were sustained by the Supreme Court of the United States as a valid trademark, and as such subject to protection from infringement, as applied to a grade of flour selected, though not manufactured by those who acquired the right to use the name. (Menendez vs. Holt, 9 Sup. Ct. Rep. 143.)

Right to monopolize the brand "Gold Leaf" has been upheld by the Canadian supreme court in a case reported at page 196, volume 17, of the reports of that court.

In a Wisconsin case the supreme court of that state decided that the word "Marvel" was subject to exclusive appropriation as a flour brand, as against a manufacturer who established a trade for flour so named, and then sold the business to plaintiff. (Listman Mill Co. vs. William Listman Milling Co., 60 N. W. 26.)

* *

In the case of Commercial Milling Co. vs. Fairchild Milling Co., decided by the United States district court, northern district of Ohio, eastern division, Judge Westenhaver held that "Velvet" as applied to flour was a descriptive word, saying:

"The rule is that a word, device or symbol not adopted for the purpose of indicating origin, manufacture or ownership, but placed upon an article to denote class, grade, style or quality, cannot

be upheld technically as a good trademark at common law. . . . The evidence tends to show that plaintiff adopted 'Velvet' originally to indicate grade or quality. . . . It was adopted because the flour in question was made from winter wheat and possessed a smooth, velvety quality."

* *

Exclusive right to use the word "Happy" in a name for feed was denied by the United States circuit court of appeals, eighth circuit, in the case of Edgar-Morgan Co. vs. Alfocorn Milling Co., 282 Fed. 394. The decision reverses a decree entered by the United States district court, eastern district of Missouri (270 Fed. 344), handed down Jan. 20, 1921.

In 1915 complainant commenced to manufacture domestic fowl feed under the name "Happy Hen Scratch Feed," and later put on the market "Happy Hog Feed," "Happy Cow Feed," "Happy Chick Feed," etc. But no attempt to market "Happy Horse and Mule Feed" was made by complainant until after defendant mill had adopted the name for one of its products.

In denying complainant the right to monopolize the word "Happy" as a technical trademark, the circuit court of appeals holds that the word falls within the rule that a term indicative of quality is not subject to exclusive appropriation under the law of trademarks. It also was decided that there was no proof sufficient to make out a case of unfair competition, for want of evidence that defendant had produced confusion or deception in the public mind as to the source of production of the respective parties' products. In the course of the higher court's opinion it was said:

"An examination of the record discloses it was the view of the trial court, notwithstanding it was shown by the proofs that the word 'Happy,' long before its use by complainant, had been employed by others to designate a brand or make of cookies or cakes, canned meats, etc., yet, complainant having employed it in the manner stated in the manufacture and sale of its 'Happy Hen Feed,' this was such an exclusive appropriation of the word and the manner of display that complainant might restrain defendant from using the same by its extension to other domestic food products, under the doctrine announced in Florence Mfg. Co. vs. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565, and other cases.

"In this present case complainant was engaged merely in the production and sale of a chicken feed when defendant began its manufacture and sale of a horse and mule feed. The trial court held, solely because complainant had used the words 'Happy Hen' to describe its chicken feed, and the defendant employed the term 'Happy Mule' to describe its horse and mule feed, almost two years thereafter, when complainant decided to begin the manufacture and sale of its horse and mule feed under the appellation 'Happy,' that defendant must desist from any further pursuit of its business, and account to complainant for profits made.

"Obviously, such ruling can rest alone on one basis, namely, the right of complainant to the exclusive appropriation to its use with regard to any and all kinds of domestic fowl and animal products which it now or at any further date shall manufacture and sell under the name or appellation of the word 'Happy.'

"We are of the opinion this word 'Happy' is one of such nature as to be incapable of exclusive appropriation and extension by any one. The rule in such cases is very clearly stated by Mr. Justice Strong in Canal Co. vs. Clark, 13 Wall. 311, 20 L. Ed. 581."

* *

A word not constituting the dominating part of a trade name may not be monopolized, according to the decision of the United States district court, northern district of Ohio, eastern division, in the case of Commercial Milling Co. vs. Fairchild Milling Co.

SECTION 447. GEOGRAPHICAL NAMES AS TRADEMARKS

In Columbia Mill Co. vs. Alcorn, 14 Sup. Ct. Rep. 151, the United States supreme court affirmed a judgment dismissing suit to enjoin defendants from using the word "Columbia" in a brand placed on flour sold by them, on the grounds, first, that the word "Columbia, as a flour brand, had been used long before its appropriation by the Columbia Mill Co., it appearing that the word was used as early as 1865 or 1866 by the Columbia Mills, of Brooklyn; second, that the word is not the subject of exclusive appropriation, under the rule that words designating locality or section of a country cannot be monopolized. The Supreme Court said that plaintiff was no more entitled to exclusively use the word "Columbia" than it would have been to use the words "America," "Unit-

ed States," "Minnesota," or "Minneapolis."

* *

Points of law affecting flour brands as trademarks were involved in the case of Sheffield-King Milling Co. vs. Theopold-Reid Co., 269 Fed. 716, decided by the District of Columbia court of appeals.

The Theopold-Reid Co. applied to the Patent Office for registration of a trademark for wheat flour, the mark consisting of the portrait of a man with the words "Jean Baptiste Faribault" below, and the picture and the words being placed in a circular field with a representation of stalks of grain on each side.

The Sheffield-King Co. opposed the application on the ground that the trademark infringed this company's previously used brand, "Faribault Fancy." Both companies had mills at Faribault, Minn. The commissioner of patents overruled the opposition and permitted registration as applied for, and the opposer appealed.

Replying to the first contention on appeal, that a previous controversy between the same companies over trademark rights, in which the appellant prevailed, concluded a contrary decision in this case, the court of appeals says:

"The mark of the earlier opposition consisted simply of the portrait of a man and the word 'Faribault' written in large type thereunder. Comparing the marks, we agree with the commissioner that the mark in the second opposition is so different from the mark of the first opposition that judgment against applicant in the first could not, under any circumstance, work estoppel in the second."

"Coming to the merits of the case," adds the court, "the only feature common to the two marks which might lead to confusion is the word 'Faribault'; but this is geographical, and either party, or any other person, has a right to use it. Nor will the registration of applicant's mark containing the word prevent any other manufacturer in Faribault from using it. Opposer, therefore, is not in a position to establish injury from the registration of applicant's mark."

SECTION 148. DECEPTIVE TRADEMARKS

There is a cardinal principle of trademark law that the courts will not protect a trademark that involves any material untruth, misrepresentation or bad faith. In other words, no monopoly will be given in favor of a trademark which is used as a means of deceiving the public.

However, two interesting cases decided by the court of appeals for the District of Columbia show that a mere change in the kinds of flour that are sold by a miller will not deprive him of a right to protect trademark rights in his brands.

In the case of Ball & Gunning Milling Co. vs. Mammoth Spring Milling Co., 48 App. D. C. 243, the court decided that where a mill adopted a trademark for use on its highest grade of flour, and subsequently produced and sold under another name a better grade of flour, but did not change the standard of quality of the original brand, it cannot be said to have abandoned the mark, and is entitled to registration. The opinion in this case reads:

"Appeal from a decision of the Patent Office in a trademark interference proceeding in which priority of adoption was granted appellee, Mammoth Spring Milling Co.

"It was found by the Patent Office tribunals, and is conceded here, that the appellee company was the first to adopt and use the words 'Golden Gate' as a trademark for flour. Appellant, Ball & Gunning Milling Co., first contends that appellee has abandoned or forfeited its mark because, prior to 1907, it used the mark on its highest grade flour, but about that time produced and sold under another name a better grade of flour. There was no contention in the Patent Office, nor is there here, that the standard or quality of the 'Golden Gate' brand was lowered; in other words, there is no evidence that the 'Golden Gate' brand is not as good today as it was when the mark was adopted. These facts bring the case within the ruling in Royal Milling Co. vs. J. F. Imbs Milling Co., 44 App. D. C. 207, where a mark that had been used on flour made from soft wheat was used on flour made from hard wheat of the same grade, and it was held that there had been no misrepresentation.

"It appears that these parties, located in adjoining states, used this trademark for a number of years without either party learning of the other. With the increase of transportation facilities, however, actual conflict resulted, but it is here contended that under the ruling in Hanover Milling Co. vs. Metcalf, 240 U. S. 403, 36 Sup. Ct. Rep. 357, registration should not be granted appellee. That case involved a different question, that of unfair competition, and the facts differed materially from those in this case, as appears from the following: 'We are not dealing with a case where the junior appropriator of a trademark is

occupying territory that would probably be reached by the prior user in the natural expansion of his trade, and need pass no judgment upon such a case.' The question here is not that of unfair competition, but whether appellee, under the terms of the statute, is entitled to the registration of this mark, which it was the first to adopt and use. We agree with the Patent Office that it is. Whether there are equitable reasons why appellee may not prevent appellant from using the mark in the territory formerly occupied by appellant is a question not here involved. The decision is affirmed."

In the other case—Royal Milling Co. vs. J. F. Imbs Milling Co., 44 App. D. C. 207—referred to by the court in the first-mentioned case, the opinion is as follows:

"The Royal Milling Co. filed an application Oct. 18, 1911, for the registration of the word 'Rex' as a trademark for flour. The mark consisted of a diamond-shaped figure upon which appears in large script type the word 'Rex' as the dominant feature of the mark, and is all that is applied for.

"The applicant claims a certificate of registration granted to the Royal Milling Co. Oct. 3, 1893. The opposer, the J. F. Imbs Milling Co., claims that it and its predecessors have used the word 'Rex' as a trademark for flour continuously since 1873. The mark was adopted originally by J. F. Imbs, who is the senior member of the firm opposing registration.

"The proof shows that the mark was adopted and used by J. F. Imbs in 1873 as a trademark for flour, and has been continuously used since that time by successive firms of which J. F. Imbs was the senior member. He is the senior member of the J. F. Imbs Milling Co. The proof establishes satisfactorily the use of the mark upon the flour packed in barrels since said date.

"The examiner of interference and the commission, on appeal, rendered decisions sustaining the opposition, from which there has been an appeal to this court.

"The applicant contends that the word 'Rex' was fraudulently used by the opponent, basing its contention on the fact that 'Rex' was originally used on flour made from soft wheat, but is now used on flour made from hard wheat.

"As stated by the commissioner, it is a well-known fact that 25 or 30 years ago hard wheat began to be raised in this country. Since that time it has gone into extensive use, and while the flour made from hard wheat may be different from that made from soft wheat, Imbs's record shows that 'Rex' was always used upon good flour, and always on the same grade of flour, and he held that the trademark is not to be vitiated by a change in the species of wheat used, any more than it would be vitiated by an important change of process in the making of flour. It appears that the 'Rex' flour is of the same grade, of the best flour, and there has been no misrepresentation in its use. We agree with the commissioner that no fraud has been shown, and his decision is affirmed."

SECTION 449. WHO MAY ACQUIRE TRADEMARKS?

One may own a valid trademark for a given brand of goods although not the manufacturer of the goods. Use of a trademark does not necessarily intimate that the articles are made by the user of the mark. As decided by the Massachusetts supreme judicial court, "it is enough that they are manufactured for him, that he controls their production, or even that they pass through his hands in the course of trade, and that he gives to them the benefit of his reputation, or of his name and business style." (Maryland court of appeals in Corkran, Hill & Co. vs. A. H. Kuhlemann Co., 111 Atl. 471.)

SECTION 450. DURATION OF USE AS ELEMENT OF TRADEMARK RIGHT

The right to exclusive use of a particular trademark does not depend upon any particular period of usage, holds the United States circuit court of appeals, second circuit, in the case of Wallace & Co. vs. Repetti, 266 Fed. 307. A mark having been adopted in good faith, the right thereto inures, and will prevail against any subsequent user.

But as to the right to register trademarks, see section 455.

SECTION 451. EFFECT OF PRIOR USE

In the case of Bulte vs. Igleheart Bros., 137 Fed. 492, the United States circuit court of appeals for the seventh circuit held that plaintiffs were not entitled to protection in the use of a flour brand containing the words "White Swan," and a design of a swan floating on water, where substantially the same brand has been previously used by other millers, though plaintiffs' arrangement of the words and design was somewhat different; the matter of arrangement being subordinate to the words "White Swan" and the design, which were the salient objects to catch the eyes of purchasers.

SECTION 452. TERRITORIAL LIMITATIONS ON RIGHTS

Priority of use of a trademark, in good faith, in given territory, gives a superior right to monopolize it in that territory, as against one whose use in other territory antedated the first use in the given territory. This proposition, with important qualifications, was laid down by the highest court of the land in the case of Hanover Star Milling Co. vs. Metcalf, 36 Sup. Ct. 357. So, a milling company which built up a valuable business under a brand named "Tea Rose" in the Southeast was protected in its use against another company which first used the same name for a brand of flour not attempted to be marketed below the Ohio River until long after the first mentioned business had been built up.

The following are the principal observations made by the Supreme Court in this case:

"That property in a trademark is not limited in its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs, is true in a limited sense. Into whatever markets the use of a trademark has extended, or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trademark, good in the markets where it has been employed, can monopolize markets that his trade has never reached, and where the mark signifies not his goods, but those of another. We agree with the court below (L. R. A. ..., ..., 125 C. C. A. 515, 208 Fed. 519) that 'since it is the trade, and not the mark, that is to be protected, a trademark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.'"

But the court adds:

"We are not dealing with a case where the junior appropriator of a trademark is occupying territory that would probably be reached by the prior user in the natural expansion of his trade, and need pass no judgment on such a case."

SECTION 453. RESPECTIVE VOLUMES OF COMPETING BUSINESSES IMMATERIAL

On a conflict of rights to use a given trademark, it is not a decisive factor that the business of one of the parties may be much larger than the other's. As stated by the circuit court of appeals, seventh circuit, in another case, "it is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by the piracy of the trademark is the same in such case as in that of an article of high and general reputation, and of long continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the use of the trademark." (United States circuit court of appeals, eighth circuit; Williams vs. Ansehl, 267 Fed. 9.)

SECTION 454. NECESSITY FOR REGISTRATION

"Nor was it necessary that the trademark should have been registered by the appellant to entitle it to its use, or protect it against infringement. From an early day the common law has recognized the right of the proprietor of a trademark to its exclusive use. The right has been, without interruption, recognized and protected by the courts of England and the United States, in the absence of statutes declaring the existence of such rights, or providing regulations for its exercise and remedies for its deprivation." (From the opinion of the Maryland court of appeals in Corkran, Hill & Co. vs. A. H. Kuhlemann Co., 111 Atl. 471.)

SECTION 455. RIGHT TO REGISTER TRADEMARK

The court of appeals for the District of Columbia has decided that, where a flour dealer selling flour under contract with the mill producing it originated and used a brand applied to that product, but knew that the mill had registered the same mark and was using it on flour sold to other dealers within 10 years before the dealer registered the brand under the federal trademark act, the commissioner of patents properly canceled the registration to the dealer, on application of the mill, on the ground that the dealer had not exclusively used the mark for 10 years prior to the registration, irrespective of questions of first use, abandonment, and acquiescence.

* *

Holding that a trademark in which the letters "U. S." are the most prominent feature is not subject to registration under the federal trademark act, the court of appeals for the District of Columbia lately said, in the case of

United States Rubber Co., 265 Fed. 1016:

"Section 5 of the trademark act . . . denies registration to any mark which 'consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any state or municipality or of any foreign nation.' We agree with the Patent Office that 'the meaning of U. S. is too clearly established to permit of registration of any mark having that as the most prominent feature.'"

SECTION 456. EFFECT OF REGISTRATION

Priority of registration of a trademark does not give priority of right against the first user of the mark. (United States circuit court of appeals, eighth circuit; Williams vs. Ansehl, 267 Fed. 9.)

* *

In the case of Commercial Milling Co. vs. Fairchild Milling Co., decided by the United States district court, northern district of Ohio, eastern division, Judge Westenhaver said:

"If plaintiff has a good common law trademark in the word 'Velvet' standing alone . . . the trademark act of 1905 confers certain rights and remedies. If registration was . . . authorized under that act, then any colorable imitation thereof would constitute an infringement independently of any wrongful intent in fact. It may also be true that certain presumptions, both as to validity and to the right of register, result from the registration. Even so, no retroactive rights are conferred which make the trademark good as against a valid prior user, or dominates a status lawfully created prior to registration, or prevents a third person from disputing the validity of the registered mark as a trademark."

It was ruled that "if the word 'Velvet' as used by plaintiff was not exclusive, or if it was descriptive of flour or of the character or quality of flour, then it was improperly registered. In this situation the validity of plaintiff's trademark in the word 'Velvet' must of necessity be determined on general common law principles. . . .

"Whether plaintiff has a good common law trademark depends on two major inquiries: (1) whether the word 'Velvet' in the phrase as quoted is descriptive; and (2) whether it was the dominating word in the phrase 'Henkel's Velvet Pastry Flour.'"

* *

Question being raised as to whether registration of a trademark in the British Patent Office covers sale of flour in Ireland, Scotland and Wales, as well as England, an opinion was expressed, based on an examination of the British act, that the registration does extend to those countries, subject to such enactment as may be made by the Irish Free State. In the absence of information as to what legislation, if any, has been adopted to apply in the Irish Free State, it is suggested that inquiry direct to the British Patent Office on this subject will afford the most reliable advice on that point.

SECTION 457. SAME MARKS FOR DIFFERENT COMMODITIES

The decision of the United States circuit court of appeals, second circuit, handed down in the case of Aunt Jemima Mills Co. vs. Rigney & Co., 247 Fed. 407, affords a most important judicial authority for the protection of trademarks against infringement in certain cases where the infringer is not a present competitor of the complainant.

It has often been broadly stated by judges that a manufacturer of one class of goods has no legal cause for complaint against use of the same or a similar trademark by another manufacturer of a distinct and noncompeting class of goods. Under this statement the owner of a trademark, "Rose," as applied to flour, would have no cause for complaint because of subsequent adoption of the same mark by a manufacturer of stoves or hair brushes.

When complainant sued in the United States district court for the eastern district of New York to restrain defendants from copying complainant's familiar trademark, "Aunt Jemima's," covering self-rising flour, as defendants' mark covering pancake sirup, the trial judge conceived the facts to come within the rule just stated, and dismissed the suit. (234 Fed. 804.) But, on an appeal taken by complainant, the decree was reversed, the circuit court of appeals saying:

"To use precisely the same mark as the complainant has done is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant's reputation or of its advertisement, or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against injunction, unless they get it from a consideration now to be examined.

"It is said that even a technical trademark may be appropriated by any one in any market for goods not in competition

with those of the prior user. This was the view of the court below in saying that no one wanting sirup could possibly be made to take flour. But we think that goods, though different, may be so related as to fall within the mischief which equity should prevent.

"Sirup and flour are both food products commonly used together. Obviously the public, or a large part of it, seeing this trademark on a sirup, would conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These we think are property rights which should be protected in equity."

* *

Another instructive decision on this point was handed down by the supreme court of the District of Columbia in the case of Williams vs. Kern & Sons, 47 D. C. 441.

Williams applied for registration of the word "Success" as a trademark for self-rising pancake flour and corn meal. Kern & Sons opposed the registration, on the ground that they and their predecessors had continuously, since 1873, used the same word as a trademark for flour; the mark having been registered in 1902, and re-registered in 1915. The commissioner of patents sustained the opposition, and the supreme court affirmed the decision, saying:

"The single question involved is whether the goods of the respective parties possess the same descriptive properties, and the use of appellees' trademark by appellant would be likely to create confusion in trade by leading purchasers to believe that appellant's goods were manufactured by appellees. It is on this ground that the appellees urge they would sustain damage.

"The goods of the respective parties belong to the general classification of flour, and are common in their source of manufacture. Each is a product of the milling business. Each can be readily associated with the product of one engaged in the milling business. The test is not whether a user would make the improbable mistake of using appellant's pancake flour for appellees' wheat flour, but whether a purchaser would be likely to purchase appellant's product, believing it had been manufactured by appellees. The test here is not the likelihood of confusing the products, but the source from which they come."

* *

But in France Milling Co. vs. Washburn-Crosby Co., 3 Fed. (2d) 321, the United States district court for the southern district of New York decided that defendant's prior rights in the trademark "Gold Medal," as applied to wheat flour, did not give it superior right to use the same name for prepared pancake flour and prepared buckwheat flour as against complainant, prior user of the name on such products, especially since complainant's use had been continued for 20 years without objection. This decision was lately affirmed by the United States circuit court of appeals (7 Fed. [2d Ser.] 304).

And, despite complainants' use of the word "Noxall" as a trademark for wheat flour, there was no right on their part to use it on stock food, where defendant was the prior user of the word "Nox-All" on stock food, held the United States district court, eastern district of Missouri, in the case of Pease vs. Scott County Milling Co., 5 Fed. (2d) 524.

The trademark, "Golden Crumbles," used on candy since 1915 by petitioner, was not invalidated by defendant's use of the word "Krumbles" for cereal breakfast foods since 1912, and on candy since 1916, held the court of appeals for the District of Columbia in the case of Paul F. Beich Co. vs. Kellogg Toasted Corn Flakes Co., 262 Fed. 640. Said the court:

"The acting examiner of interferences pertinently observed that there is no 'proof to the effect that manufacturers of cereal breakfast foods are in the habit of engaging in the production of candy.' Moreover, the general and essential characteristics of breakfast foods and candy are different, and we are of opinion that the use of a mark by a dealer in one leaves its use open to a manufacturer of the other."

SECTION 458. ABANDONMENT OF TRADE-MARKS

In Williams vs. Anschl, 267 Fed. 9, the United States circuit court of appeals, eighth circuit, observed that whether in a particular instance the first user of a trademark has abandoned his rights to it, so as to give his adversary the better right to exclusive use in the future is a question to be solved in the light of what the Supreme Court of the United States said in the case of Hanover Milling Co. vs. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357:

"Trademark rights, like others that rest in user, may be lost by abandonment, nonuser, laches [delay in asserting rights], or acquiescence. Abandonment, in a strict sense, rests upon intent to abandon. . . . As to laches and acquiescence, it has been repeatedly held, in cases where defendants acted fraudulently or with knowledge of plaintiffs' rights, that relief by injunction would be accorded, although an accounting of profits should be denied. . . . So much must be regarded as settled."

The burden is upon one who asserts abandonment of a trademark right by a prior proprietor to prove it by a preponderance of the evidence.

* *

"An abandonment is the voluntary and intentional disuse or nonuse of the trademark. Such intention may be inferred from circumstances necessarily pointing to an intention to abandon, but an actual intention to permanently give up the use of the trademark is necessary to constitute an abandonment of it. Mere disuse, though for a considerable period, in the absence of intentional abandonment will not amount to an abandonment, nor will it destroy trademark rights, unless the mark has ceased to be distinctive, and the good-will associated with it has passed away, or the mark has become identified with other goods." (From the opinion of the Maryland court of appeals in Corkran, Hill & Co. vs. A. H. Kuhlemann Co., 111 Atl. 471.)

* *

In order that one sued as for infringement of a trademark may successfully defend on the ground of an abandonment of the complainant's rights, "it is essential to show, not only acts indicating practical abandonment, but an intent to abandon. Thus, where the appearances may be sufficient to indicate an abandonment, this may be satisfactorily explained by showing a want of intention to relinquish the right claimed. . . . There is no penalty which inflicts the loss of right of property in trademarks by nonusage, unless there also be found an intent to abandon. Of course, intent may be inferred from the facts shown; but the facts must be adequate to support a finding of abandonment. To give up for a long period and to discontinue the use of the trademark 'Blue Bird,' and permit others to use it indiscriminately without prosecution, would amount to an abandonment." (United States circuit court of appeals, second circuit, in Wallace & Co. vs. Repetti, 266 Fed. 307.)

SECTION 459. ESTOPPEL TO ASSERT INFRINGEMENT

In the case of Aunt Jemima Mills Co. vs. Rigney & Co., 247 Fed. 407, decided by the United States circuit court of appeals, second circuit, question was raised as to whether or not the complainant was not precluded from complaining against use of an infringing mark because of acquiescence in the use, claimed to have been shown by the fact that, when defendants' use of the mark began, complainant's predecessor wrote defendants that it was "presumed" that this did not violate any law, and because there was a delay of nearly seven years afterward in suing. It was decided, however, one of the judges dissenting, that complainant had not evinced any intention to abandon its legal right to redress against the infringement.

* *

In a suit for infringement of a mill's flour brand it was decided by the Utah supreme court that the mill's act in permitting the adverse party to use some of its sacks bearing the mark involved was "perhaps, also, open to criticism," but that this permission amounted to nothing more than a revocable license which could not justify infringement after revocation of the license. (Holley Milling Co. vs. Salt Lake & Jordan Mill & Elevator Co., 197 Pac. 731.)

In the same case it was held that suit brought within one year was not unreasonably delayed.

SECTION 460. TRANSFER OF TRADEMARK RIGHTS

Legally, a flour brand is as inseparable from the business to which it belongs, by transfer, as is the hole therein inseparable from the doughnut. Despite a very general misconception among laymen on this subject the law is quite well settled along the lines thus laid down by the Wisconsin supreme court not long ago:

"The public has an interest in the trade name to the extent that the courts will not tolerate a fraud upon the public by allowing a name to be used in connection with another business, or upon different articles or inferior articles from those with which it was first associated or adopted. . . . A trademark cannot be sold or assigned independent of the business to which it is attached. It cannot be assigned or its use licensed except as incidental to the transfer of the business or property in connection with which it has been used. . . . A trademark may be abandoned, and in such case . . . may be adopted by another who appro-

priates and uses the same in good faith." (195 N. W. 701.)

* *

In a case before the United States circuit court of appeals, seventh circuit (2 Fed. 2d Ser. 237), that court followed a well-established rule of law in holding that, generally, "a trademark in and of itself, and apart from any business or product to which it is appurtenant, is not a subject of conveyance, and that the conveyance of good-will of a business in connection with the business itself will carry with it trade names under which the business is carried on, and marks whereby its product is known."

* *

These principles were specifically applied to a flour brand in the case of Atlantic Milling Co. vs. Robinson (20 Fed. 217) by a federal court in New York. In that case it appeared that plaintiff was the last of several succeeding transferees of the Atlantic mills, St. Louis. A former owner of the mill adopted the name Champion as a flour brand, and plaintiff sued for defendants' conflicting use of the name. Defendants insisted that plaintiff failed to prove a right to a decree, because there was no proof that the trademark had been specifically transferred with the mill property, but the court said:

"The right to the exclusive use of a word or symbol as a trademark is inseparable from the right to make and sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. [The court probably did not intend to intimate that the trademark might not be abandoned without abandonment of the business.] It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment rather than of the proprietor.

"A trademark of this description is of no value to the original proprietor, because he could not use it without deception, and therefore would not be protected in its exclusive enjoyment. Such a trademark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business, because such implication is consistent with the character of the transaction and the presumable intention of the parties."

The same principle was applied in the case of Carroll vs. Duluth-Superior Milling Co. (232 Fed. 675), decided in 1916 by the United States circuit court of appeals, eighth circuit. It was there decided that a verbal agreement by a miller that a flour brand used by him should pass to a mortgagee of the mill property, in aid of the mortgage, gave the mortgagee no interest in the brand, the mortgage never being foreclosed, and the business having been discontinued on the burning of the mill. The court said:

"It is well known that a trademark or trade name cannot be assigned, except in connection with the assignment of the particular business in which it has been used, with its good-will, and for continued use upon the same articles or class of articles. An attempted assignment of a naked trademark, disconnected from any business or good-will, is void."

In a still later case,—Holley Milling Co. vs. Salt Lake & Jordan Mill & Elevator Co. (197 Pac. 731),—decided by the Utah supreme court, it appears that defendant, owning two plants near Salt Lake City, sold one of them to plaintiff. The deed did not transfer any trademark rights in specific terms, and the court decided that there was no transfer by implication. The court said:

"Where it has been held that the trademarks passed, the vendee has always acquired the good-will of the business purchased, and, as a general rule, the vendor has retired from the business."

As an independent ground for claiming a right to use the flour brand involved, the plaintiff attempted to justify under a license from a third concern, Collins & Co., which had registered the mark in the United States Patent Office. But the court replied:

"In view that a trademark is not transferable except in connection with some business or enterprise in which it is used as such, . . . the plaintiff obtained nothing from Collins & Co. by reason of the so-called bill of sale or transfer of the alleged trademark."

An assignment of a flour brand, disassociated from the business in which it had been used and in which it acquired its value by association with the manufacture of flour by the originator and his successors, was held void and no defense to the assignees in a suit against them for infringement of the trademark, in the case of Bulte vs. Igleheart Brothers (137 Fed. 492). The court observed that "To uphold such a transfer would be to

disregard the fundamental office of a trademark, would be to disregard its purpose and object, and would be to sanction a fraud upon the public purchasing the article."

"It is, however, also contended that a trademark may be acquired for a limited territory merely, and in support of that contention the case of The Coca-Cola, etc., Co. vs. The Coca-Cola Co. (D. C.), 269 Fed. 796, is cited. There is no doubt that such is the law, but in order to accomplish that result there certainly must be an agreement or understanding to that effect between the parties. How can any one determine how much territory is intended to be transferred, or is, in fact, transferred, unless it is stated and agreed upon by the parties?

"The plaintiff in its complaint did not base its right to the trademark upon any such theory; nor, in view of its acts and conduct, to which reference has been made, can a right thereto be based upon any such hypothesis. It is not enough merely to assert a right in this court. The right, if it exists, must have some basis in the pleadings, and be supported in the proceedings. It is manifest from this record that plaintiff did not acquire the right to the use of the trademark in question in any manner whatever, and hence its claim in that regard must fail." (From the opinion of the Utah supreme court in Holley Milling Co. vs. Salt Lake & Jordan Mill & Elevator Co., 197 Pac. 731.)

SECTION 461. WHEN TRADEMARKS ARE INFRINGED

A trademark will be held to infringe another if the two bear a resemblance sufficiently close to tend to deceive ordinary purchasers, using ordinary caution. (United States circuit court of appeals, eighth circuit; Williams vs. Ansehl, 267 Fed. 9.)

In Procter & Gamble Co. vs. Eney Shortening Co., 267 Fed. 344, the District of Columbia court of appeals holds that the word "Esco" infringed "Crisco," as applied to a lard substitute. Replying to a suggestion that the user of the former name adopted it, using the initial letters of its name, the court holds that "the trademark statute takes no account of the origin of a mark. The question is: Would its use be likely to result in confusion? If so, it is unregisterable."

* *

Use of the name "Cressota" as a flour brand was held to infringe the name "Ceresota," by the United States circuit court for the eastern district of Pennsylvania, in a suit brought by that company against Mauser & Cressman (162 Fed. 1004), although the infringing name was claimed by defendants to have been derived from the combination of the first syllable of Mr. Cressman's name with the suffix, "ota," asserted to be indicative of wheat states, Minnesota and the Dakotas. The court held that the formation of the word "Ceresota" from "Ceres," the goddess of grain, and the suffix "ota" constituted a valid trademark, to the exclusive use of which the owners were entitled.

That name was, also, protected against use of "Certosa" to designate a competing brand, in Northwestern Consolidated Milling Co. vs. William Callam & Son, 177 Fed. 786. In that case it appeared that the word "Ceresota" was adopted by plaintiff in 1891 as a trademark for flour made from spring wheat, and was registered as a trademark in 1905. Defendants were denied permission to register the name "Certosa," to designate their product but nevertheless they used the word in competition with "Ceresota." On these facts the United States circuit court for the eastern district of Michigan decided that there was an infringement of plaintiff's trademark.

* *

In Pillsbury vs. Pillsbury-Washburn Flour Mills Co., 64 Fed. 841, a brand including the words "L. F. Pillsbury's XXXX Best Patent Minnesota," in a circle formed by three dotted lines, with the name "L. F. Pillsbury's" printed vertically on each side of the circle, and the words "L. F. Pillsbury's Best" at the bottom, was held to infringe a previously used brand consisting of the words "Pillsbury's Best XXXX Minneapolis, Minn.," in a circle formed by two dotted lines, with the name "Pillsbury's" printed vertically at each side, and the words "Pillsbury's Best" at the bottom.

The court of appeals for the District of Columbia affirmed a ruling of the commissioner of patents that the trademark "Premium" so closely resembles a previously registered mark, "Premier," for the same kind of goods, as not to be entitled to registration. The resemblance in sound and meaning is held to be so close as naturally to tend to confusion in the trade. (Getz Brothers & Co. vs. Alaska Packers' Association, 258 Fed. 526.) But in other litigation between the same parties (p. 527) it is decided that use and registration of different kinds of flags as trademarks does not

preclude a competitor from registering the trademark "Our Flag."

* *

Another important decision affecting the right of a manufacturer of flour to enjoin a competitor from adopting a similar trademark was handed down by the court of appeals for the District of Columbia. (Aunt Jemima Mills Co. vs. Blair Milling Co., 270 Fed. 1021.)

Appellant company, a Delaware corporation, with its place of business at St. Joseph, Mo., filed its opposition to the registration of a trademark by appellee company, a Kansas corporation, doing business at Atchison, Kansas, 23 miles from St. Joseph.

Appellant's device is the well-known "Aunt Jemima" trademark for self-rising buckwheat flour. It consists of the words "Aunt Jemima's," having underneath the bust picture of a full-faced, smiling Negress, with a handkerchief wrapped about her head and shoulders. This mark has been used by appellant company and its predecessor in business at St. Joseph, Mo., on pancake flour since 1889, and on buckwheat flour since 1904.

Appellee's mark consisted of the word "Sambo," having underneath the representation of a full-faced, clean-shaven, smiling Negro, having a white cap on his head and wearing a long apron, bearing in one hand a plate of smoking cakes, and in the other a cake turner. This mark had been used by appellee company at Atchison, Kansas, on pancake flour since 1913, and on pancake buckwheat flour since Aug. 7, 1916.

The opposition to registration was based upon the similarity of the marks and the likelihood of confusion in trade, when the marks are applied to goods of the same descriptive properties. From an order dismissing the notice of opposition, an appeal was taken. Reversing the ruling of the commissioner of patents, the court of appeals says:

"The goods on which the marks are used are the same, and we think the marks are deceptively similar. It is urged that the goods would be distinguished as 'Sambo' and 'Aunt Jemima's' brands, but we doubt this conclusion. The Aunt Jemima flour has become so widely known that a glance at the picture would satisfy the average purchaser. In other words, while the goods are known by the name, the picture is the distinguishing feature by which the goods are visually identified.

"In determining the question of possible confusion and resulting damage, it is proper to consider the manner in which appellee's mark may be used. Cartons were produced at bar as exhibits, on which the lower part of the figure of the Negro cook was so covered with printed matter that to the casual observer only the shoulders and head were plainly visible. Should registration be granted, the printed matter could be extended until only a bust picture remained, and nothing would prevent the registrant from using whatever coloring it desired in setting forth the mark, so long as the style of dress and the features of the Negro were retained.

"We think our opinion in the case of Wayne County Preserving Co. vs. Burt Olney Canning Co., 32 App. D. C. 279, is controlling here. There, as here, the marks were used on the same kind of goods. There, as here, the parties were located in neighboring towns, and there, as here, one was a bust picture and the other a full-length figure. The mark of the appellant company in that case consisted of a bust portrait of General Wayne in colonial military uniform, while the mark of appellee company consisted of a full-length figure of a colonial military officer designated by the words 'Col. Willett.' . . .

"So here the adoption of the mark before us by appellee company, situated only 23 miles from where appellant company has for years been manufacturing and widely distributing its goods bearing the Aunt Jemima mark, will admit of but one inference—that of gaining advantage from the wide reputation established by appellant in the goods bearing its mark. While the case is a close one, the court will adhere to its rule, and resolve the doubt in favor of the opposer.

"As was said by Mr. Chief Justice Smyth, in William Waltke & Co. vs. Geo. H. Schafer & Co., 263 Fed. 650, 49 App. D. C. 254: 'The case is not free from difficulty, but where there is doubt the courts resolve it against the newcomer. . . . The reason for this is, as has been said by this court more than once, that the field from which a person may select a trademark is practically unlimited, and hence there is no excuse for his impinging upon, or even closely approaching, the mark of his business rival. . . . Where he does so he is open to the suspicion that his purpose is to appropriate to himself some of the good-will of his competitor.' "

* *

The opinion of the court of appeals of

the District of Columbia in the case of Aunt Jemima Mills Co. vs. Kirkland Distributing Co., 48 App. D. C. 248, is as follows:

"Appellant, the Aunt Jemima Mills Co., opposes the registration by appellee, the Kirkland Distributing Co., of the trademark, for use on self-rising flour, consisting of the bust of a Negro holding a piece of watermelon under the chin, surmounted by the words 'Good Enuf.' The opposition is based upon a registered mark for use on pancake flour, consisting of the bust picture of a Negro woman with a red bandanna handkerchief around her neck, surmounted by the words 'Aunt Jemima.' From a decision dismissing the opposition, the case comes here on appeal.

"It is substantially conceded that the goods upon which the respective marks are used are of the same descriptive properties. The concession obviates the necessity of an express holding to the same effect. The only question left is whether the marks are so similar as to be likely to create confusion in trade. It would be difficult to imagine a more flagrant violation of the statute than the one here presented. The red core of the watermelon with its seed spots, held under the chin of the Negro, is a good reproduction of the red bandanna with its spots, tied around the neck of the Negress. A mere glance at the marks is convincing. No evidence of confusion is necessary, nor can any amount of fine-spun discrimination withdraw the case from the direct operation of the statute. The opposition should have been sustained."

* *

The opinion filed by the United States circuit court of appeals, sixth circuit, in the case of M. C. Peters Milling Co. vs. International Sugar Feed No. 2 Co., 262 Fed. 336, adds another interesting judicial determination concerning monopoly of flour and feed brands.

The decision affirms a decree of the United States district court for the western district of Tennessee in favor of defendant, exonerating that company of a charge of trademark infringement and unfair competition.

The litigation arose on a claimed similarity of trademarks used by the respective companies in the sale of stock feed. The characteristic feature of plaintiff's trademark is two concentric circles, within the innermost of which is the picture of a horse and rider. Defendant's trademark consists of two concentric circles, also, within which is another circle, of saw-tooth outline. These circles are within a rectangular field surrounded by heavy lines, also in saw-tooth form. Outside this border, around the rectangular field, and a part of it, are straight lines touching the saw-tooth points. Within the inner circle is the picture of a horse.

"It further appears from the evidence," says the circuit court of appeals, "that prior to registration of plaintiff's trademark practically all of its distinguishing features, except the rider, were in general use, in some form or other, by the manufacturers of horse feed. It also further appears that it is and was the custom in general use by all manufacturers of stock feed to print or stamp on the bags containing the same the picture of the head or whole of the animal for which the feed is specifically intended. While this is conceded by the appellant [plaintiff], the claim is made in its behalf that the brands and trademarks of this character were applied only to what is known to the trade as 'dry feed,' and that it was the first manufacturer to use such mark or brand in connection with the manufacture and sale of a mixture of grain, alfalfa, and molasses, known to the trade as 'sweet feed'; that 'dry' and 'sweet' feeds are entirely different products; and that for this reason it is entitled to the exclusive use of the concentric circles, and the picture of a horse within the inner one, in connection with the manufacture and sale of 'sweet feeds.'

"This question is discussed and decided in the case of W. A. Gaines & Co. vs. Rock Springs Distilling Co., 226 Fed. 531, 537, . . . and in that connection Judge Denison, speaking for the court, said:

" 'Whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trademark as belonging to different people for different kinds of the same article.' "

The circuit court of appeals holds that it necessarily follows that, where it has been the common custom of the manufacturers of horse feed to print or stamp the picture of a horse on the bags containing the same, the plaintiff could not acquire any prior right to the use of such picture by reason of the fact that it was the first to use the same on the feed containing an additional ingredient, "for, after all, it is still horse feed, although

differing in this respect as to its component parts."

"In determining whether the brand used by the defendant is an infringement of plaintiff's trademark," continues the opinion, "this court is not disposed to consider or apply any nice, technical distinctions such as an artist's eye would readily perceive, but rather only such marked differences as would be readily apparent to the ordinary purchaser of horse feeds. The doctrine is fairly stated by Mr. Nims, in his work on 'Unfair Competition and Trade-Marks' (2d Ed.), p. 583, in this language:

"'Such a similarity as will deceive is that likeness which renders the average buyer unable to distinguish the defendant's name or mark from the memory of plaintiff's name which he carries in his mind, not so much as will enable him to know them apart when the two are put side by side before him.'

"Applying this principle to the facts in this case, it is apparent that the defendant's trademark is so unlike the trademark of the plaintiff that the average buyer may easily distinguish between the two."

* *

An illustrative decision was handed down by the court of appeals for the District of Columbia in the case of National Biscuit Co. vs. J. B. Carr Biscuit Co. (3 Fed., 3d Series, 87). The court upheld the National Biscuit Co.'s opposition to the registration of the name "Eta" for crackers, on the ground that that name too closely resembles "Uneeda," owned by the first-named company.

See, also, section 471.

SECTION 462. REFILLING COMPETITOR'S BAGS

In enjoining use of secondhand bags bearing the label of the Consolidated Milling Co., Minneapolis, by defendants, Illinois manufacturers of flour, the Illinois appellate court, in a case brought by that company (72 Ill. App. 70), decided that the motives of defendants were immaterial; that it need not appear that there was fraudulent intent to dispose of their flour as that manufactured by complainant, the tendency to mislead the public being the controlling element. In this case the defense was that defendants' principal customers were bakers, with whom contracts were frequently made requiring the bakers to furnish the bags, and that among those furnished and purchased from bakers were bags bearing plaintiff's brands. The defense was rejected by the court on the ground that it did not appear that bakers were defendants' only customers and that, even if they were, the bakers might expose the flour in the sacks for resale, and thus deceive the public.

SECTION 463. DAMAGES RECOVERABLE FOR INFRINGEMENT

As to the measure of damages recoverable for infringement of a trademark, the Utah supreme court, in Holley Milling Co. vs. Salt Lake & Jordan Mill & Elevator Co., 197 Pac. 731, adopted the rule followed by other courts—that on infringement of a trademark being established the aggrieved party is entitled to an accounting for the net profits made by the infringer in invading the other party's rights, where the latter has not unreasonably delayed suing for such accounting.

Fixing a time as of which accounting should begin and a basis for computing defendant's damages, the court declares:

"Assuming . . . that the plaintiff was justified in believing that the defendant made no objection to plaintiff's use of the trademark immediately after the sale of the sacks aforesaid, yet when the defendant came into court and set forth the facts respecting its title, and claimed its legal rights, the plaintiff no longer had any reasonable ground upon which to base its claim of ownership and right to the use of the trademark in connection with its milling plant. . . . From that time on, therefore, in contemplation of law, the plaintiff must be held to have used the trademark without authority and without right, and hence it should be required to account to the defendant for the profits it realized from the sale of flour under the White Fawn brand.

"The defendant, however, claims that it sold its White Fawn flour at a net profit of 25c bbl, and therefore it should be awarded the profit it received from sales made by it. The authorities, however, all lay down the rule that the measure of damages is the net profits which the infringer of the trademark received from all sales made by him, and that is the rule which, in our judgment, should prevail in this case."

The court allowed damages from the date that defendant filed its counterclaim to the date of judgment enjoining plaintiff from making further use of the brand, adding:

"We remark that we do not wish to be understood as holding that in all cases where there is delay in asserting the right to the exclusive use of a trademark

the owner can recover damages only from the time the right is asserted in court. There may be cases of reasonable delay where the circumstances in no way countenance the use of the trademark by the infringer and where the right to an accounting will relate back to the very inception of the use of the trademark if wrongful. The measure of damages in the case at bar is based on what we conceive to be the overwhelming weight of authority in cases of this character where there is some doubt respecting the use of the trademark before the right is asserted in the courts."

* *

Damages awarded for infringement of a trademark will be limited to those sustained by claimant since the commencement of suit therefor, where it appears that there was no willful infringement and that defendant believed, in good faith, that he was within his rights. (Pease vs. Scott County Milling Co., 5 Fed. [2d] 524, decided by the United States district court, eastern district of Missouri.)

* *

In the case of W. R. Lynn Shoe Co. vs. Auburn-Lynn Shoe Co. (62 Atl. 499), decided by the Maine supreme judicial court, the measure of recovery for infringing a trademark, and for unfair competition in passing off one's goods as being the product of the complaining party, was thus stated:

"The rule which now prevails in the equity courts respecting the wrongdoer's accountability for the 'profits and damages' resulting from his unlawful acts requires the master [the court officer who hears and reports on the subject of damages] not only to take an account of all the profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts; and, since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trademark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trademarks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor."

* *

In the case of Grocers' Supply Co. vs. I. Renaud Co. (125 N. E. 144), it was claimed that, in computing damages for unfair competition, gross profits derived from infringing sales should not be allowed; that only net profits were recoverable. Overruling this contention, the Massachusetts supreme judicial court said:

"To allow the defendant, as now urged in argument, to charge upon the gross profits any share of its general operating expenses would be to permit it to take advantage of its own deliberate wrong when it intentionally palmed off its goods as having been made by the plaintiff."

* *

In Nelson vs. J. H. Winchell & Co. (89 N. E. 180) the Massachusetts supreme judicial court said, in part:

"The fact that there was no evidence . . . that the plaintiff had sustained damages through the loss of his trademark or because of its use by the defendants does not necessarily make it inequitable to hold them for their profits. It is expressly provided by our statute . . . that such profits shall be allowed. . . .

"He [the master who heard the evidence in the case] had the right to treat the failure of the defendants, after they had received notice of the plaintiff's claim, to keep accounts which would show accurately the amount of their expenses and of their profits . . . as a circumstance bearing against them. . . . As to losses from bad debts, he adopted the doctrine of Edelsten vs. Edelsten, 10 L. T. N. S. 780, neither increasing the amount of profits by reason of such sales nor diminishing that amount on account of the loss caused thereby; but practically treating those sales as if they had not been made at all. In our opinion, this was right. As to the allowance of general expenses of the business, he followed the rule laid down in Regis vs. Jaynes, 191 Mass. 245, 251, 252, 77 N. E. 774. Here, as there, to allow the defendants to charge against their profits upon these goods any portion of such expenses not shown to have been increased by their dealing in these goods would be to permit them, by diminishing the expenses of conducting the rest of their business, to derive a direct advantage from their own wrongdoing. . . . We do not find that the master adopted any erroneous rule of law."

"It is for the jury to say whether a

falling off in plaintiff's custom was due to defendant's infringement. Damages need not be proved with precision and definiteness, but it is sufficient if the evidence affords a basis for a reasonably probable estimate. General damages can be awarded. Nominal damages may be recovered for infringement where no actual damages are proved. Exemplary damages, beyond full indemnity, should not ordinarily be given. But exemplary damages for infringement may be allowed where an intention to defraud is shown." (38 Cyc. 892, 893.)

UNFAIR COMPETITION

SECTION 464. TRADEMARK RIGHTS AND UNFAIR COMPETITION DISTINGUISHED

Apart from the infringement of trademarks, the law recognizes a kindred species of business wrong, against which relief will be awarded, technically known as "unfair competition," which is chiefly distinguishable from the infringement of trademarks in that no exclusive proprietary interest in the name or mark used to deceive is essential before relief will be granted. This branch of the law affords a remedy against the adoption of an individual, firm or corporate name so nearly the same as that of a name used by competitor previously engaged in business as to permit the offender to trade upon the other's reputation and good-will.

In other words, the distinction lies in the fact that infringement of a trademark involves invasion of the owner's property right in the mark, whereas unfair competition involves the adoption of other devices to enable the guilty person to sell his goods on the reputation of another. When a personal name has become the trade name for a certain manufacturer's product, another person of the same or a similar name will not be permitted to use that name in such way as to lead the public to believe that in buying his goods they are buying those of the previously established and better known manufacturer or dealer. On the same principle, use of a similar corporate name will be enjoined.

* *

"The question of unfair competition is so closely allied with the question of the infringement of a trademark that, in view of the conclusion reached, it would seem unnecessary to discuss the former at any length. As a general rule, the right to recover upon either of these causes of action depends, substantially, upon the same state of facts, excepting, of course, the statutory provisions applying to trademarks, and excepting, also, that in disposing of the question of unfair competition, a court should take into consideration the dress, combination of colors, and manner and method of application and use of the respective marks in connection with the designs actually appropriated and protected by registration, if registration has, in fact, been secured. . . .

"Unfair competition consists in the use of methods, brands or advertising matter intended to cause, or in fact causing, confusion in the trade, or to induce or mislead the trade into the belief that the goods of the person or firm marketed under such similar device are the goods of the person or firm who has established a trade and acquired a good-will in business in connection with the rightful use of such trade token. While it is not necessary to establish by direct evidence the intent to deceive, where the circumstances are such as to lead to no other rational conclusion, yet in this case the distinguishing features of the trademarks of the plaintiff and defendant, taken in connection with their dress and color scheme, as actually used by each, are so patent and obvious that the presumption as to the intent is to the contrary, and, in the absence of direct evidence showing that the defendant's trademark has in fact created confusion and misled and deceived customers, this presumption must obtain." (United States circuit court of appeals, sixth circuit, in M. C. Peters Milling Co. vs. International Sugar Feed No. 2 Co., 262 Fed. 336.)

SECTION 465. ACTUAL COMPETITION ESSENTIAL

But where there is no actual competition between two parties, neither can be guilty of unfair competition against the other. (United States circuit court of appeals, eighth circuit, in Carroll vs. Duluth-Superior Milling Co., 232 Fed. 675.)

SECTION 466. COMPETITIVE METHODS IN GENERAL

The decision reached by the United States circuit court of appeals, seventh circuit, in the case of Sears, Roebuck & Co. vs. Federal Trade Commission, 258

Fed. 307, marks an important step toward curtailment of advertising methods which tend to deceive the public, and especially where the deception is practiced at the expense of competitors of the offender.

The respondent commission issued an order limiting the petitioner company's advertising practices, and this order was affirmed by the circuit court of appeals, with certain modifications. But the court makes it clear that the company's faults were regarded as quite conventional in the commercial world, by saying:

"Sufficient appears in this record and in the presentation of the case to warrant us in expressing the belief that petitioner's business standards were at least as high as those generally prevailing in the commercial world at the times in question, and that the action of the commission is to be taken rather as a general illustration of the better methods required for the future than a specific selection of petitioner for reproof on account of its conduct in the past."

The commission's order commanded the company to desist from circulating advertisements containing false representations that, because of large purchasing power and quick moving stock, it could undersell its competitors; from selling sugar below cost; from advertising that its competitors did not deal honestly with their customers, and falsely representing that the company's special representative personally supervised the picking in Japan of tea sold by it, and that it bought its coffee direct from the best plantations in the world.

Modifying this order, the circuit court of appeals holds that the Federal Trade Commission is without power to prevent a trader from selling a staple article below cost, but may prevent such sales when accompanied by false representations tending to injure competitors. On this point the court says:

"We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him, or from giving it away. But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction."

In other words, a miller may sell his flour below cost, but in doing so he must not make representations that tend to discredit a competitor, by falsely conveying the idea that the latter is charging an exorbitant price for his product.

* *

A feed manufacturer complained of an advertisement published in a trade periodical by the manufacturer of a feed mixer. Complaint was made that the advertisement was misleading, to the prejudice of feed manufacturers. The machine was offered to retail feed dealers as a supposed means of eliminating the wholesale dealer. The advertisement stated that feeds could be mixed at $1 a ton with this machine, and concluded with this statement, to which special exception was taken on the ground that it was misleading:

"If you've been buying feeds you have been paying from $5 to $19.50 per ton for the actual work of mixing. Why not save this money instead of giving it to the feed manufacturer?"

Assuming that such an advertisement is false or misleading in the statement that the machine will mix feeds at $1 a ton, or in the statement that wholesale feed prices are loaded from $5 to $19.50 per ton to cover the actual work of mixing, or in both statements, we were asked to discuss the question whether the law affords feed manufacturers a remedy against such methods of attempting to install the advertised machines at the expense of the wholesale feed trade.

Although the question presents novel features which do not appear to have been litigated in any reported case, we do not regard the law as being so impotent to do justice that it cannot redress a wrong of this kind. Even a cursory glance at decisions involving analogous legal principles is convincing that a remedy does exist.

We believe that an action lies to recover damages if specific injury can be traced by a feed manufacturer to misleading advertising of this character. If such proof cannot be made, but injury is manifest, we believe that an action for injunction against continuance of the unfair practice would lie. And no reason is manifest why several feed manufacturers or wholesale dealers might not join in such injunction suit as parties complainant. Because of the difficulty of proving specific damage, it may be that an injunction suit would be the more feasible remedy. It is also probable that, so far as interstate commerce is involved, the Federal Trade Commission

would entertain a complaint against continuation of the practice.

* *

As throwing light, not only on precedents pertinent to the particular matter before us, but as showing the scope that the Federal Trade Commission has covered in proceeding to stop unfair business methods in respect to false or misleading advertisements, etc., we give the substance of certain practices against which complaints have been issued by the commission:

Making injurious statements relative to a competitor's products and financial standing.

Falsely advertising that the offender is selling goods at cost or less than cost.

Publishing misleading advertisements inducing belief that an article has been certified by a government bureau.

Misrepresenting goods as being of a certain kind, whereas they are in fact adulterated.

Matter published by mail order house, containing misleading statements derogatory to regular dealers, and as to benefits to be derived by dealing with respondent. (The proceedings in this case, in which the commission made an order May 27, 1919, might be found to constitute a pertinent authority on the question raised by the feed manufacturer.)

Disparaging the business of competitors by means of misleading statements and advertisements falsely depicting the claimed advantages of the offender's product.

Misleading statements as to source, purity and vitality of the offender's product.

Publishing a false list of average market prices for purpose of comparison with the offender's lower prices, and falsely representing that the offender's retail prices are lower than current wholesale prices. (The commission's order in the latter of these two cases—dated Nov. 1, 1920—would be a precedent for stopping a practice of misstating how economically a machine may be operated in grinding a ton of feed, or how expensively feed is ground for sale to retail dealers.)

Publishing misleading advertisements disparaging the product of competitors.

Publishing misleading advertisements to induce belief that goods can be bought cheaper from the offender than from his competitors.

Making false statements relative to the offender's own and his competitor's product.

* *

One may not complain of a copying of his uncopyrighted advertising matter where there is no tendency to deceive the public as to the origin and identity of products, held the United States circuit court of appeals, eighth circuit, in the case of International Heating Co. vs. Oliver Oil Gas Burner & Machine Co. (288 Fed. 708).

SECTION 467. TREATING PROSPECTIVE CUSTOMERS, ETC.

The United States circuit court of appeals for the second circuit, in the case of New Jersey Asbestos Co. vs. Federal Trade Commission, 264 Fed. 509, denied the right of defendant commission to require a manufacturer or dealer to discontinue a practice of treating prospective customers.

The decision reversed an order made by the commission against expenditure of money by the asbestos company, through its salesmen, in entertaining customers and prospective customers and their employees, by treating to liquors, cigars, meals, theatrical entertainment, etc.

"We have held," says the court, "that only unfair practices which affect the public, as distinguished from individuals, are within the jurisdiction of the commission. We take judicial notice of the fact that the method of entertainment found to be unfair has been an incident of business from time immemorial. It is recognized by article 133 of the regulations covering the assessment of income tax, promulgated Jan. 2, 1918, as follows:

" 'So-called spending or treating money, if actually advanced by corporations to their traveling salesmen to be used by them as a part of expenses incident to selling the product of such corporations, is an allowable deduction in a return of income by such corporations. The deduction of such expenditures is conditioned upon a satisfactory showing that all the allowance claimed as a deduction was actually expended for and was an ordinary and usual expense incurred in selling the product or merchandise of the corporation.'

"The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud justifying the discharge of the employee within his contract term of service, and perhaps the recovery by the purchaser of the amount or value of such

inducement from the seller, upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals, and not one so affecting the public as to be within the jurisdiction of the commission. . . . However, it stretches theory to the breaking point to suppose that the entertainment expenses found unfair in this case constitute fraud practiced by the respondent and by the employee on the purchasers of the respondent's goods.

"It is difficult to conceive that the purchaser would have a right to recover the amount of such entertainment as a part of the price paid for the goods bought, or that he would have a right to discharge the employee within the terms of his service on this ground. So broad a construction of the statute would bring within the disposition of the commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the government. For instance, advertising is a method of selling goods which, without increasing their merits, increases their cost; and so does securing servants or competitors by paying them higher wages, though we suppose no one would say the act gives the commission a right to regulate these matters."

* *

In a decision handed down by the United States circuit court of appeals, seventh circuit, in the case of Kinney-Rome Co. vs. Federal Trade Commission, 275 Fed. 665, the court set aside an order of the respondent ordering petitioner to desist from offering premiums to dealers' salesmen to further the sale of petitioner's product in preference to the product of its competitors. The decision of the court appears to have been influenced by the fact that the premiums were given with knowledge of the salesmen's employer.

Petitioner admitted that in the course of its business in manufacturing and selling bed springs it gave premiums, such as necktie sets, etc., to the salesmen of merchants handling its products. On the other hand, it was conceded that these premiums were given "with the knowledge and consent and through arrangements with the merchants who are employers of said salesmen."

The commission found that the petitioner's practice constituted "unfair methods of competition in interstate commerce," in violation of the Federal Trade Commission act.

The following are the salient paragraphs of the opinion of the circuit court of appeals:

"In Federal Trade Commission vs. Gratz, 253 U. S. 421, . . . it is said: 'The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include.' . . .

"In Cole Co. vs. Am. Cement & Oil Co., 130 Fed. 703, it was stated by this court: 'The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good-will of a trade built up by his efforts, and sought to be taken from him by unfair methods.' . . .

"We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of the opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an 'unfair method of competition.'

"Without perhaps admitting petitioner's conclusions, even if its premises are true, respondent vigorously assails those premises, saying, 'Petitioner's whole brief is based on this false assumption—that the manufacturer is justified in doing whatever the dealer may do.'

"We are of opinion that the assumption is not false, but is fully justified. The stipulated facts show 'These premiums being given with the knowledge and consent and through arrangements with the merchants who are employers of said salesmen.'

"It cannot be that a merchant may personally do a thing touching his business that is legal, but that it becomes illegal when done by another through his procurement. When petitioner did the things complained of through arrangement with the merchants, the merchants became parties to the act. As it effected sales of their property, presumably they profited by the arrangement. If it was lawful as to one, it was lawful as to the other.

"In determining whether there was used 'an unfair method of competition' it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What, then, may the merchant do? In United States vs.

Freight Association, 166 U. S. 290, the Supreme Court said, at page 320:

"'The trader or manufacturer . . . carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction.' . . .

"In respondent's brief is asserted a self-evident truth, viz: 'The manufacturer has no such relation to the goods after he has sold them as entitles him to control their resale by the dealer.'

"This means that not only petitioner, but every manufacturer, is excluded from all right to control the merchant in his resale of his goods. No one, then, having any right to interfere in his business or to control in any way the resale of his goods, the merchant may do and permit to be done anything in connection with his business that he may see fit, and those he permits to participate in his business may do anything in that business permitted by him, and no one has any right to complain unless that which is done amounts to a fraud upon his rights. If such right did not belong to the merchant, then he would not have the ordinary rights of contract that belong to every man, and he would be compelled to carry the burden, risks and hazards of a business subject, without his consent, to the control of every manufacturer who might have sold him a bill of goods.

"The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered.

"It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public.

"It needs no discussion to show that that was his own competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to any one who does not own the goods.

"Likewise the public, if it has an interest in competition, has such interest only in competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house, and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

"We are of opinion that there can be nothing in the contention that some special interest in a clerk which is undisclosed to the buying public represents an unfair method of competition because of an incentive and opportunity of the clerk to deceive the public. Undoubtedly the clerk, with the master's consent, may discriminate between the master's goods.

"All of the buying public, with at least ordinary knowledge and intelligence, knows that a salesman is representing the merchant's interest, and that every merchant may and very frequently does have reason for pushing the sale of one kind of goods more than another; but if that were not true, it would be little less than an absurdity to say that a salesman, who often is the merchant himself, in order to escape the charge of unfairness must disclose to every would-be buyer his interest in the transaction in hand. . . .

"Nor is it conceived that there is any danger from falsehood or misrepresentation. A salesman, with the master's consent, may discriminate all he pleases between the goods he has to sell. Neither a salesman having a special interest in one article, where he has many to sell, nor a salesman with a single article to sell, has any right to indulge in falsehood and misrepresentation; but there is

here no evidence of falsehood or misrepresentation."

Federal Trade Commission vs. Larabee Flour Mills Corporation was a proceeding under which complaint was made against the milling company as follows: "Unfair methods of competition in the manufacture and sale of its flour . . . in that it by advertisements, hand bills, and by oral statements made by drummers, agents, etc., promised to give, and actually did give in many cases, a 10-year guaranteed gold filled watch to each merchant who sold 25 bbls of its flour and for each 25 bbls of its flour sold by such merchant a similar watch to the merchant's nominee among its employees, . . . the effect of which was to induce merchants to purchase respondent's flour and to induce the clerks to use extra and unusual effort to sell such flour, to the disadvantage of manufacturers of other brands of flour."

This complaint was dismissed after the handing down of the decision of the United States circuit court of appeals above referred to—presumably because that decision clearly established the proposition that the complaint was without legal merit.

SECTION 468. ACCUSING OF PATENT INFRINGEMENT

In the case of Emack vs. Kane, 34 Fed. 46, a federal judge made observations here pertinent. That was a case where complainant sued to enjoin defendant from driving away complainant's patrons by unjustly charging that complainant was infringing defendant's patent. Holding that a court of equity had jurisdiction to enjoin continuance of the libel, and that complainant was not limited to an action at law for damages, the court said:

"I cannot believe that a man is remediless against persistent and continued attacks upon his business and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proof in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action [for damages] in most cases would do no good, and ruin would be accomplished before an adjudication would be reached.

"True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain the wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ."

SECTION 469. SIMILAR PACKAGE MARKINGS

The legal aspects of cases where competing manufacturers of cereal products sold in cartons adopt similar designs of printing are both interesting and important. For example, if one manufacturer adopts a background of polka dots or fleur de lis or squares, may a competitor later adopt the same figures, if the trade names of the respective products and of the respective manufacturers do not bear confusing similarity and are conspicuously printed on the packages? And what difference does it make that different color of printing is adopted by each manufacturer? The suggestion has been made that it would be unjust to permit one manufacturer to monopolize a background design that has been long known to the printing art.

The law on this subject is both fair and simple. If a competitor has so long and so extensively marketed breakfast food in a carton, the background of which is a network of blue fleur de lis, that consumers have come to associate this design with that particular brand of goods, another will not be permitted to use a fleur de lis background on packages of a rival product under such circumstances as naturally to tend to a confusion of the brands in the public mind.

Any difficulty in solving a controversy as to rights in this regard is apt to become one of difficulty in determining the pure question of fact as to whether confusion is created by the resemblance. The mere fact that both use fleur de lis, and that one manufacturer first adopted the design, does not give him standing to restrain another's continued use of it, if by reason of prominence of the printing of the name of the product or manufac-

turer, or other circumstance, the background is an inconsequential feature in enabling consumers to identify at a glance the product of a particular manufacturer.

On the other hand, the fact that the fleur de lis on one manufacturer's packages are printed in red, while his competitor's are blue, or that the first may be much larger or smaller than the other, will not relieve one from a charge of unfair competition if the resemblance is close enough that his competitor will be prejudiced by confusion in the public mind, and if the latter was the first user of the design.

It is often supposed that if, through a difference of colors or other circumstance, one package readily can be distinguished from another, when laid side by side, there can be no invasion of the first user's rights. But the following summary of court decisions shows that this is an erroneous assumption:

"It is a question of fact in each case whether or not the goods or business of the subsequent trader have been so distinguished as to prevent any actual or probable confusion and deception. All the circumstances of the particular case must be considered. It is presumed that the public uses its senses and takes note of differences which are thus disclosed. But, on the other hand, it must be remembered that similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another, so that mere existence of differences does not necessarily show honest and sufficient differentiation.

"A nice discrimination is not to be expected from the ordinary purchaser. Although differences between the respective labels and packages exist, and are readily apparent upon comparison, yet if the ordinary purchaser is liable to be deceived by the similarities which also exist, an injunction will be granted. Where the distinctive part of a name or mark is taken, minor differences afford no defense. Similarity in the main distinguishing features will usually be sufficient to constitute infringement or unfair competition. Alleged distinguishing features which are not so placed or used as to be sufficiently prominent to prevent deception, or which are not likely to attract attention comparably with deceptive features, are insufficient.

"Any artifice, such as the use of small type, to make inconspicuous the alleged distinguishing features, shows unfair competition. Where the trade name is in itself deceptive, injunction lies, although there are differences in the dress of the goods, since purchasers may not be familiar with the exact appearance of the goods." 38 Cyc. 790-791.

* *

An instructive decision was handed down by the California supreme court in the case of Burke vs. Cassin, 45 Cal. 467, 480. The court said:

"It will readily be seen, upon a comparison of the labels of the plaintiff with those of the defendants, that they are in many respects different, but in other respects there is a marked resemblance. . . . The labels are of nearly the same dimensions, the paper and ink are respectively of the same colors, . . . and the general appearance of the defendants' labels is such that a large majority of persons would be liable to mistake them for the plaintiff's labels.

"In Falkinburg vs. Lucy, 35 Cal. 52, it is said that a label is not entitled to protection as a trademark; and on the authority of that case, as we understand the plaintiff's counsel, the preliminary injunction in each of these cases was dissolved. A label is not a trademark, as recognized at common law, though it may in fact contain no words, figures, etc., except those which constitute the trademark. A person may adopt a label of given materials, size, color, etc., and may attach the same to his goods, or the wrappers, cases, etc., in which they are packed, although another person has previously adopted a label of same materials, dimensions and color, and used them in the same manner.

"While this right is conceded, in its exercise there is no necessity or propriety in adopting a label already in use by another. But labels, like trademarks, may be adopted and used by a manufacturer or seller of goods to distinguish his goods from those of others; and when another person uses the same label or a colorable imitation thereof, it produces the same result as would a copy or colorable imitation of a trademark—that is to say, it is a false representation that the goods to which it is attached were manufactured or sold by the person whose label was copied or imitated, and purchasers are deceived and are liable to be defrauded.

"On principle, a person is as fully entitled to be protected in the use of his label as his trademark. . . . While it may be conceded that a label is not, strictly speaking, a trademark, the authorities, in our opinion, leave no doubt that the law does and should protect a

party against the use or colorable imitation of his label by another."

* *

So, where a manufacturer of stove polish built up an extensive business in selling packages wrapped in blue paper and bearing printing in black ink, it was decided that a competitor would be enjoined from adopting the same features (4 Fed. 527). And the National Biscuit Co. was held to be entitled to enjoin imitation of its widely known red label with white ellipse and intersecting lines, although the imitation used the words "Factory Seal" on its label, instead of "In-er-Seal" (127 Fed. 160).

* *

In another case it was decided that there was invasion of rights under the famous yellow "Gold Dust" washing powder package, although the compéting product bore the very dissimilar name, "Buffalo Soap Powder" (77 Fed. 869). But in the same case it was decided that an order of injunction should be qualified by providing: "This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said complainant's package that they are not calculated to deceive the ordinary purchaser." Here, again, we find the courts laying down the uniform test as to actionable conflict between package wrappers.

* *

The law works no hardship against the owner of branded goods. It does not limit his right to use cartons, barrels, bags, or any other standard container for use in selling his product. And, as some judge has pertinently remarked, the principles under which a manufacturer is protected in the exclusive use of a distinctive dress for his goods must not be extended so far as to permit one to monopolize the use of a brown paper sack tied with twine.

No miller can monopolize the use of white sacks for the packing of flour. But just as soon as some distinctive marking on a package becomes associated in the public mind as indicating the product of a particular miller or other manufacturer, just that soon his competitors cease to be entitled to adopt the same general style of dress, if deception to his prejudice is apt to result, although theretofore the design was equally open to adoption by all.

A visit to any large grocery store and observation of competing goods on the shelves will serve to show how successful cereal product manufacturers of the country have been in using their right to put up their goods in standard sized packages without imitating the individual appearance of competing manufacturers' products.

* *

In the case of Commercial Milling Co. vs. Fairchild Milling Co., decided by Judge Westenhaver, of the United States district court, northern district of Ohio, eastern division, he said, concerning use of the word "Velvet" as applied to flour:

"The trade of which mutual complaint is made relates to flour sold in paper sacks of various sizes. The appearance, coloring, labeling, and other characteristics of these respective sacks are so distant and different that confusion in trade, deception of the casual purchaser, and substitution of one for the other, cannot be held necessarily to result; and no substantial evidence is produced tending to show any confusion or deception in fact."

* *

In the case of Potter-Wrightington, Inc., vs. Ward Baking Co. (298 Fed. 398), the United States circuit court of appeals, first circuit, affirmed a decree (288 Fed. 597) enjoining defendant from using certain matter on bread wrappers on a finding that this matter had an unfair tendency to lead bread buyers to believe that the product was made of "Old Grist Mill" flour; complainant having a prior right to use that name, and promoting sale of its flour by furnishing bread wrappers to bakers using the flour.

SECTION 470. PERSONAL NAMES

One will not be prohibited from using his own name upon marks or brands placed upon articles of his own manufacture merely because it has been rightfully first used by another, who has established the reputation of, and built up a trade in, like articles by use of the same name in a trademark, sign or label thereon, held the Kansas supreme court in the case of Aetna Mill & Elevator Co. vs. Kramer Milling Co., 109 Pac. 692. But the court decided that the law will not permit any artifice or device to be used by the former to induce a belief of customers that the articles so marked are the products of the other.

* *

In the case of Sheffield-King Milling

Co. vs. Sheffield Mill & Elevator Co., 117 N. W. 447, decided by the Minnesota supreme court, the plaintiff company, as successor to the Sheffield Milling Co., was awarded an injunction against defendant's use of the word "Sheffield," as indicating a milling business; it appearing that plaintiff and its predecessor had built up a wide reputation as flour millers and producers of "Sheffield" flour, and that the name adopted by defendant tended to mislead the public to plaintiff's prejudice. Defendant company was organized by one Sheffield, who had been a large stockholder in plaintiff company. In granting relief to plaintiff, the Minnesota court said:

"We hold that every person has the right to use his own name in his business, either alone or associated with others in a partnership or corporation. He may not, however, use his name as an artifice to mislead the public as to the identity of the business or the corporation, or the article produced, and thereby unfairly divert the business of another person, partnership or corporation, who first lawfully selected the trade name, established a business and produced an article which is identified by that name. Such a use of one's own name, unaccompanied by a caution or explanation so specific as to prevent any confusion as to the identity of the corporation or its product, may be enjoined."

SECTION 471. SIMILAR DESCRIPTIVE WORDS

In the case of Excelsior Cereal Milling Co. vs. Taylor Milling Co., 186 Pac. 207, the California district court of appeals decided that plaintiff, as manufacturer of a product marketed under the name "California Flapjack Flour," was not entitled to restrain defendant, manufacturer of a competing product, from using the names "Los Angeles Best Self-Rising Flapjack Flour" and "Taylor's Improved Flapjack Flour."

The general legal principle involved is that, where one has no exclusive right by way of trademark in the use of a particular name or term in the description of his business or product, he may not rely upon mere similarity of names employed by a competitor as establishing unfair competition against him and right to injunction against it. To entitle one to relief in such case there must be such a condition of unfair competition, in the way of duplication, imitation and solicitation, as amounts to fraud and imposition.

The case was disposed of upon an issue as to whether the plaintiff's complaint set forth sufficient facts to entitle that company to an injunction against defendant, assuming that those allegations would be supported by proof at a trial. The complaint set forth the following facts:

For a long time before 1907 the Del Monte Milling Co. had been engaged in manufacturing and selling mill products in California and adjacent states. In the course of this business the company discovered a process for blending different kinds of flour so as to produce a compound adapted to use in making pancakes, waffles, etc. This product became widely known as "California Flapjack Flour."

In 1907 the Del Monte Milling Co. sold to the plaintiff the exclusive right to use this process in the manufacture of the compound for sale in certain southern counties of California and in Nevada and Arizona. Plaintiff had in the meantime built up an extensive trade in that territory under the same name, "California Flapjack Flour," at great expense in advertising.

It was also alleged that, because of the long-continued use of the name, the word "Flapjack" therein had come to be understood by consumers and the public and the trade generally to mean and apply to the particular brand of self-rising flour which the plaintiff was making and selling under that name, and that up to the year 1914 no other like article of food had been put on the market in the territory in question under the name "Flapjack" or "Flapjack Flour."

In 1914 the defendant began the manufacture of a competing product to which it at first gave the name "Pancake Flour." A year later the name was changed, and defendant began to use the names "Flapjack Flour," "Los Angeles Best Self-Rising Flapjack Flour," and "Taylor's Improved Flapjack Flour."

The complaint proceeded to aver that many persons had bought the defendant's products under the last-quoted names under belief that they were obtaining the plaintiff's product, being thereby deceived, to plaintiff's injury and loss.

The prayer of the complaint was that defendant be enjoined from using the name "Flapjack" in connection with defendant's product.

Upholding a ruling by a judge of the superior court at Los Angeles that the complaint failed to show any right to relief, the California district court of appeal said:

"The appellant concedes that the word 'Flapjack' and the phrase 'Flapjack Flour' are generic terms which could not

be made the subject of prior or exclusive appropriation as or by means of a trademark, and the plaintiff lays no claim to the possession of any exclusive right thereto or to the use thereof upon that ground. This phase of the case being disposed of by this admission, the only remaining basis upon which the plaintiff could predicate a claim of right to prevent the defendant's use of said terms in marketing its own product would be that by such appropriation and use of said terms the defendant was indulging in a fraudulent practice, to the plaintiff's injury, which it would be the duty of a court of equity to enjoin.

"There can be no question that upon proper averments and proof of fraudulent intent and conduct on the part of a defendant in so duplicating the plaintiff's product or imitating the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it was in fact entering the plaintiff's store or buying the plaintiff's goods, a court of equity will enjoin the further pursuit of such fraudulent purpose and practices. . . .

"On the other hand, it is equally well settled . . . that where the plaintiff has no exclusive right by way of trademark in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but that, in order to obtain such relief, the plaintiff in such a case must aver and prove such a condition of unfair trade dealing on the part of the competitor in the way of duplication, imitation, advertising, and soliciting as would amount to a showing of willful fraud, imposition, and deceit. . . .

" 'If,' the California supreme court said, 'the defendant can be shown to have put up his product with intent to palm it off as that of plaintiff, and if it does in fact tend to mislead the purchasing public, a case is made out, even though the plaintiff has shown no exclusive right in any trademark or trade name.' . . .

"While it is true that the defendant does make use of the old and familiar word 'Flapjack,' already in use by the plaintiff in relation to its own product, it does not otherwise make any attempt to deceive the public by a duplication of names. The plaintiff's article of merchandise is put forth under the name of 'California Flapjack Flour.' The defendant's product is marketed under the names 'Los Angeles Best Self-Rising Flapjack Flour' and 'Taylor's Improved Flapjack Flour.' Not only is there thus displayed the very opposite of an intent to deceive in the matter of names, but in addition to this the plaintiff makes no pretense at any showing that the defendant, in placing its product upon the market under these distinctive names, has done anything in the way of duplicating the wrappings or imitating the packages containing the plaintiff's wares, or of doing anything whatever in the way of advertising or soliciting which would have a tendency to deceive or mislead the purchasing public into the impression that it was buying the plaintiff's wares. Clearly, in the absence of such essential averments, it fails to state a cause of action."

One of the four sitting judges of the district court of appeal dissented from the opinion reached, saying:

"The case comes directly within the principle . . . that one who, with intent to defraud the plaintiff, uses any artifice, device or label on his own goods to deceive the plaintiff's customers into the belief that they are buying the plaintiff's goods, and thereby induces them to buy the defendant's goods, is liable in damages for the injury thus caused to the trade of the plaintiff. The complaint in the present case sets forth facts which bring it within this principle. The device used was putting a label, including the word 'Flapjack,' on the defendant's flour, whereby it led plaintiff's customers to believe they were purchasing flour sold by the plaintiff under that label.

"The error in the opinion is in assuming that this device could not, as a matter of law, have deceived the plaintiff's customers. The complaint alleges that it did, and the court should not and could not properly hold that this allegation is on its face impossible. It might not deceive all persons, but the case is made out if it deceives a sufficient number to constitute a substantial injury to plaintiff's trade and the deceit was practiced with the intent to defraud plaintiff. The allegation is sufficient and the fact could only be determined by the evidence. The case involved nothing more than the sufficiency of the allegations."

See, also, section 461.

SECTION 472. DECEPTION AS TO LOCALITY OF PRODUCTION

A mill raised the very pertinent question as to whether a flour manufacturer producing in one section of the country is legally entitled to use words in his brands or other advertisements indicat-

ing that his flour is made in another milling district. The inquiry was based on a report that a mill in one of the middle states designated its flour as "Minnesota XXXX" and used the term "Northwest flour" in the designation of another grade.

That this practice is illegal is manifest on a reading of the federal pure food act and the decision of the United States circuit court of appeals in the case of Pillsbury-Washburn Flour Mills Co., Ltd., et al., vs. Eagle, 86 Fed. 608.

Section 8 of the pure food act declares that food shall be deemed to be unlawfully misbranded, "the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and . . . any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced."

This section plainly covers a case where a miller falsely states that his product is "Minneapolis" or "Minnesota" or "Northwest" flour when the statement is not geographically correct, or where he designates flour as having been made of "Minnesota hard wheat" or any other particular kind of wheat, if that designation be false.

Section 10 provides for the condemnation of misbranded food found in interstate transit, and section 5 makes it the duty of the United States district attorney to whom the Secretary of Agriculture or any state food officer may complain to proceed to prosecute for any violation of the law.

Another form of legal remedy against deceptive use of geographical designations in flour brands is found under the established legal principle that "residents of a place who are using the name of such place in their business may enjoin nonresidents from using such name where such use is calculated to deceive the public and injure plaintiff." 38 Cyc. 805.

The decision of the United States circuit court of appeals above referred to shows the extent of this rule and the reasoning upon which it is based.

In this case seven Minneapolis mills were awarded an injunction against the use by defendant, a Milwaukee miller, and a Chicago flour dealer, of labels and advertising matter falsely representing that inferior flour was manufactured in Minneapolis.

The suit was mainly defended on the grounds that plaintiffs had no exclusive right to use the words "Minneapolis," "Minneapolis, Minn.," etc; and that use of the words did not indicate the place of manufacture, but, rather, use of the Hungarian process of milling, which was first introduced into the country at Minneapolis.

The second of these two grounds of defense was briefly disposed of by the court on the ground that the evidence proved "beyond any doubt or cavil that these words so used signify to the dealer, the purchaser, and the consumer that the flour is made by the roller or patent process at Minneapolis, in the state of Minnesota, and that it is this fact which has given to the flour so branded its uniform great credit for excellence in the markets of the world, not alone in this country, but in South America, Europe, China, Japan, South Africa, and wherever flour is imported from this country."

"When the defendant failed utterly to make good his defense in regard to the alleged proper meaning of the words used as a part of his brand, there was left small ground for him to stand upon," declared the court in taking up the other ground of defense.

"After that to still say that the court has no jurisdiction or power to grant relief is to fly in the face of the well-grounded principle running through all the cases that fraud accompanied by damages is actionable at law, and that, where one person has so dressed out his goods as to deceive the public into the belief that they are really the goods of another person, and so put them on the market, to the manifest injury of that person and of the public, an action at law will lie for the deceit, and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition.

"This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief."

After referring to several pertinent court decisions bearing on the subject, the court said: "So in the case at bar, the complainants can have no exclusive right to the use of the geographical names of 'Minneapolis' or 'Minnesota.' They are not the subject of a trademark proper. Any one or more of the two hundred thousand inhabitants of Minneapolis [the decision was handed down

in 1898] may use that word upon their flour. The defendant or any other person from any state may go there, and establish a mill, and brand his flour 'Minnesota Patent' or 'Minneapolis, Minnesota.' The defendant might have continued to buy Minneapolis flour, and branded it 'Minneapolis, Minn.,' and had all the benefit which these marks would give him in the market, because he would be adhering to the truth and fair dealing.

"But when he placed these same brands upon another flour, manufactured in Wisconsin, he departed from the truth, and placed a lying brand upon his goods, which was intended to deceive, and could not but deceive, the public, and result in injury to the plaintiffs' business. If the defendant could do this, all other persons could do the same thing, and so the public would be defrauded, and the good-will and business of complainants, which has taken 39 years to build up, would be greatly impaired, if not destroyed.

"If this could be permitted, there would not be much incitement to provide the public with a high grade of flour, such as the complainants have been manufacturing for many years, and which the evidence shows has led the markets of the world, if, by all manufacturers using the same brand, the complainants' flour may be confounded with all lesser grades and kinds made from all sorts and grades of wheat.

"It must be conceded that, if the private interests are great, the public interests are no less so. . . . The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trademark proper, and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence.

"In the latter class of cases, persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the good-will and business which long-continued industry and skill and a generous use of capital has rightfully built up. It will be of no avail in such cases, where the facts are admitted or proven, to allege a want of power in a court of equity to find a remedy. . . .

"Since the case of Mill Co. vs. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, was decided, holding that the word 'Columbia' placed upon flour sacks could not constitute a proper trademark word so as to give the person using it an exclusive right, no one would be so hardy as to claim that an exclusive right to the use of a geographical name could be acquired as a trademark proper. Indeed, the doctrine of that case was not new in 1893, but has been the leading doctrine on the subject both in this country and England for many years, as is clearly shown by the cases already cited.

"There is no inconsistency between that case and the previous decisions of the state and federal courts in this country, including the decisions of the United States Supreme Court before cited, to the effect that 'wrongs of this description, whereby, through an artifice of any sort, the goods of one manufacturer become confused in the public mind with goods of some other manufacturer, may be redressed in a court of equity.' . . .

"The cases in which a person has been enjoined from using his own name in connection with other labels or brands upon his goods proceed upon the same general ground of deceit and unfair competition in trade. If a person may be restrained from the use of his own name upon his own goods because such use, in the circumstances, will deceive the public into purchasing his goods believing them to be the goods of another, to the injury of the public and the good-will and business of such other person, so, also, on the like principle, may he be restrained from using any other proper or geographical name when such use will produce like results. . . .

"It is hardly necessary to cite authority for the doctrine that in cases where the question is simply one of unfair competition in trade it is not essential there should be any exclusive or proprietary right in the words or labels used, in order to maintain the action. . . .

"As we read the opinion of the court below [the decision of which was reversed by the circuit court of appeals], the injunction was refused not only because the several complainants could have no exclusive interest in the words the use of which by defendant is complained of, as a trademark, but on the further ground that the misuse of these words by the defendant cannot injuriously affect any one particular complainant, because they do not imply that any one in particular of the complainants manufactured the flour sold by the defendant.

"We think this ground is not tenable. If the complainants were consolidated into one great business concern, this ob-

jection would be obviated, because one corporation would manufacture all the flour made at Minneapolis, as now the several corporations complainant do. But, if such a corporation would be entitled to relief, we take it that any one or more of the complainant corporations having a common interest in preventing the fraud will also be entitled to maintain the action. . . . Though their interests are different in degree, they are of the same quality and kind."

From the reasoning of the circuit court of appeals it seems to be too clear to require argument that if a Wisconsin miller has no legal right to advertise his product as having been made in Minneapolis, he has no right to advertise it as "Minnesota flour." In such case, the aggrieved millers are not merely those whose plants are situated in Minneapolis, but also millers in the other cities and towns of the state, on whose behalf an injunction suit might be obtained. If there could be any doubt as to this question, it is dispelled by the provisions of the federal food act, which make it unlawful branding to misrepresent the state in which goods have been manufactured or produced.

Nor can the taking in of still more territory in misbranding flour, by designating it "Northwest flour" when it is in fact made outside the northwestern states, be regarded as avoiding the effects of either the food act or the decision of the circuit court of appeals. Manifestly, the false advertising of flour as being of northwestern production, as against a false advertising of the product as being of Minneapolis make, merely multiplies the number of millers who are injured by the fraud.

It may be doubted that a mere false advertising of flour as having been made of "Minnesota hard wheat" would sustain an injunction suit of the kind involved in the decision of the circuit court of appeals, for that does not involve a misrepresentation as to the place of manufacture, in view of the well-known fact that wheat of that grade is shipped all over the country, and even abroad, for milling. But it seems clear that such fraudulent advertising would fall within the provisions of the federal and state pure food acts, as an imposition upon the public.

CHAPTER LII

PATENTS AND COPYRIGHT

SECTION 473. WHAT MAY BE PATENTED?

THAT an improved composite food product and the method of making it may be protected by patent is a rule of law that was affirmed lately by the United States circuit court of appeals, second circuit, in the case of P. E. Sharpless Co. vs. Crawford Farms, Inc., 287 Fed. 655. Applying the rule, the court sustained the validity of a patent for blending cheese, and cited the famous flour patent case of Cochrane vs. Deener, 94 U. S. 780, in support of the conclusions reached. In the course of its opinion, the circuit court of appeals said:

"The question is presented of whether or not a food product or a process of producing it may properly be considered as the subject matter for the grant of a patent, within the meaning of the statute authorizing the grant for a new and useful composition of matter, or 'any new and useful improvement thereof' (as to the product), or any new and useful art, being interpreted to mean or include a method or a process within the lay meaning of those terms. It is to be observed that Congress provided for invention in respect 'of composition of matter.' There is no restriction as to the nature of the composition which may be patented. The only limitation is it must be new, useful, and the result of invention. . . .

"A patentable composition of matter may well result or be formed by the intermixture of two or more ingredients, which develop a different or additional property or properties which the several ingredients individually do not possess in common. In Cochrane vs. Deener, . . ., a process was described as:

"'A mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; while the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.'"

A patent was issued to Cochrane in 1863, and was reissued in 1874, covering a process for manufacturing flour. The object of the invention, as stated in the patent specifications, "was to increase the production of the best quality of flour; and my improvement consisted in separating from the meal, first the superfine flour and then the pulverulent impurities mingled with the flour producing portions of the middlings meal, so as to make 'white' or 'purified' middlings, which, when reground and rebolted, would yield pure white flour, which, when added to the superfine, would improve the quality of the flour resulting from their union, instead of deteriorating its quality, as had heretofore been the case when the middlings flour was mingled with the superfine."

The litigation questioned the validity of the Cochrane patents and the fact of infringement by the process used by defendant. The opinion of the United States Supreme Court gives a detailed description of the methods used by the parties for improvement of flour manufacture. It was found by the court that such differences as existed in the respective parties' machinery were not of such character as to avoid defendants' guilt of infringement of the Cochrane process. The court said:

"The defendants admit that the process has produced a revolution in the manufacture of flour; but they attribute that revolution to their improvements. It may be, as they say, that it is greatly due to these. But it cannot be seriously denied that Cochrane's invention lies at the bottom of these improvements, is involved in them, and was itself capable of beneficial use, and was put to such use. It had all the elements and circumstances necessary for sustaining the patent, and cannot be appropriated by the defendants, even though supplemented by and

enveloped in very important and material improvements of their own."

But the right to patents for machinery improvements, as distinguished from patents covering a process, was expressly recognized by the court, as is shown above by a quotation made from the decision. In connection with that statement, the court observed:

"That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar or a mill. Either may be pointed out; but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the same."

Bearing on situations where one person holds a patent for a process and another holds a patent applying to a machine used in that process, the court also said:

"We do not perceive that the patent of Cogswell and McKiernan [under which defendants claimed], if valid at all as against Cochrane . . ., affects the question in the least. That patent is not all for the process which Cochrane claims. If valid, and if, in using his process, Cochrane is obliged to use any device secured to Cogswell and McKiernan, it does not detract in the slightest degree from his own patent. One invention may include in it many others, and each and all may be valid at the same time. This only consequence follows: that each inventor is precluded from using inventions made and patented prior to his own, except by license from the owners thereof. His invention and his patent are equally entitled to protection from infringement, as if they were independent of any connection with them."

* *

As being of historical interest, rather than of present or future practical importance, we reproduce below an extract from George H. Christian's article on "Pioneer Milling," which appeared in the Oct. 6, 1915, issue of The Northwestern Miller:

"The introduction of the improved methods of milling in the year 1872, with the remarkable relative advance in the prices of Minnesota flour, greatly excited the imagination and covetousness of a class of adventurers then living in Washington, who saw an opportunity to take advantage of the loose methods in the administration of our Patent Office to exploit their sinister talents.

"If it had been possible to obtain a patent on the process after it had been introduced in Minneapolis, subsequent experience warrants the belief there would not have been wanting men ready to claim the improvements as their own and to back it up with all the necessary affidavits which the law demanded as proof. But as the machinery introduced had been accurately described in foreign publications of prior date, it became necessary to antedate these publications.

"Accordingly, some patent attorneys in Washington looked up a patent which had been issued to one Cochrane years before for the blowing of air into a bolting reel to carry off the vapor which was generated by the millstones under the practice of fast and close grinding then prevailing. It was not difficult for them to induce Cochrane to turn his patent over to them. The patent was surrendered and an application for a reissue was made (under a provision of the patent law) to cover the flat reciprocating sieve with a current of air blown upward through the sieve and through the thin stream of material to be purified flowing upon it.

"To any person acquainted with the utterly different designs and uses of the two machines, the claim that the second was involved in the plan of the first, as required in the terms of the law authorizing the reissue, seemed utterly absurd. It is hard to believe that the inspectors of the Patent Office did not see this fact or that the reissue could have been allowed without some sinister influence, but it was granted. With this document they quietly commenced suit against a party at Georgetown, in the neighborhood of Washington, who had installed the new process in his mill.

"The case was argued in the lower court and a decision rendered in favor of the patent. That the defense was not intelligently made, subsequent events proved. The Georgetown miller appealed to the Supreme Court of the United States. The same sort of defense was made in this court of last resort. The case of the defense was so argued that the Supreme Court was deceived and declared the reissue valid. If the parties had been in collusion, the defense could not have been more misleading.

"Here was an improvement of the highest value in an art of the widest importance, affecting every individual of the land eating bread, covered by this reissue

and confirmed by the Supreme Court of the United States. It was not until after this decision of the Supreme Court that the milling world knew what had been going on. The schemers saw before them a fortune of millions.

"They put out Cochrane as their agent to collect these millions, demanding, for a license to run the Washburn Mill A alone (the one existing before the explosion), the sum of $250,000. They counted upon getting from Minnesota $1,000,000. When they called upon the eastern milling concerns, they were met with the response that 'this thing originated in Minneapolis. The largest mills in the country are there. What are the Minneapolis millers going to do about it?'

"Accordingly, the patentees came to Minneapolis and started suit for an injunction against the use of the machinery in the very mill in which it had been introduced and from which all the users of the new process throughout the land had derived their knowledge of it! This was in 1876.

"I had retired from business and was succeeded by my brothers, who had formed with the Hon. C. C. Washburn, the owner of the mill, a partnership under the name of J. A. Christian & Co. They of course resisted the suit. All of the owners of important mills throughout the country formed a Millers' National Association to fight the claims of the Washington ring, which now included one George T. Smith, who had patented the whole process of making flour in that way as his own invention, and I was appointed chairman of the executive committee.

"We employed Gordon Cole, of Faribault, one of the foremost of the Minnesota bar, to defend our case. The suit for a preliminary injunction came up before Justice Miller at St. Paul. We filed what we thought were conclusive proofs that the reissue had been for an invention quite different from the original patent, that our machinery had been invented abroad years before the issue of the Cochrane patent, that the suit brought before the Supreme Court was collusive, and especially we urged that, if the reissue was valid, we were not using the process described in it.

"Justice Miller, in rendering his decision, said:

" 'This is a case asking for a preliminary injunction based upon a reissue of a patent which has been confirmed by the Supreme Court. I am not an expert in such matters; moreover, I have not time to go carefully over the exparte depositions the defense has put in. I am due to hold court in Nebraska in a day or two; besides, I have little confidence in exparte depositions. The defense hardly deny that they infringe. They claim to be responsible; let them give bond for $250,000 until the case can come up on its merits at the future trial.'

"This decision gave the Washington ring a great opportunity, and they did collect, I believe, in the aggregate a large sum for licenses, but their avarice was so excited that they found comparatively few to meet their exorbitant demands. One of the owners of a small interior mill in Minnesota intimated that he would give $5,000 for a license for his mill. 'Man,' Cochrane is reported to have replied, 'I would not walk across the road to pick up your five thousand!'

"It must have been a year afterwards that the case came up for trial at St. Louis, by stipulation, under Judge Treat, who was known to be an expert on the intricacies of patent right litigation. Meanwhile, we had secured the services of Mr. Harding, of Philadelphia, and Mr. Seward, of New York, a nephew of William H. Seward, Secretary of State under President Lincoln. Mr. Harding confirmed the proverbial reputation of a Philadelphia lawyer. He thoroughly absorbed the merits of the defense and presented the case in a masterly manner, assisted by our other attorneys.

"The court was crowded with millers from all parts, lawyers and interested spectators. Immense sums hung upon a proper presentation of the case. Large-sized working models of the original Cochrane reel with its patented attachment, and of the machines we were actually using, were exhibited. Experts testified as to the working of these machines, which were put in useful operation in the very presence of the court, and as to the principles involved in each. It was a notable scene.

"Judge Treat promptly rendered his decision that the Cochrane reissue was invalid on the ground that this reissue covered a machine whose merits depended upon a principle not appearing in the original patent. The case was not appealed. The bubble burst, but the cost to the millers for a year or more in traveling expenses, expert testimony and large fees to lawyers was several hundred thousand dollars."

In the case of the Alsop Process Co., St. Louis, against La Grande (Oregon) Milling Co. for infringement of their process patents, a decision was rendered in the district court of the United States for the district of Oregon, in favor of the

Alsop company. A portion of the decision rendered by Judge Wolverton reads as follows:

"The defendant's apparatus is so arranged as to discharge nitric acid and water in fixed proportions upon metal contained in a receptacle for the purpose. This process, it is admitted, produces nitrogen peroxid, the same as the process known to complainant's patent. Then by forcing air through the receptacle, and on through a conduit, the fumes produced are brought into relation with the flour, and the bleaching is accomplished. So that the defendant is using the same agency, evolved by practically the same process, for bleaching flour, and is liable for infringement, unless it be, as defendant claims, that the process is a thing not patentable.

"It is said that a principle is not patentable, and this is true in legal parlance. But complainant's patent is not of a principle, but of a process. The real invention, or the thing that was really discovered and brought into applied use, is the effect of nascent oxygen upon flour in fine division, which results in whitening or bleaching it. As to this, it has been judicially settled that it has the quality or property, not only of novelty, but of invention, and not only of invention, but of utility.

"I hold, therefore, that complainant's patent is valid, and that the defendant should be enjoined from further infringing it; and such will be the order of the court.

"The same order will be entered in the case of Alsop Process Co. against the Pioneer Flouring Mill Co."

This case is the first one actually brought to trial since the decision upholding the patents handed down by the court of appeals in 1909.

* *

The Quaker City Flour Mills Co. successfully defended a suit in which the Union Special Machine Co. sought to show that use of the Burghardt patent, covering machinery for sewing the mouths of filled flour sacks, infringed the Bigelow and Foster patents for similar devices. The milling company established its claim that, so far as there was similarity in the features of the rival machines, there was no patent invasion, because those features were public property prior to the issuance of the respective patents.

Judge Dickinson, of the United States district court for the eastern district of Pennsylvania, in rendering his decision in the case, made the following reference to the circumstances under which sewing machines came into use in mills:

"Flour and other mill products were at first handled in barrels. Later, bags came into use. The closing of the mouths of the bags was done by sewing them by hand. . . . As was to be expected, the already known sewing mechanism was brought into requisition. A change was found necessary, in that the tops of the bags could not be folded or lapped over as in ordinary sewing operation, but must be sewed while in an upright position. The thrust of the needle must in consequence be horizontal, instead of vertical.

"Again, the feeding mechanism in a sewing machine must bring the material to the needle and permit it to remain until the thrust is made and the needle withdrawn. . . . The inertia and momentum of filled bags compel a continuous movement of the bag carrier, and this in turn requires the feeding movement of the top of the bag to synchronize with the carrying movement of the body of the bag, so that neither will interfere with the operation of the other. The bags, moreover, are of different lengths or heights.

"This calls for some means of adjusting, through a raising and lowering operation, the position of the top of the bag with the position of the needle. The sewing head must also overhang the bag carrier, and the side toward the operator be open, so as to afford ready access to the bags. The commercial value of any such device consists in the reduction of the unit cost of the operation. It must, therefore, have a capacity for rapid and economical operation, and portability adds to this value."

The court then proceeds at considerable length to analyze the functions of the sewing machines, observing that there could be no patentable invention in the means of operating the carrier, or in changing the vertical thrust of the ordinary sewing machine to a horizontal one, or in the use of a conveying chain or belt, or in providing a support under the belt, etc., so far as such devices were previously in use in general mechanical operations.

In other words, the mere adaptation of old devices to a new use in sewing flour sacks would not constitute patentable invention. "The prior art was rich in all the elements which enter into the construction of a machine for sewing filled bags," remarks the court. "There was room for mechanical improvement in some of its parts. There was room for

the elimination of some of its features at the cost of the loss of certain functions. There was room for the incorporation of other elements in order to give new functions to the machine through these adjunctive features.

"Bigelow accomplished this, and, because of what he did, secured the exclusive right to the machine which he had thus constructed; but he did not thereby acquire an exclusive right to what others had contributed to the art before he constructed his improved machine. When, therefore, the defendant made the same use of the prior art of which Bigelow himself had made use, and abstained from any trespass upon the rights which Bigelow had acquired in his improvements, the defendant was doing only that which it had the right to do." (236 Fed. 246.)

See, also, the next section.

SECTION 474. WHAT MAY BE COPYRIGHTED?

Question was raised as to whether or not a formula for feed may be copyrighted, and thereby prevent others from manufacturing according to the formula without license from the copyright owner. The question was suggested by a suit pending in California against a mill, wherein plaintiff claimed that the mill infringed a copyright covering a formula for ground chicken feed. The formula calls for certain percentages of crude protein, fat, carbohydrates, and fiber and mineral ash in specific proportions. It seems to have been claimed by plaintiff that this gives him a monopoly in mixing a ration containing these elements in these specific percentages; that the copyright is broad enough to prevent use of another formula calling for protein in any percentage between 10 and 19; and that tagging of sacks of feed with the formula, as required by local feed laws, in itself constitutes an infringement of the copyright.

Incidentally, right to exclusively use the words "All in One" as applied to such product was asserted.

Although the precise question concerning the right to monopolize the manufacture of mixed feed under a copyright by using certain elements in specific proportions, does not appear to have been passed upon by the courts, it seems that this lack of judicial precedent naturally may be attributed to the circumstance that heretofore no one has been rash enough to assert that exclusive rights could be so acquired.

An examination of the copyright law and decisions in point lends the conviction that there is no plausible ground for a view that the manufacture of goods can be exclusively enjoyed under a copyright. Probably a book or booklet containing one or more formulæ for the manufacture of feed or other products would be copyrightable for the purpose of preventing others from copying the work, or essential parts of it, and publishing the same.

In that light the copyrighted matter would stand precisely the same as a copyrighted compilation of household recipes, in which latter case no one would probably question the right of any person to cook according to one of the recipes, howsoever the recipe may have been obtained. In other words, the copyright merely protects the right to publish an idea in an original form of expression. An authority on copyright law says:

"At present, a basic distinction between the patent and copyright laws is that the former gives an actual, absolute, monopoly in the idea patented, largely through giving the patentee the right to the exclusive use of the patented article, while no such absolute monopoly is given, or attempted to be given, a copyright proprietor. The United States copyright acts do not attempt to give monopoly in ideas, but only in particular cognate forms, or media for reproducing or communicating them." Weil's "Copyright Law," 67.

Furthermore, copyright merely protects against copying. If through original and independent intellectual effort one expresses an idea in given form he is not deprived of the right to even print and publish the idea in that form, although, unknown to him, some one else has previously reached the same, or substantially the same, result and copyrighted it. But, of course, identity or similarity of matter may raise a presumption of copying to be overcome only by clear proof where the circumstances point to copying rather than to honest and natural identity or similarity.

The claim made in this case, that attaching the formula to sacks of feed constitutes an infringement, appears to be refuted by the rules and regulations of the Copyright Office, in which it is declared that formulæ on boxes, bottles and other receptacles are not copyrightable. Furthermore, it would seem that a publication required by law to be made could not constitute a copyright infringement.

The decision of the United States Supreme Court in Trade Mark Cases, 100

U. S. 82, appears to be conclusive on the proposition that trademarks, as such, are noncopyrightable. So if plaintiff be decreed to enjoy a monopoly in the use of the words, "All in One," the right must be adjudicated on the ground of prior use of a fanciful, nondescriptive and nongeneric phrase, or on the ground of unfair competition.

However, should it appear that in the particular territory "All in One" is generally understood by the public as designating a competing product manufactured by plaintiff, it may be that the use of such a name as "Smith's All in One" would be enjoined as unfairly tending to divert patronage from plaintiff, for the same reasons that a court would probably protect the trademark, "Eskimo Pie," from violation by a competitor's use of "Smith's Eskimo Pie."

Referring back to the subject of monopoly of the manufacture of feed according to a particular formula, it should be noted that authority exists for obtaining patents for "composition of matter." And, according to Walker on "Patents" (5th Ed.) 16, the phrase "composition of matter," as used in the statutes, "covers all compositions of two or more substances. It includes, therefore, all composite articles, whether they shall be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids. To be a proper subject of a patent, a composition of matter must, like a process, a machine, or a manufacture, be able to endure the relevant tests of invention, novelty, and utility."

It would seem from this last quoted statement that before a valid patent could be obtained for a mixed feed it would be necessary that the feed be not only of a character not previously known to the feed trade and industry, but that it also possess some inherently useful property not common to other mixed feeds.

It is not understood that the mere idea of mixing certain ingredients in specific proportions is patentable although they may never have been so mixed before. But it is understood that if some one were to discover a new composition of feed ingredients which would enable a hen to lay two eggs at a time where she had previously been able to lay but one, or which would involve the introduction of any other new utility in the consumption of feed, the idea would be patentable.

* *

When copyrighted forms of advertisements contain statements that are misleading to the public, the courts will not protect the copyright by enjoining its infringement, declares the United States circuit court of appeals for the fifth circuit. The decision is based on the principle that injunction is an equitable remedy which is available only to persons who "come into court with clean hands."

See, also, the preceding section.

CHAPTER LIII

EXCHANGES*

SECTION 475. MEMBERSHIP AS PROPERTY

A MEMBERSHIP in an exchange is to be regarded as personal property, in the sense of being subject to attachment or execution to satisfy judgment against the holder, declares the supreme court of the state in the case of Wagner vs. Farmers' Co-Operative Exchange Co., 180 N. W. 231. The suit involved the status of a membership in the Minneapolis Chamber of Commerce, and the court said:

"We are well aware of decisions holding a seat on a stock exchange, a body similar to the Chamber of Commerce, not subject to sale under a common writ of execution. Nevertheless, we reach the conclusion that such a seat or membership may be attached and appropriated to the payment of the owner's debts. The membership is more than a privilege. It is personal property. It is transferable by the member during his lifetime, and descends after his death to his representative. It may be burdened by restrictions, but it is nevertheless valuable property; the membership in this instance having a market value upwards of $7,000. It may be reached by creditors' bill or by proceedings supplementary to execution. With all the foregoing characteristics and attributes of tangible property, no good reason suggests itself why it should not be reached by ordinary process, such as attachment and execution. . . .

"Nearly all courts that have spoken on the subject are in accord that such a membership may be reached by creditors' bill or in proceedings supplementary to execution; the court being empowered to compel the judgment debtor, the owner of the membership, to transfer it to a receiver. A sale on execution may accomplish the same thing. It passes the owner's title. No rights or equities of the other members of the chamber are affected. The one in whom the title vests takes it subject to the reasonable regulations and restrictions of the chamber. To say that a resident creditor has no way of attaching such membership when owned by a nonresident, but when owned by a resident it may be reached after judgment, would be to discriminate in favor of the nonresident debtor. If courts possess the power to appropriate memberships in stock exchanges or chambers of commerce of this state in satisfaction of the debts of resident owners, the same power should exist as to nonresident owners."

See, also, section 510.

SECTION 476. EXPULSION OR SUSPENSION OF MEMBERS

There are numerous decisions (see 23 Corpus Juris, 252-254) upholding the right of exchanges to discipline members who violate their membership obligations. The discipline may be accomplished by fine, suspension or expulsion. Among the grounds on which punishment has been imposed and upheld by the courts are dishonest practices and violating reasonable rules of the exchange.

The validity of a rule requiring members to submit controversies between each other to arbitration has been upheld by a decision of the New York court of appeals (Haebler vs. New York Produce Exchange, 44 N. E. 87) and by the California supreme court (Rorke vs. San Francisco Stock, etc., Board, 33 Pac. 881).

"In the case of Moffat vs. Board of Trade of Kansas City, 250 Mo. Rep. 168, decided by the Missouri supreme court, it appeared that defendant was chartered "to facilitate the speedy adjustment of business disputes," as well as to further other interests of its members in common. One of the sections of the constitution of the Board of Trade reads, in part:

"He [every member] shall also submit all disputes of a financial, mercantile or commercial character, connected with or arising from any matter referred to in this constitution and the rules and regulations of this association, whether with other members of this association, or with

*See, also, the chapter on Arbitration of Controversies (LVIII). As to validity of practices of associations as constituting restraint of trade, see section 443.

other parties, when such other parties assent thereto, to the arbitration of the committees of arbitration and appeals, and promptly and faithfully perform the awards thereof."

Plaintiffs were charged with having resisted proceedings for arbitration of a claim against them based on loss of a car of grain in a flood; the point in controversy being whether title to the shipment had passed. Proceedings were brought to expel plaintiffs and they sued for an injunction. The trial judge issued a permanent injunction, and an appeal was taken to the supreme court, which vacated the injunction as having been prematurely sought. Incidentally, the supreme court said, after setting forth various provisions of the defendant's constitution:

"We agree with the learned court of appeals that in case of a difference or disagreement 'of a financial, mercantile or commercial character' between or among members of the Board of Trade the board of directors might, in a proper case, determine whether such difference or disagreement was under the rules a proper subject for arbitration and, if so, and the complainant demanded arbitration, then a refusal of the other party to arbitrate would subject him to fine, suspension or expulsion; and we also agree that if the controversy was held by the board of directors not to be a proper subject for arbitration, then that decision did not invest the board of directors with power to decide the matter, but the parties might resort to the courts."

The court found, however, that in that case plaintiffs did not refuse to arbitrate, no request for arbitration having been made. Injunction against expulsion was held to be premature in the absence of a showing that plaintiffs had "exhausted their remedies within the Board of Trade" before resorting to the courts for redress against the threatened expulsion. It seems that plaintiffs had assumed that the directors would order their expulsion on pending charges. The court, however, holds that it could not be presumed, in advance of action by the directors, that they would sustain the charges.

* *

Another case in point was decided by the Ontario court of chancery in 1879—Cannon vs. Toronto Corn Exchange, 27 Grant's Chancery Reports, 23. Plaintiff was sustained by the court in his suit to enjoin his expulsion from membership in defendant association, but the decision rested on the fact that he had not been given sufficient notice of the hearing of the charges against him. The opinion leaves it quite clear that, had it been shown both that he violated a rule of the defendant by unreasonably refusing to submit a controversy to arbitration and that he had been given proper notice of hearing on that charge, his expulsion would not have been interfered with.

Bylaws of the Toronto exchange provided that misunderstandings between members might be submitted to the committee of arbitration for settlement; that refusal of a member to submit to arbitration, after being so required to do by the committee of management, should be "considered a flagrant breach of the constitution and bylaws of this association, and shall be deemed sufficient grounds for suspension or expulsion from this exchange," on certain hearing, etc.

No contention was urged before the court of chancery against the validity of these bylaws. The court says on this point: "It was suggested, but not argued, that the bylaws on the subject were ultra vires [beyond the power of the exchange to adopt]. It is not necessary to consider this subject further, for I assume in favor of the defendants that the bylaws were not ultra vires, . . . or that the plaintiff by signing them is bound by them."

* *

A decision affecting boards of trade and their members was handed down by the Minnesota supreme court in the case of Melady vs. South St. Paul Live Stock Exchange, 171 N. W., 806.

The gist of the decision was that plaintiff was not entitled to recover damages from either the defendant exchange or its board of directors as for wrongful suspension from membership in the exchange.

The court holds that a board of directors of a corporation so organized, when acting upon charges preferred against a member, is a quasi judicial tribunal, and that the directors, individually and collectively, are protected by the general rule of law that an action for damages does not lie against one whose acts, howsoever erroneous or malicious they may be, were done in the exercise of judicial authority clearly conferred.

And it is decided that if the directors of an exchange are not to be held responsible for wrongfully finding a member guilty of uncommercial conduct, fining him therefor, and suspending him from membership for nonpayment of the fine, there is no foundation upon which a claim for damages can be enforced against the exchange as a corporation.

CHAPTER LIV

WAREHOUSEMEN*

SECTION 477. LIABILITY FOR LOSSES IN GENERAL

WHEN flour or other goods are placed in a warehouse for storage, the warehouseman, in the absence of special agreement on his part, is merely bound to use an ordinary degree of care to avoid injury to the goods. But, knowing their peculiar nature, his care of them must be gauged according to their susceptibility to injury. The practice of warehousemen generally may be shown on an issue as to whether reasonable care has been exercised in a given instance.

He is not liable for loss caused by a tide, unless some degree of negligence on his part directly causing the loss is established.

When goods are sold while in storage, and are afterwards injured, any claim against the warehouseman for the loss must be enforced by the buyer, and not by the seller. (Hecht vs. Boston Wharf Co., 107 N. E. 990, decided by Massachusetts supreme judicial court.)

* *

A decision of the Oregon supreme court, handed down in the case of Hansen vs. Oregon-Washington Railroad & Navigation Co., 188 Pac. 963, throws interesting legal light on questions pertaining to the liability of a warehouseman for injury to, or loss or deterioration of, food products while in his custody, in the absence of special provisions fixing responsibility.

It is held that where the owner proves that the goods in question were delivered to the warehouseman in good condition and were returned in bad condition, or not at all, the law raises a presumption that the injury or failure to return was due to negligence. Unless this presumption is rebutted by proof on the part of the warehouseman, the owner of the goods is entitled to damages.

The opinion recognizes that the warehouseman relieves himself of responsibility by showing that the goods were lost, injured or destroyed by fire, theft, or some other cause consistent with the exercise of reasonably careful storage. It is further held that the presumption of negligence arising from failure to return in good order, although the owner does not prove any specific cause of loss or injury, does not arise where it appears that the warehouseman's custody of the goods has not been exclusive of that of the owner. On the other hand, it declares that the mere fact that the owner may be afforded access from time to time to take samples from the stock in storage will not be regarded as such possession as will defeat the presumption above referred to.

A further limitation upon this rule that negligent storage may be inferred from the warehouseman's return of the goods in damaged condition is thus stated by the court: "This doctrine of prima-facie negligence does not apply unless the chattel be of such a nature that it would not deteriorate or perish from internal defects, or through the operation of natural causes."

Other points decided by the court are as follows:

The measure of damages recoverable for injury to foodstuffs in storage, when the warehouseman is found to be responsible, is the excess of the market value of the goods in good condition at the place where injured, and at the time when returned to the owner, above the market value of the goods in their damaged condition.

Application of this measure of damages to a case where goods are shipped out of storage and refused by the owner's buyer on account of their damaged condition is not to be defeated by considering the price at which the owner agreed to sell to such buyer nor the price at which the owner may have resold to others, excepting so far as such prices reflect market values.

* *

The rule that a warehouseman is not liable for loss of goods stored with him if he proves that reasonable diligence

*The status of delivering carriers of goods as warehousemen is dealt with in Chapter XLII.

was used to guard against the same was applied by the California district court of appeal in the case of Garrette et al. vs. Grangers' Business Association, 208 Pac. 1010.

Plaintiffs deposited a quantity of wheat with defendant in a dock warehouse. Through the action of teredo in boring into the piling supporting the structure a section of the warehouse collapsed and precipitated plaintiffs' wheat into the water below.

"The wheat was admittedly destroyed while it was in defendant's possession as a warehouseman," observes the court, "and it therefore became necessary for defendant to prove that, as a warehouseman, it had exercised such care in safeguarding plaintiffs' property as a reasonable and careful owner of similar goods would exercise. This it sought to do by offering proof as to the precautions it had taken."

On trial of plaintiffs' action to recover damages, the jury found that defendant had exercised due care by causing engineers to make inspections of the piling from time to time, etc., and that the sudden attack of teredo was something that could not have been reasonably anticipated under the circumstances.

* *

A milling company which receives grain for cleaning and storage for the owner, on returning it in a damaged condition has the burden of proving that the loss was not caused by carelessness attributable to the company, according to a decision handed down by the South Carolina supreme court (82 S. E. 679).

The court holds that this point is unaffected by the question whether the grain was received for storage for compensation or not. And it was further decided that carelessness in caring for stored grain cannot be excused on the ground that the warehouseman uses no greater degree of care concerning his own grain. (82 S. E. 679.)

* *

The case of Ressler vs. Terminal Warehouse Co., 168 N. Y. Supp. 462, involved injury to stored goods by rats. The appellate term of the New York supreme court said:

"Even if we assume that the testimony that the cheese was eaten by rats is sufficient to require the defendant to show that it has exercised due care to protect the goods in its warehouse from rats, the evidence in this case shows without dispute that the defendant has taken at least the customary precautions, and under such circumstances it is not liable for the injury to plaintiff's goods. It appears from the defendant's testimony that there are no warehouses entirely free from rats, and that the defendant was regularly using traps, and kept five or six cats on its premises, and occasionally utilized ferrets, dogs, and rat catchers to reduce the number of rats, and even experimented with and expended large sums for virus designed to exterminate the rats."

Responding to a suggestion made by plaintiff, it was held by the court that the defending warehouseman was not bound to provide separate compartments with cement or zinc floor, walls, and ceilings in which to store the food products, in the absence of proof showing that such compartments would be practical or were customarily used.

SECTION 478. LIABILITY FOR FIRE LOSSES

Aspects of a grain warehouseman's liability for loss caused by negligent failure to take proper precautions against fire, and retention of a careless and habitually intoxicated watchman, were involved in the case of Runkle vs. Southern Pacific Milling Co., 195 Pac. 398, before the California supreme court.

Plaintiff sued for damages, and was awarded more than $5,000 for loss of beans stored in defendant's warehouse. Affirming the judgment on the ground that the milling company failed to use due care to avoid the fire that destroyed the beans, and that there was negligence in retaining one Thomas as watchman, he having been on duty at the time of the fire, the supreme court says:

"It is conceded, as indeed it must be, that by reason of the relationship of the parties arising out of the contract of bailment [storage] for hire and the provisions of section 21 of the warehouse receipts act (Stats. 1909, p. 437), the duty devolved upon the defendant to exercise such care in the safeguarding of the plaintiff's property as a reasonably careful owner of similar goods would exercise, and, failing in this, the defendant must be held in damages for the resulting loss.

"The evidence in the instant case shows, in response to the issue of negligence, substantially as follows: The defendant's warehouse was a wooden structure, 200 feet long and 74 feet wide, in which, in addition to general merchandise, gasoline, and other inflammable and explosive substances, were stored. Two barrels of water, without buckets at hand, were located at either end of the building, and these, with two small pyrene fire extinguishers and a three quarter inch low-pressure water pipe leading from a neigh-

bor's well and terminating with a faucet in a sink inside the warehouse constituted the fire fighting appliances provided by the defendant for the protection and preservation of the warehouse and its contents.

"Whether these fire fighting appliances were ordinarily adequate and reasonably sufficient as a protection against loss and damage by fire under all of the circumstances, and considering particularly the situation of the warehouse, was clearly a question of fact for the jury to determine. The liability of the defendant as a bailee [warehouseman] for hire was not lessened, and the plaintiff was not estopped from asserting such liability merely because the plaintiff may have had knowledge as to the manner in which the defendant conducted its business at the time plaintiff stored his beans with the defendant. . . .

"If Thomas at the time of the commission of the act which resulted in the fire was in the warehouse within the general scope of his employment, and the injury and damage resulted from his negligence, that is all that need be shown in order to charge the defendant with liability for the damage. . . . But, however that may be, the jury may well have found that the defendant was guilty of actionable negligence in the selection and employment of a man whose duties called for the constant possession of a key to the warehouse, with the consequent right of access thereto at all times, and who to the knowledge of defendant's agents drank intoxicating liquors to excess and who was in the habit of getting drunk. . . .

"In short, the real question involved in the instant case is not so much one of the scope of Thomas' employment, but rather a question of the negligence of the defendant in the selection of an employee whom it knew was not competent, by reason of his known drinking habits, to be placed in the care and charge of the defendant's warehouse and the property of the plaintiff therein."

* *

A decision handed down by the California district court of appeal in the case of Lynch vs. Bekins Van & Storage Co. 159 Pac. 822, holds that, where a warehouseman leads a customer to understand that storage is to be made in a fireproof structure, the customer can recover the value of his goods on their being destroyed by fire in a non-fireproof building, although the warehouseman may have been at no fault as to the cause of the fire. This is an application of the general legal principle that one who violates a contract concerning the safekeeping of property becomes an insurer of it against damage.

SECTION 479. WAREHOUSEMAN AS AGENT IN HOLDING GOODS

Where a contract for a sale of wheat provides for delivery at an elevator belonging to a third person, the owner of the elevator becomes the buyer's agent for safekeeping of the grain, and not the seller's, according to a decision by the Washington supreme court in Farmers' Grain & Supply Co. vs. Lemley, 178 Pac. 640.

SECTION 480. VALIDITY OF GRAIN SALES

One buying grain from an elevator company without knowledge that the company is not the owner and is not authorized to sell the same takes good title, unless the circumstances are such as to place a prudent and honest man on inquiry as to the company's right to sell, holds the Minnesota supreme court in the case of Northern Trust Co. vs. Consolidated Elevator Co., 171 N. W. 265, a suit involving defendant's right under purchases of wheat from the North Dakota Grain Co., which became insolvent.

The defendant bought various quantities of wheat from the grain company while the latter operated country elevators in North Dakota, without knowing that any of the grain was held for storage only. On insolvency of the grain company, plaintiff, as its surety on a bond given to the state of North Dakota as public warehouseman to secure redelivery or payment for grain, was held liable to holders of storage receipts, and sued defendant for reimbursement, on the theory that defendant was chargeable with either actual or constructive notice that the grain purchased by it was held for storage.

Deciding the case in defendant's favor, the Minnesota court holds that the evidence offered at the trial sufficiently established defendant's good faith, and remarks:

"The wheat was purchased on the floor of the Board of Trade in the usual and ordinary manner, at its fair market price. There had been similar transactions between the parties for several years, and no one had previously questioned them.

"Under the law of North Dakota, a public warehouseman does not become a wrongdoer by shipping stored grain to a terminal elevator. . . . Naturally, the proprietor of such an elevator would have no cause to suspect that the warehouse-

man was wrongfully disposing of the grain shipped."

SECTION 481. VALIDITY AND EFFECT OF ELEVATOR CONTRACT

The Kansas supreme court decided an appeal in favor of plaintiff in the case of Carlisle vs. Farmers' Elevator & Business Association, 180 Pac. 280.

Plaintiff sued for damages for breach of a contract by defendant "to weigh, dump, elevate and load into cars" any grain offered by plaintiff for that purpose for a compensation of three fourths of one cent per bushel. This contract was made in conjunction with the sale of an elevator by plaintiff to defendant.

The first ground of defense advanced by defendant was that the contract was unenforceable as being one-sided, in that there was no reciprocal obligation on plaintiff's part to deliver his grain at the elevator. This point was ruled against defendant, the supreme court holding that such a contract could be validly made as part of the consideration for the sale of the elevator by plaintiff at a stated price.

The second point unsuccessfully sought to be made by defendant was that plaintiff could not recover because he had not procured the necessary cars to load the grain he tendered. The contract was silent as to any mutual understanding on the question as to who should secure cars, but the supreme court inferred from the dealings between the parties as to grain which had been actually handled that defendant understood that the duty of obtaining cars rested on it.

SECTION 482. LIEN FOR CHARGES

A warehouseman has a special lien upon the goods stored with him, and is entitled to retain possession until all storage charges are paid and until the warehouse receipt is surrendered. If the receipt be lost, the warehouseman is entitled to retain possession of the property until the owner gives bond to indemnify him against any possible loss in the event of the lost receipt turning up in the hands of some other person who might present it and demand the property. This rule, which is generally applied throughout the country, was reaffirmed by the Georgia court of appeals in the case of Penick vs. Almand, 87 S. E. 845.

SECTION 483. RIGHTS OF HOLDERS OF RECEIPTS

A South Dakota statute, which declares, in effect, that a receipt for the storage of grain shall be conclusive evidence of the ownership of the person to whom the receipt was issued, so far as concerns the duties and liabilities of the receiving elevator, was sustained by the supreme court of that state as being a valid exercise of the state's power to regulate the business of public warehousemen (Street vs. Farmers' Elevator Co. of Elkton, 149 N. W. 429).

* *

Indorsement and delivery of a receipt covering grain in a warehouse passes title to the indorsee at once as effectively as if physical possession of the grain were delivered, according to the holding of the supreme court of North Dakota in the case of Dammann vs. Schibsby Implement Co., 151 N. W. 985.

Incidentally, the supreme court applied the statute of North Dakota which declares that a deposit of grain in an elevator on issuance of a receipt to the owner shall not constitute a sale to the warehouseman, but constitutes him a custodian of an amount of wheat of the kind and quality stored, although it is not contemplated that the identical wheat will be redelivered.

* *

In affirming judgment on a North Dakota warehouseman's bond for the benefit of holders of storage tickets covering grain, the supreme court of the state holds that while, under the North Dakota laws, a warehouseman may sell stored grain, and upon a demand for the delivery of grain stored substitute like grain therefor, a ticket holder need not make demand in the alternative for the same grain or that of an equal grade, as a basis for holding the warehouseman liable as for conversion of the property, where such holder has demanded return of his grain or payment of its value. A demand for the grain or its value throws upon the warehouseman the burden of offering substituted grain if he would not or cannot return the identical grain. (State vs. Daniels, 159 N. W. 17.)

* *

The right of a bank holding warehouse receipts covering wheat to claim the proceeds of mill products ground from the grain was involved in the case of Central State Bank vs. McFarlin, 257 Fed. 535, which was before the United States circuit court of appeals, eighth circuit.

The Shannon & Mott Co. operated a mill and elevator at Des Moines, Iowa. The B. A. Lockwood Grain Co. bought all the assets, but continued to operate the mill under the other company's name. Warehouse certificates covering wheat were issued in the name of the Shannon & Mott Co. to the Lockwood company.

and were indorsed by the latter as collateral security for loans made by a bank to it. For some time prior to the Lockwood company's becoming bankrupt, there was never enough wheat on hand to cover the certificates held by the bank; incoming grain being ground into mill products and sold. The receiver in bankruptcy turned over to the bank wheat remaining on hand, and unsold products of wheat subject to the bank's claim, but controversy arose as to whether the bank had a preferred claim, for a balance due, against accounts due for products which had been sold.

The court decided this question against the bank, holding that as to this balance the bank had a mere unsecured claim, with no priority over claims in general against the bankrupt estate.

The principal rules of law laid down by the court in its opinion are as follows:

Indorsement of a warehouse certificate to a bank to secure a loan vests legal title in the bank to the grain covered by the same, subject to divestiture of the title on payment of the debt secured.

This title in the holder of the certificates does not prevent a mingling of the wheat with other grain of like grade, whether belonging to the warehouseman or to third persons. And, since the bank knew that the wheat covered by its certificates was being constantly ground, the act of grinding did not constitute an unlawful conversion of the grain, as against the bank, so long as the products remained on hand, although the wheat may not have been replaced. "But the grinding of wheat into products and selling of those products down to a point where there was not sufficient wheat, plus products on hand, to satisfy the bank's certificates, constituted conversion to the extent of the deficiency. A further result might also follow. The products so sold being made up in whole or in part of wheat belonging to the bank, there might arise, in the absence of countervailing circumstances, a constructive trust attaching to the accounts payable by the purchaser."

But the opinion holds that, even if this last-stated proposition be good law, the claimant who seeks to trace his wheat into accounts receivable covering mill products and owing the bankrupt debtor must make the identity clear. That a bankrupt's general assets have been swelled by conversion of property belonging to the claimant gives the latter no prior rights in such assets unless he specifically traces his property. In this case it is held that the bank failed to so trace its wheat into the specific accounts receivable due the mill for products sold by it.

See, also, section 490.

CHAPTER LV

ACCOUNTS AND PAYMENTS

SECTION 484. ACCOUNTS STATED

A DECISION of the appellate term of the New York supreme court draws attention to an important legal rule governing the collection of accounts.

Primarily, of course, a creditor who seeks to collect a lump sum as being due for the delivery of various sales items has the burden of establishing the correctness of each item, and, except as the debtor may specially preclude himself from denying the correctness of a statement rendered, the selling creditor must stand ready to prove to the satisfaction of a judge or jury that his account is correct in its various items.

But the delinquent debtor is apt to simplify matters for the creditor by converting the indebtedness into what the law calls an account stated. An account stated arises when an itemized account is submitted to a debtor and he expressly or impliedly promises to pay the balance shown by that statement, except as justice may require a correction of the account because of a mistake in it. On the same condition the account is usually binding upon the creditor who submits it.

So, ordinarily, a creditor makes out a case entitling him to recover by showing that an itemized statement of account has been submitted to the debtor and he has expressly promised to pay the balance shown thereby to be due. But it is not necessary that he expressly promise to pay it. Generally, his retention of the statement without objection to any of its items within a reasonable time will be treated as an implied admission of its correctness.

This latter phase was the one dealt with by the New York court in the case of Postal Telegraph Cable Co. vs. Newman, 172 N. Y. Supp. 228, brought to recover upon an alleged account stated for telegraph tolls. The court said:

"In order to show an account stated, the plaintiff is not required to show an express assent by the defendants to the correctness of the bill rendered. It is required, however, under such circumstances, to show facts from which such assent on the part of the defendants can be inferred. Where an account is made out by one party and transmitted to the other party, and the latter fails to object to the party rendering the account within a reasonable time, an inference may be drawn that he is satisfied with it. . . .

"There is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the account thus rendered; but it is merely competent evidence, subject to be rebutted by circumstances from which counter inferences may be drawn."

But until the debtor discharges the burden of proving why he made no timely objection to the statement, he is to be regarded as bound by it.

* *

A decision of the Arkansas supreme court declared:

"When an itemized account is rendered, objection must be made within a reasonable time, or it becomes an account stated and subject to attack for fraud and mistake only. . . . The retention of the account without objection is evidence of more or less weight according to the length of time, the business, character, education of the parties, and all the circumstances of the case." (May & Ellis Co. vs. Farmers' Union Mercantile Co., 189 S. W. 1053.)

* *

The Springfield (Mo.) court of appeals has decided that the rule does not "work both ways," in the sense that a creditor in submitting an itemized statement is bound by it. It is held that it is open to him to show that there was an inadvertent omission of one or more items. (Friedman, Keller & Co. vs. Olson, 173 S. W. 28.)

The reason of this holding appears to lie in the fact that the debtor's possession of the statement gives him superior opportunity to discover any mistake that may exist in it.

* *

It was unsuccessfully sought to apply the law concerning "accounts stated" to a sale of wheat to a mill in the case of Bloss vs. Aurora Milling Co., 229 S. W.

833, decided by the Springfield, Mo., court of appeals.

Plaintiff, a farmer, sold wheat grown on 100 acres of land directly to defendant mill. He kept an account of weights of the grain as it came from the thresher. As each truckload was delivered by his driver to the mill, the latter issued to the driver a weight ticket based on mill weights. These tickets were turned over daily by the driver to plaintiff, who discovered a discrepancy between the weights at the thresher and at the mill just about the time the deliveries were completed. In the meantime the wheat delivered had been intermingled with other grain at the mill.

When plaintiff sued to recover a balance in his favor shown by his weights in excess of the weights shown by the mill records and the tickets issued thereon, the mill contended that the account between the parties had become stated through the mill's delivery, and plaintiff's retention, of the weight tickets. Affirming a verdict in plaintiff's favor, the court of appeals says, in part:

"To constitute an account stated, the debtor and creditor must both agree to the correctness of the account, and in addition thereto the debtor must agree to pay or satisfy the amount agreed upon and the creditor must agree to accept the payment of the agreed sum in satisfaction of the account.

"The agreement may be proven by evidence either direct or circumstantial as any other fact may be proven, or, if the party to whom the account is rendered retains it without objection for an unreasonable length of time, his so retaining it will justify the inference that he has approved it, and in such a case other proof of his acceptance and agreement to pay is not required. . . .

"The contention in this case is that the delivery of the weight tickets to the driver of the truck at the mill was an account stated by the defendant as to the quantity of wheat delivered. We do not think so. The delivery of the weight tickets at the mill to the driver of the truck was not a delivery to plaintiff as applied to the contention of an account stated, for the reason that there was no evidence that the driver had any authority to settle or adjust the account or to make any agreement as to the correctness of the weights; so plaintiff's conduct must be judged in the light of what he did after the tickets reached him. . . .

"It is not sufficient to show delivery to plaintiff alone. Plaintiff's agreement thereto must be shown before it becomes an account stated that binds him. The only contention that his agreement thereto was shown is based on the fact that he retained the weight tickets without objection until the wheat was all delivered, which covered a period of six or seven days, and that such retention by him without objection was unreasonable.

"In passing upon plaintiff's conduct in this respect, we must measure it by what he should reasonably be expected to do under the circumstances in this case. It is manifest that plaintiff could not have made objection to any particular load in time to have furnished defendant an opportunity to correct its error if one were made in weighing that load. . . .

"We do not think the conduct of the plaintiff in not sooner discovering the discrepancy between the weights as shown by the weigher on the thesher and those shown by the weight tickets furnished by the mill should be held as binding him to abide by the mill weights. There would be no reason why he should make the comparison until the threshing was completed, in the absence of anything that would suggest to him that there might be a difference in the weights. . . . In our view of the case . . . we do not think the question of an account stated was involved in the case."

Passing to the nature of proof required of plaintiff to establish his right to recover, the court adds: "If plaintiff had been bound as upon an account stated, he would then have been compelled to show that defendant had made a mistake in weighing his wheat, but, with that question eliminated, he could show the weight of his wheat in any way permissible under the rules of evidence, and was not bound to explain anything in connection with defendant's manner of weighing the wheat."

SECTION 485. APPLICATION OF PAYMENTS

In the suit of Union Elevator Co. vs. Born, 118 N. E. 973, the appellate court of Indiana was called upon to determine whether certain contracts for future deliveries of corn had been discharged by various dealings between the parties.

Plaintiff advanced to defendant different sums of money, each to apply on corn to be delivered within a specified time, and took receipts which bound defendant to pay interest, and, in the event of failure to deliver the required quantities of corn or to repay the money, attorneys' fees incident to a collection from him.

Defendant did not deliver any corn within the specified times, but afterwards

made deliveries greatly in excess of the requirements of these agreements, in addition to delivering quantities of other commodities and paying cash. In the course of these running transactions, defendant became further indebted to plaintiff, but there was no further agreement for payment of attorneys' fees in the case of enforcing payment.

Settling the final accounts between the parties, the court refused to permit plaintiff to recover such fees, holding that all of defendant's obligations under the contracts first mentioned had been satisfied in the course of the running accounts. As governing the case, the court said:

"Where a debtor owes his creditor distinct accounts or debts, and he makes a voluntary payment, he may direct its application; if he fails to do so, the right passes to the creditor to apply the payment to any one or more of the debts as he pleases. If neither party makes a specific appropriation of the payment, the law will apply it according to its own notion of justice, giving effect, however, to the intent of the parties, and primarily to the intent of the debtor, if such intent may be gathered from the facts and circumstances.

"In the absence of an appropriation, express or implied, made by the parties, to any specific debt, the law will, in running accounts, make the appropriation according to the order of time in the items in the account; the first item on the debtor side being discharged by the first item on the credit side. . . . The rule is not confined to payments made in money, but is extended to payments made in commodities. . . . It has been held that the law will apply the payment to an interest-bearing debt in preference to one bearing no interest."

SECTION 486. CHECKS AS FINAL SETTLEMENTS

The legal term "accord and satisfaction," as used in the following paragraphs, signifies a tender and acceptance in discharge of a claim held by the acceptor.

There is a common notion among business men that receipt of a check by a creditor, with an indorsement on it to the effect that it is issued in full payment of a certain account, or an accompanying statement to that effect, precludes him from recovering any balance actually due. This is true as to unliquidated debts, where a bona fide dispute as to the amount due exists, but not where there is no room for controversy as to the amount due.

So, it was held by the appellate division of the New York supreme court, in the case of Frank vs. Vogt, 166 N. Y. Supp. 175, that where goods were sold at an agreed price and were received by the buyer, his sending a check for a smaller amount to the seller as full setlement, and the seller's retention of the check, did not preclude the latter from suing to recover the balance actually due, although the buyer claimed a deduction on account of claimed inferiority of the goods. But, of course, in a suit by the seller to recover the balance, it would be open to the buyer to establish his counterclaim.

The court held that a debtor cannot, by paying an amount admittedly due in any event, foreclose the creditor from claiming that more is due. "To hold otherwise," declares the court, "would result, in many cases, in permitting a debtor to coerce his creditor into making an unjustified deduction from his bill."

* *

The effect of a seller's retention of a check tendered by the buyer in full settlement for a purchase, when the seller claims that a greater amount is due, was considered by the Iowa supreme court in the case of Schultz vs. Farmers' Elevator Co., 156 N. W. 716, wherein plaintiff sued for a balance claimed to be due on a purchase of shelled corn. The court said:

"Where there is a good-faith dispute as to the amount due from one party to another, the acceptance, without objection, of a statement showing a less sum due than is claimed, and of a check for the balance of account thus shown, will amount in law to a complete accord and satisfaction. . . . It is not absolutely necessary, in order that an accord and satisfaction may arise, for the debtor to declare expressly, in connection with his tender, that it is meant to be in full payment, for circumstances may show as conclusively as language that this was meant, and that the parties so understood the matter. There must be a meeting of minds, and it must be shown that the creditor understood or should have understood he was abating his claim when he received the check for the settlement."

* *

In a Minnesota case (173 N. W. 413) the supreme court of that state followed this view of the law on the subject:

"When a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule, but one of two courses open to the creditor, either to decline the offer

and return the check or to accept it with the condition attached. The moment the creditor indorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete." 1 Ruling Case Law, 196.

The Minnesota court remarked that the creditor cannot avoid the legal effect of retaining a check of this kind by striking out words on it indicating that it is tendered in full settlement.

* *

In the case of Sollenberger & Brant-haver vs. Scattergood, 82 Pa. Super. 571, the Pennsylvania superior court said:

"We have . . . (1) A controversy growing out of the shipment of a car of cottonseed meal; (2) a tender by defendants to plaintiffs of a check for the amount said to be due the latter 'on this shipment'; (3) accompanied by a declaration that 'this check covered the plaintiffs' claim in full on this car,' which is equivalent to a condition that if accepted it should be in full discharge of the claim . . .; and (4) an acceptance of the check by the plaintiffs and their retention of the money. These embrace all the elements necessary for an accord and satisfaction."

SECTION 487. SUBSTITUTION OF DEBTORS

"Novation" is a legal term denoting that an original debtor is released and a new one substituted. But the law recognizes that a situation may be such as to negative an agreement to release the old debtor and to hold the new. These principles were involved in the bankruptcy of Dahnke-Walker Milling Co., 1 Feb. (2d), 404. There it appeared that the company had obtained credit at a bank on forged bills of lading and drafts. On discovery of the forgery, three of the company's officers gave their personal notes to the bank for the amount.

When the bank sought to establish its claim against the estate of the bankrupt company the trustee in bankruptcy resisted, on the ground that taking of the personal notes released the company, but the United States district court for the western district of Tennessee said:

"Such extinguishment and novation would not have arisen, except by agreement of the parties or by such acts on their part as clearly indicated an intention to cancel the original debt and accept the note in payment or substitution therefor. The record negatives any such intention either by express agreement or by acts. The burden of showing a novation rests upon the trustee. He has not met this burden in any sense. . . .

"The bank did not surrender the fictitious bills of lading and drafts. They were sent to the officers of the Dahnke-Walker Milling Co. upon their request for inspection, and without any knowledge on the part of the bank were by such officers destroyed. The bank was no party to this act, and endeavored to retain them as evidence of the origin of its indebtedness. In no event could it be charged with the unwarranted acts in this regard of the officers of the Dahnke-Walker Milling Co., in view of the facts disclosed by the record.

CHAPTER LVI

BONDS AND GUARANTIES*

SECTION 488. VALIDITY OF GUARANTY OF PAYMENT

AN ingenious attempt of a mill to obtain security for a claim against an apparently insolvent debtor failed, according to a decision handed down by the United States district court for the southern district of New York. (262 Fed. 691.)

For several years the mill company had bought bags from a bag company, which became indebted to the former for about $12,000 on account of advance payments and otherwise. The mill company made an additional purchase of bags, and gave the bag company notes for about $9,000 to cover the price. These bags were never delivered, but the bag company sold the notes. On discovering this fact, and the further fact that the bag company was short on funds, the mill company demanded an adjustment of accounts.

It was finally agreed that the bag company should formally agree to deliver bags worth $22,100—approximately the sum due the mill company—and that performance of this contract should be guaranteed by a surety company. This contract was entered into, and recited that the purchase price had been paid. In fact, the only payment made was effected in this manner: The mill gave a check for the $22,100, but at the same time took back a check for $21,087.20—the amount owing it by the bag company. The only bags delivered to the mills under this contract were worth $1,050.

On discovering the facts, the plaintiff, the surety company, sued to cancel the bond guaranteeing deliveries under the contract, and the decision referred to granted the relief prayed. The court said:

"It follows that, if the bond had never been obtained or is now unenforceable, the mill will be $37.20 better off for what took place between Sept. 27 and Oct. 3, 1918, and that, if the bond be held good, it will have profited to the amount of $21,087.20. . . . The making of the contract was obviously a mere means of inducing the surety company to guarantee the existing debt of the bag company. The surety company would never have executed the bond, had it been told the facts, and it is certain that both the president of the bag company and the president of the mill knew that it would not. The fraudulent character of the whole transaction is too obvious for further comment. The bond should be canceled."

The decision in this case was affirmed by the United States circuit court of appeals (273 Fed. 67).

* * *

A decision of the Kansas supreme court awards recovery to the Vilm Milling Co. against the Kansas Casualty & Surety Co. on a bond given to secure the mill in payment for products consigned to one Stuckey for sale. (180 Pac. 782.)

Under the contract between the mill and Stuckey, flour, meal and feed were shipped to him in carload lots, he being charged with invoice prices and undertaking to sell at enough higher prices to cover his compensation. He agreed to collect and remit the proceeds due the mill, and to keep stock on hand insured for the benefit of the mill. Defendant became his surety against any loss resulting from Stuckey's fraud or dishonesty amounting to larceny or embezzlement. The mill later sued on the bond for more than $2,000 claimed to be due from Stuckey, and the supreme court sustained the right to recover.

The first defense interposed by the surety company was that the bond insured Stuckey's fidelity in the capacity of agent or employee only, and that his relationship to the mill was that of buyer of the flour, etc. This point was ruled against the surety on the ground that the surety had investigated the relationship between the mill and Stuckey before executing the bond, and that, since both the contract and bond designated him as

*See section 482, on a warehouseman's right to exact indemnity against liability on a lost warehouse receipt. See, also, section 305, relating to bonds for the surrender of bills of lading, and, also, section 383, on stoppage of goods in transit.

agent, as did the answer filed by the surety company in the suit, the company was estopped to deny its guaranty of Stuckey's fidelity in dealing with the mill under the contract.

The second ground of defense was that Stuckey had not been guilty of larceny or embezzlement, and that the public authorities had refused to prosecute. Overruling this contention, the court said:

"It having been held that he was acting in the capacity of an agent or employee in the care and disposition of plaintiff's flour and feed, the failure to account for the plaintiff's money and property constituted personal dishonesty which amounted to embezzlement. . . . The fact that Stuckey had not been convicted of embezzlement, or that the public prosecutor had declined to prosecute him for that offense, is not material. So far as the matter of proof is concerned, it was not necessary for the plaintiff to produce testimony sufficient to have secured a conviction of embezzlement. A recovery can be had on the bond, 'upon proof that the default of the bonded party was caused by fraud or by a breach of trust.'"

* *

Unless one who guarantees payment of indebtedness to be incurred by another requires notice of acceptance of the guaranty, such notice need not be given, holds the Minnesota supreme court in the case of Midland National Bank vs. Security Elevator Co., 200 N. W. 851. In the ordinary case, the extension of credit on the faith of the guaranty implies an acceptance.

* *

In the case of J. Zimmern's Co. vs. Granade, 102 So. 210, decided by the Alabama supreme court, it appeared that plaintiff had refused to extend credit to a small milling corporation. Thereupon defendant, a stockholder, wrote plaintiff: "If you will not ship the Chatom Mill Co., then the writer will stand personally responsible for the accounts of the concern to you," etc. The validity and effect of this guaranty was the subject of the litigation, and the supreme court decided:

"The contract thus evidenced and construed was an original, direct, and not collateral, promise on the part of defendant to pay for merchandise thereafter to be shipped by plaintiff to the Chatom Mill Co. Plaintiff's letter of March 6 shows a withdrawal of credit from the Chatom Mill Co. and an offer of credit to defendant, by him accepted. . . .

"Such being the effect of the contract, its nature was, of course, not changed by the fact that the merchandise bargained for was to be delivered, and was delivered, to the Chatom Mill Co. . . . Nor, in the presence of these writings, does the fact that the merchandise was charged on plaintiff's books, as the evidence showed, change the legal effect of the contract in writing between the parties. . . .

"Defendant's engagement, shown by his letter of March 10, was continuing in its character. That much we think is clear, and under that contract, evidently, plaintiff continued for some time to ship goods to the Chatom Mill Co. . . . But after a while the company's plant at Chatom was burned, and thereafter it began business at Winchester, Miss. Goods of the same character as before were shipped to that point, and payments made from time to time, so that, when subsequently the company was adjudicated a bankrupt, the only goods remaining unpaid for were those that had been delivered at Winchester. Now the question is whether, on the evidence, plaintiff was entitled to have the jury instructed that such goods were furnished on the personal credit of defendant, or whether that was a question for the jury."

Holding that defendant was liable on his guaranty, the supreme court said:

"In Cahuzac vs. Samini, 29 Ala. 288, the court said: 'But we hold that, when an offer of a continuing guaranty, unlimited in amount, has been accepted, and notice of its acceptance given in a reasonable time'—as to which there is no difficulty in this case—'it then becomes the duty of the guarantor to guard his interest, and to see that his confidence is not abused.'

"That was the case of a technical guaranty, true, but the case here points even more conclusively to liability, for, accepting the fact that defendant and his corporation were distinct legal entities, the circumstances, shown without conflict in the evidence, should have inculcated more persuasively defendant's duty, if he would stop the shipment of goods on his personal credit, to notify plaintiff of his changed intention."

See, also, section 389.

SECTION 489. COVERAGE OF FIDELITY BOND

One Kresge was employed to act as local sales agent for the Phoenix Mill Co., of Minneapolis, and gave a bond to secure accounting for money due the mill. The bond recited his employment for certain local territory in New York, but the

mill claimed that the employment was for Pennsylvania territory. In fact, the agent made no sales in New York, and did transact business for the mill in Pennsylvania, thereby becoming indebted to the mill for more than $4,000.

Suit was brought on the bond to recover the amount, and the sureties defended on the ground that the bond covered sales in New York only. The trial court took the plausible view that the recital of the bond that the employment was for New York did not control the other clauses of the bond, which required the agent to account for all money due the mill, and ordered judgment in favor of the company.

An appeal was taken to the Pennsylvania supreme court by the sureties, with the result that the judgment was reversed. The higher court holds that the bond should be interpreted as binding the agent to account only for sales made in New York territory, there being no claim on the part of the mill that there was any fraud or mistake inducing the recital of of the bond that the employment was for New York. (98 Atl. 772.)

* *

Unauthorized speculation by a company's manager with its funds constitutes such embezzlement as to forfeit a bond given by him to secure the company against loss by any act of his constituting larceny or embezzlement. This is one of the points decided by the Kansas supreme court in the case of Mitchell Grain & Supply Co. vs. Maryland Casualty Co., 195 Pac. 978.

Plaintiff grain company sued on a bond given by its manager, and it appears that one of the items of a shortage in his accounts represented a loss in a speculation on the pork market conducted in the name of the grain company but not shown by the company's books. The supreme court says, in affirming judgment on the bond:

"As used in this connection, 'constituting embezzlement' must be regarded as essentially the equivalent of 'amounting to embezzlement.' The bond is to be interpreted in the light of its nature as a contract of insurance, in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract. A risk fairly within its contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words. The term 'embezzlement' must be deemed to have been used in its general and popular sense, rather than with specific reference to the precise definition of the local statute. One who unlawfully makes way with the property of his employer intrusted to his care may be an embezzler, even although he derives no personal benefit from the transaction. . . .

"The manager claimed that in the pork deal he acted with the advice of the vice president of the grain company, but the court obviously disbelieved his statement. He also asserted that he had previously made money for the company by hedging on wheat deals, and that the purpose of the pork transaction was to hedge against loss through the government fixing the price of wheat. The trial court found specifically that the company had no knowledge of any such speculation in wheat; and selling pork for future delivery in the expectation that the government would likewise regulate its price can hardly be seriously considered as a justifiable hedge against a loss in wheat."

Another point decided in the case is that, where a contract of insurance against losses through the embezzlement of an employee contains a warranty on the part of the employer that the books shall be inspected, audited, and verified at least once in three months, this requirement is met by an examination conducted by the officers of the employing company, and does not involve the employment of an expert accountant for the purpose; nor does the fact that the examinations that were made failed to disclose shortages that were afterwards found to have existed necessarily show any breach of the warranty.

SECTION 490. BONDS COVERING WAREHOUSE RECEIPTS

The liability of a mill's surety on a bond given to secure repayment of money lent by a bank was the subject of consideration by the Texas court of civil appeals in the case of Mechanics'-American National Bank of St. Louis vs. New England Equitable Insurance Co., 213 S. W. 685.

Before the Alliance Milling Co., Denton, Texas, became a bankrupt, it established a line of credit with the plaintiff bank. The milling company did not do public warehousing, its 250,000-bu storage capacity being devoted to the keeping of grain to be ground by it into flour. The bank agreed to extend a line of credit up to $50,000 against certificates representing wheat held in storage by the mill, and took a bond, on which defendant became a paid surety, for indemnity against fraudulent issuance of warehouse re-

ceipts, withdrawal of the wheat without return of the certificates, and conversion of the wheat by the mill. The defendant, as surety, was apprised concerning all these facts.

The mill borrowed $30,000 from the bank, delivering as collateral security three receipts or certificates, each calling for 10,000 bus of wheat as being stored for the bank. When the second and third certificates were issued the mill did not have enough wheat on hand to cover them, although the bank did not know this fact, and when the milling company became bankrupt, with the three certificates still outstanding, all wheat on hand had been manufactured into flour.

The ground on which the defendant sought to avoid liability to the bank as surety was that the bond secured against fraudulent issuance of "warehouse receipts," and that that term did not embrace receipts of the kind actually issued. It was argued that "warehouse receipts" are limited to certificates issued by public or bonded warehouses, and that the certificates issued in this case by the mill to the bank, covering wheat to be retained and ground by the mill, subject to the bank's lien, did not fall within the quoted term.

But the court holds that, since the defendant became surety on the mill's bond with full understanding as to the nature of the transactions to be had between the mill and the bank, it was precluded from questioning the character of the certificates as being "warehouse receipts." Says the decision:

"It is evident that these 'warehouse receipts' were to be issued by the milling company against its own wheat in its elevator; for, if issued to another party against wheat owned by the holder of the receipt, such receipt might have served as collateral to the party owning the wheat, and who, as would have been evidenced by such receipt, did not own the wheat. So, when defendant obligated itself to 'indemnify and hold harmless the said obligee against any loss or damage directly arising by reason of the issuance of fraudulent warehouse receipts,' etc., it meant receipts such as were afterwards issued by the milling company showing that it had in its elevator the wheat called for in such receipts."

Reviewing the case, the Texas supreme court held that the court of civil appeals correctly ruled as to the character of receipts covered by the bond. The higher court also ruled that the surety's liability was not affected by the principal's bankruptcy. (234 S. W. 1087.)

* *

A decision of the Missouri supreme court, announced in the case of the National Bank of Commerce of Kansas City vs. Flanagan Mills & Elevator Co., 188 S. W. 117, covers several legal aspects respecting loans to mills on grain.

The milling company gave a bond to the bank to secure redemption of "warehouse receipts" hypothecated with the bank as collateral security for loans, and various loans were made on the security of documents in ordinary grain warehouse receipt form. On default in payment of the debts, and failure to deliver the wheat called for by the receipts, the grain having apparently been destroyed in a fire which consumed the mill elevator, the bank sued on the bond, recovering a judgment which the Supreme Court affirmed on the surety's appeal.

It was asserted by the surety that the mill was to be regarded as a mere custodian of the grain for the bank, and that, as such custodian, there was no liability on account of the loss of the wheat by fire, unless that loss could be traced to negligence on the part of the mill. But the court refused to so decide, saying:

"That the milling company was not doing a warehouse business is clearly indicated by the bond. . . . On the contrary, it is clearly indicated that the grain and grain products, which were to be in its mill and elevator, were its own property and were to so continue. . . . It clearly appears that the grain bought and stored by the milling company was for its own use in mills at Rich Hill, Mo. . . . The Flanagan Mills & Elevator Co. was a milling concern, and only handling and storing grain and mill products to be used in the ordinary course of its business. It was not a warehouseman either at common law or under the statute, because not engaged in the business of receiving and storing goods, wares and merchandise for others. In such case, the mere form of the receipt is not sufficient to make it a warehouse receipt."

The court cites numerous decisions of other courts as sustaining the principle that the state laws which make "warehouse receipts" negotiable symbols of the grain called for by them do not apply to receipts issued by the owners of the grain or by others than public warehousemen.

Again, the court holds that the transactions between the mill and the bank could not be regarded as a pledge of grain to the bank, as concerning liability for its loss by fire, because two essential

elements of a valid pledge were absent: segregation of the pledged goods and their delivery to the pledgee.

Construing the transactions as evidencing a promise by the mill to turn over the quantity of grain called for by the so-called receipts delivered to the bank, on demand by the bank after default in paying the mill's notes, title to the grain in the meantime remaining in the mill, the court holds that the bond was broken by the mill's failure to make such delivery of the wheat.

See, also, section 483.

CHAPTER LVII

MORTGAGES*

SECTION 491. VALIDITY OF CHATTEL MORTGAGE

IF not attended with fraud or bad faith, a mortgage to secure future advances of flour, other supplies, or money, is valid, although such purpose is not expressed on the face of the mortgage, excepting perhaps as against equities of subsequent purchasers from or mortgagees of the mortgagor. (In re Grocers' Baking Co., 266 Fed. 900.)

* *

Sales of flour and other mill products to retail dealers on credit are subject to the rule of law that a dealer may give a valid mortgage on his stock to secure the claim of one of his creditors, although that may have the effect of jeopardizing the claims of other creditors, subject to the provision of the Bankruptcy Act that a preference given one creditor within four months preceding institution of bankruptcy proceedings is voidable by the other creditors.

But, recognizing the fact that unrestricted application of this rule would enable an insolvent merchant to hide behind a mortgage given in fraud of other creditors, the St. Louis court of appeals has held, in line with the decisions in other states, that a mortgage on a merchant's stock is void, as against other creditors, if it permits him to sell from the stock in the ordinary course of business without applying any of the proceeds to the mortgage debt. (Kahmke vs. Webber, 173 S. W. 76.)

* *

A mortgage on wheat stored in the bins of a mill for manufacture into flour, etc., is not void, under the Texas statutes, as constituting a mortgage on goods exposed for sale.

Under the general rule of law that that is certain which is capable of being made certain by reference, a chattel mortgage on "3,000 bushels of No. 2 wheat situated in the steel bins of the Cedar Hill Milling Co. on the right of way of the Gulf, Colorado & Santa Fe Railway" is sufficiently specific as to the property mortgaged to be valid.

A mill building was erected by the owner on a railroad right of way, under lease reserving right in him to remove the building, etc. This constituted the building personal property, making a chattel mortgage on it valid, and the holder of the mortgage has a valid lien on the machinery in the building, subject to prior specific liens against the machinery. (In re Ballard, 279 Fed. 574.)

* *

The validity of a mortgage and the note secured by it, executed in the name of plaintiff milling company, was the subject of the case of Huntington Roller Mills & Mfg. Co. vs. Miller, 208 Pac. 531, decided by the Utah supreme court. The company failed in its attempt to have the documents canceled.

One of the grounds on which the suit proceeded was that the note and mortgage were executed under authority from only three of the milling company's directors at a meeting which was not attended by the remaining two directors, and of which these two had no notice. The opinion of the supreme court referred to an established rule of law that, with certain exceptions, action taken by a quorum of directors at a meeting of which notice has not been given is invalid; but the court held that all persons dealing with corporations are not necessarily required to ascertain at their peril whether a directors' meeting was properly called and legally convened, and whether a quorum was actually present. The court quotes Cook on "Corporations":

"The rule sustained by the great weight of authority, however, is that, where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held.

*See Chapter LX, where mortgages are dealt with in relation to bankruptcy and insolvency; also, the chapters on Mill Equipment as Permanent Fixtures (LXIX); and section 460, relating to trademarks.

As to fraudulent transfers, see Chapter LIX.

A quorum of the directors is presumed to have been present."

The supreme court adds: "The mortgage had been duly recorded, and there was nothing from which any one would suspect, much less conclude, that the note and mortgage were not authorized by the corporation through its directors and executed by its president and secretary."

Question was also raised as to whether defendant had become owner of the note and mortgage in such sense as to be an innocent holder, and therefore immune from attacks that might have been made on the paper had it remained in the hands of the original mortgagee. It appeared that defendant was a stockholder in, and secretary of, the bank to which the note and mortgage were given, but that she bought the papers for value, without notice of any irregularity in the authority under which they were issued. Under these circumstances it was held that she was a bona fide holder, although the opinion adds:

"We do not wish to be understood . . . to say that banking establishments may, under all circumstances and with impunity, dispose of their paper to their officers and employees and confer upon the latter the rights of innocent holders in due course, and thus permit them to recover on paper when the bank could not have recovered. . . . Where it is made to appear, as in this case, that the holder of the note has acquired it from the bank in good faith and for full value in due course, the holder is entitled to protection under the law."

The opinion also states that even if the milling company had been entitled to have the note and mortgage canceled on the grounds that they were not properly authorized and that defendant was not a bona fide holder in due course, still the company would have been required to pay the debt evidenced by the papers, inasmuch as the company received the full benefit of the loan represented by them, in good faith and for legitimate purposes of the company.

* *

Looseness in the way in which a chattel mortgage was drawn and acknowledged defeated the mortgagee's lien against mill property, giving another creditor of the mill superior rights, in the case of Wolf Co. vs. J. D. Best & Co., 185 Pac. 371.

The Farmers' Mill & Elevator Co., Montrose, Colo., gave three notes to the plaintiff and executed a chattel mortgage on certain of its property to secure payment of the notes. Subsequently the defendant obtained judgment against the mill and elevator company, and levied execution on that judgment against the property covered by plaintiff's mortgage. Plaintiff then sued to recover possession of the property, but the Colorado supreme court held that defendant's judgment lien was superior to plaintiff's chattel mortgage lien, although junior in point of time, and although the mortgage had been recorded, because the mortgage was not sufficiently executed to constitute its record constructive notice of the lien purported to be granted by it.

The following excerpts from the opinion of the court should serve to emphasize the importance of using care in the execution of documents which are intended to preserve lien rights:

"A chattel mortgage is valid as against the rights of third persons or attaching creditors, if the mortgagor retains possession, only where the mortgage is acknowledged in substantial conformity with the statute, and recorded. The converse is equally true. A chattel mortgage not acknowledged in substantial compliance with the statute, where the mortgagor retains possession, is invalid as against the rights of third parties or attaching creditors, even though recorded. The chattel mortgage set out in the complaint was acknowledged and recorded, the chattels remained in the possession of the mortgagor and were never taken possession of by the mortgagee, and the question is: Was it acknowledged by the mortgagor in substantial compliance with the statute? It was not. . . .

"The mortgage in question should have been signed 'The Farmers' Mill & Elevator Company, a Corporation, by I. W. Hottel, as Secretary and General Manager.' It was signed 'The Farns Mill & E. Co., by I. W. Hottel, Sec. and Gen.'

"It should have been acknowledged thus: 'This mortgage was acknowledged before me this 16th day of October, 1915, by I. W. Hottel, the secretary and general manager, for the Farmers' Mill & Elevator Company, a corporation, mortgagor.'

"It was acknowledged: 'This mortgage was acknowledged before me by I. W. Hottel this 16th day of Oct., 1915.'"

The opinion is not to be understood as meaning that a signature or acknowledgment must be precise, but as meaning that too much must not be left to be read between lines.

SECTION 492. COVERAGE OF AFTER-ACQUIRED PROPERTY

Mortgages on specified quantities of wheat stored in a mill do not cover after-

acquired wheat unless the mortgages so provide. "There was less wheat in the bins at the time of bankruptcy than there had been at any time subsequent to the dates of the mortgages. Had the stock at any time subsequent to the dates of the mortgages fallen below the amount on hand at the time of bankruptcy, then the difference would not have been subject to any of these mortgages. The law presumes Ballard to have ground his own wheat, and not that mortgaged. . . . Taking the wheat from the bottom of the bins for grinding purposes and replacing the same by putting new wheat at the top of the bins would not be a conversion of mortgaged property so long as there was sufficient on hand at all times to satisfy the mortgages." (In re Ballard, 279 Fed. 574.)

SECTION 493. PRIORITY OF LIENS

When one taking a mortgage on wheat in a mill knows of the existence of a prior mortgage, the first mortgagee does not lose priority by taking a new mortgage in satisfaction of the old, without consent of the second mortgagee. (In re Ballard, 279 Fed. 574.)

* *

There being insufficient wheat left in the mill of a bankrupt to satisfy all mortgage claims against the same, the holder of an unrecorded mortgage is not entitled to share pro rata with other and prior mortgagees who took their mortgages without notice of the unrecorded mortgagee's rights, and a mortgagee who contends that he has a prior lien over other mortgages, by reason of priority of filing, waives the right to pro rate with the other mortgagees on failing to establish his claim. (In re Ballard, 279 Fed. 574.)

SECTION 494. PURCHASES OF MORTGAGED PROPERTY

In the case of Adam vs. Caldwell Milling & Elevator Co., 197 Pac. 723, the Idaho supreme court affirmed judgment for plaintiff, establishing the superiority of his claim to grain under a chattel mortgage given before the grain was sown, as against the mill's rights as purchaser of the threshed grain from the mortgagor. The court said:

"Chattel mortgages may be made upon growing crops and upon crops to be sown and grown in the future. When duly recorded, such a mortgage is notice to all persons claiming to have acquired rights in or to the mortgaged crop through . . . the mortgagor, subsequent to the recording of the mortgage. . . . The lien follows the grain after severance and removal, and is valid against a purchaser from the mortgagor."

And the court ruled that one who buys mortgaged grain without the consent of the mortgagee is liable to him for the reasonable value of the crop up to the amount due and unpaid on the mortgage.

It is noted in the opinion that a different rule, as to the first point of the decision, exists, in some other jurisdictions. It appears that in Montana the statutes terminate the lien of a chattel mortgage on removal of severed grain from the premises of the mortgagor; and that the Nebraska supreme court has reached a conclusion at variance with that of the Idaho court.

Where a mill buys mortgaged wheat and the mortgagee sues the mill for damages, the burden is on the latter to establish by a preponderance of the evidence a claim that the mortgagee had consented to the sale or ratified the same or was equitably estopped to enforce his mortgage claim against the mill. This was decided by the Colorado supreme court in the case of Mulvaney et al vs. Longmont Farmers' Milling & Elevator Co., 205 Pac. 525.

Another point decided in the same case is that plaintiff mortgagees were not bound, before bringing suit, to demand that the mill return the wheat in question, on which the plaintiffs had a mortgage, where it was manifest that such demand would have been unavailing on account of the grain having been intermingled with other wheat owned by the mill.

* *

A grain company was held liable for the value of wheat received from a farmer but covered by a mortgage previously given to a bank and recorded, under a decision of the Washington supreme court in the case of German-American State Bank vs. Seattle Grain Co., 154 Pac. 443.

After the wheat was harvested the farmer delivered about 1,000 bus to defendant in payment of an indebtedness of $66.40 for sacks furnished the previous year. The grain was deposited in a common mass held by defendant. The mortgagee bank thereupon foreclosed the mortgage as to the remaining wheat and, there remaining a deficiency after judgment and sale, suit was brought against the grain company to recover the value of the wheat received by it.

This suit was defended on the grounds that the grain company had a superior equity on account of the amount due for the sacks, and that the bank waived any right to proceed against defendant by

foreclosing the mortgage without making the grain company a party to the foreclosure.

However, the supreme court overruled both of these contentions, saying: "The mortgages gave plaintiff a lien upon the wheat, of which defendant had notice through the public records. When, therefore, it took the wheat and commingled it with its own, it was an act of conversion."

SECTION 495. WAIVER OF LIEN

A bank holding a mortgage on corn waived its lien by accepting part of the proceeds of a sale made by the mortgagor, and by applying the payment to the debt, with knowledge of the sale. But, in reaching this conclusion in the case of Sloan State Bank vs. B. M. Stoddard & Son, 159 N. W. 636, the Iowa supreme court decided that the mortgagee bank could hold the buyer of the mortgaged corn liable in damages as for conversion of the property; this right having been preserved by the bank by promptly notifying the buyer that he would be held liable.

It was claimed by the buyer that the bank's acceptance of part of the proceeds of the sale constituted a waiver of all rights under the mortgage, but the court decides that the lien against the specific property was the only thing waived.

SECTION 496. FORECLOSURE

A bank filed suit to foreclose a mortgage against the mill and elevator of the Lawton (Okla.) Mill & Elevator Co., and a receiver was appointed to take charge of the property. Over the objections of the company, the trial court ordered a sale of the property by the receiver, before final decree of foreclosure, and confirmed a sale so made. But, on appeal, the supreme court of Oklahoma decided that the circumstances did not authorize the sale, and annulled it.

The higher court upheld the power of a judge in foreclosure suit to order a receivership sale in a proper case, even in advance of a decree finally determining the rights of the parties, but declared that the power should be sparingly and cautiously exercised.

"Here the application was based upon allegations of the deterioration of the machinery by nonuse, destruction by rats and mice, and partial cancellation of the insurance on the property," said the supreme court. "It suffices to say that all these things, if true, were not in any wise sufficient to authorize a receiver's sale in this cause. The cause was at issue, it could only be a few months at most until a proper trial could be had, and, if justified, a decree of foreclosure obtained. If that decree were superseded on appeal, it must be by a bond sufficient to render plaintiffs indifferent as to the fate of the mortgaged property. If not superseded, a sale could be had." (164 Pac. 670.)

CHAPTER LVIII

ARBITRATION OF CONTROVERSIES*

SECTION 497. VALIDITY OF PROVISIONS FOR ARBITRATION

THERE is widespread recognition of the fact that litigation inflicts tremendous economic loss. Millions are spent every year to settle controversies that should never have arisen. So, quite naturally, the layman is favorably disposed to a system that will save attorneys' fees and court costs. Arbitration is about the only remedy that has been evolved from several hundred years' effort to avoid lawsuits, but opportunities for submitting disputes to arbitration are not always accepted. The trouble is that many disputants are in favor of arbitrating their controversies only on condition that they can be given practical assurance that the award will favor them; but arbitration is gaining popularity, and members of the milling and grain industries are, we are told, very generally disposed to submit matters under this plan.

A decision of the Illinois supreme court (129 N. E. 753) reflects the modern attitude of the law and the courts toward commercial mediation. Upholding the validity of an arbitrator's award in a case involving liability for damages in a collision of automobiles on a street, the court says, in response to plaintiff's contention that it was entitled to withdraw from arbitration proceedings:

"The appellant contends that it had a right to revoke the submission to arbitration and take a nonsuit at any time before the arbitrator had indicated his finding in the controversy. At common law the rule was well established that either party might revoke the submission at any time before the award was made, thus rendering the submission wholly ineffectual and taking from the arbitrator all power to make a binding award. . . . Section 3 of the arbitration act provides that a submission to arbitration shall, unless a contrary intention is expressed therein, be irrevocable. The legislature has the right to enact such a provision unless it is prohibited by the Constitution from doing so.

"The appellant contends that the provision is unconstitutional because it deprives parties of property without due process of law and confers judicial powers on individuals not recognized by the Constitution. It is true that arbitration is in the nature of a judicial inquiry, but the statute confers no judicial powers on arbitrators. It is not compulsory, but is entirely voluntary. If parties choose to submit their controversies to arbitration, they have the right to do so. The object of arbitration is to avoid the formalities, delay and expense attending litigation in court, and it has been recognized from a very early period by the common law as a method of settling disputes.

"At common law an agreement could be entered into by parol to arbitrate any cause of action which did not involve the title to land, and an award was a full and final adjustment of the controversy, having all the force of an adjudication and effectually concluding the parties from again litigating the same subject. . . . The statute, in making the agreement irrevocable, confers no new power and takes away no inalienable right. It simply recognizes the agreement of the parties and enforces it.

"Before the statute was enacted the court would not specifically enforce the agreement to arbitrate, but left the parties to their remedies at law for a breach of the contract. The effect of making the agreement irrevocable was merely to provide for the specific enforcement of the contract, and it violated no constitutional rights. It conferred no power on individuals, but provided for the method of carrying into effect the contract of the parties.

"It is also objected that the act is unconstitutional and void as being an attempt to oust the courts appointed by the Constitution of their jurisdiction. There is no constitutional provision against the settlement of controversies

*Refusal to arbitrate as ground for expulsion from exchange membership is dealt with in section 476. As to allowances properly made to the successful party, see section 210A.

out of court or the submission of them to the judgment of arbitrators who may be agreed upon by the parties, and no constitutional provision is referred to under this head of the appellant's argument. It has been held that an agreement in an executory contract to submit any controversy which may arise under it to arbitration is an effort to divest the courts of their jurisdiction, and is invalid because contrary to public policy. . . .

"This principle applies only where there is a general agreement to submit all controversies to arbitration. It does not apply to cases where a controversy has arisen and an agreement is made to submit the particular controversy to arbitration or to agreements to arbitrate special questions, such as the amount of the loss under an insurance policy as a condition precedent to maintaining an action. . . . The statute does not require any causes to be submitted to arbitration, and nobody is any more bound now to submit causes to arbitration than before. It merely recognizes the right, already existing, of parties to submit their causes to arbitration, and regulates the method in which the arbitration may be conducted."

* *

But a decision of the Texas court of civil appeals holds that provision in a contract for the sale of goods that any dispute arising under the contract shall be settled by arbitration is void, it being against public policy to permit one to bargain away the right to such redress as the courts afford him.

It is not meant, however, that where parties to an agreement execute provision for arbitration by submitting their controversy to arbitrators, and where an award is made, the award is a nullity. On the contrary, it is well established that an arbitration award is just as binding as a judgment.

A legal authority also notes another qualification of the general rule that an agreement to arbitrate differences under a business contract cannot be enforced:

"Where a contract contains a stipulation, not that all questions arising thereunder, whether as to the validity or effect of such contract, or otherwise, shall be submitted to arbitration, but that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract.

"Freedom to contract for arbitration to this extent, it has been held, imports no invasion of the province of the courts, and there is no ground upon which a right so essential to the convenient transaction of modern business affairs can be denied, nor is such agreement objectionable as being against public policy." 5 Corpus Juris, 43, 44.

So, it seems that a contract to sell mill products or grain may carry a valid provision for arbitration of questions of fact as to the particular grade or quality of a shipment, etc., in the event of dispute between the parties. But an unperformed agreement for a determination by arbitrators as to the ultimate legal rights and liabilities of the parties would fall within the general rule that one cannot validly bargain away, in advance, his right to his "day in court."

SECTION 498. EFFECT OF AGREEMENT TO ARBITRATE

A clause in a contract of sale, that "any dispute arising as to the proper fulfillment of this contract shall be settled by arbitration," has no reference to a dispute as to the price fixed in the contract, according to the holding of the Washington supreme court in the case of Gile vs. Tsutakawa, 187 Pac. 323.

SECTION 499. VALIDITY OF AWARD

Although the theory of arbitrating commercial controversies is to avoid litigation, it sometimes takes a lawsuit to determine whether the arbitrators have made a valid award. Then it may take an appeal to determine whether the trial judge has soundly ruled as to the validity of the award. And if the appeal be passed upon by a tribunal not of last resort, it may take a further appeal to determine whether the intermediate appellate court has correctly ruled as to the correctness of the trial judge's ruling on the validity of the arbitrators' award.

We say that sometimes an arbitration award does not prove to be conclusive in itself, but in the far greater number of instances the friendly offices of mediators result as a finality; and when litigation does follow an award the final decree usually supports the conclusion reached by the arbitrators, except where

the arbitrators have been guilty of fraud, corruption or other misconduct.

An interesting court decision bearing on this subject was handed down by the appellate division of the New York supreme court in the case of Wheat Export Co. vs. New Century Co., 173 N. Y. Supp. 679 (Affirmed by the New York Court of Appeals, 125 N. E. 926.) The export company, referred to in the opinion as appellant, made contracts with the other company, referred to as respondent, covering 1,000 carloads of flour to be delivered free alongside steamers at Atlantic and Gulf ports for export by the appellant in its capacity as an agent for the British government during the war.

No controversy arose as to deliveries made at the port of New York, but controversy did arise as to the quality of some 60 or 65 cars delivered at other ports. The parties agreed to submit the matter to three members of the flour committee of the New York Produce Exchange for arbitration, "subject to and under the rules of said exchange." The contracts involved contained no reference to samples, but appellant claimed that it had bought the flour on samples of two grades. Appellant was unable to produce for comparison samples taken from all deliveries, but submitted some.

Respondent, relying upon the fact that the arbitration was submitted subject to the rules of the New York exchange, pointed to rule 18 of that exchange, a rule providing that only flour inspected by inspectors of the exchange should be recognized by it in case of dispute as to quality or condition. No samples had been submitted to those inspectors in this case, as to the specific deliveries involved. Some reliance was also placed by respondent upon rule 13 of the exchange, giving a buyer 24 hours from notice of arrival in which to examine deliveries as to quality.

After extended discussion before the arbitrators as to the identity of samples submitted, etc., the matter was left with the committee for decision; respondent's representative insisting, however, that the arbitration must be under the rules of the exchange. The chairman replied that it was the province of the arbitrators to make an award without regard to those rules, and thereupon the hearing closed.

One week later the arbitrators signed a formal award in writing, making allowances in appellant's favor, aggregating $5,853.04, and covering per barrel allowances with respect to flour delivered in 37 of the cars. Appellant filed a motion at special term of the supreme court for New York County to confirm the award, and respondent filed a counter motion to vacate it. Appellant's motion having been denied, and respondent's sustained, appellant appealed to the appellate division, which has reversed the lower court, saying:

"The position taken by the respondent before the arbitrators and on this appeal is that, by the provisions of the contracts and the terms of the arbitration agreement, the arbitrators were confined by the rules of said exchange to making an award based on samples taken by the official inspectors of said exchange. Both parties knew that no such samples were taken with respect to the flour which is the subject of the arbitration agreement, and that if that contention were valid there would be nothing to arbitrate.

"It is manifest that said rules 13 and 18 relate to deliveries made at New York, and that the official inspection is made for the purpose of determining whether the delivery tendered is a good delivery under contracts between members of the exchange. The provisions of the contracts and of the arbitration agreement referring to the rules of the exchange are satisfied by confining them to deliveries made at the port of New York, and in so far as they relate to samples taken by the official inspectors of said exchange they are inapplicable to deliveries made at other ports.

"By the arbitration agreement the parties agreed that there was a controversy between them with respect to the performance of these contracts by respondent, and particularly with respect to the quality of the flour delivered, to be arbitrated, and that controversy they submitted to the arbitrators. The arbitrators received all the evidence offered by either party and confined their award to matters submitted to them for arbitration. They therefore proceeded within their jurisdiction and on evidence, pertinent to the submission, which was deemed satisfactory to them.

"In the absence of restrictions in the arbitration agreement, the arbitrators are not confined either by strict rules of law or evidence, and the general rule is that such awards may not be set aside for either error of law or fact not appearing on the face of the award, where the arbitrators have not exceeded their jurisdiction and have not been guilty of fraud, corruption, or other misconduct.

"The authority of the court with respect to such awards is confined, limited,

and controlled by the provisions of sections 2373, 2374, and 2375 of the Code of Civil Procedure. By said section 2373 it is the duty of the court, on motion duly made, to confirm such an award, unless the award is vacated, modified, or corrected as prescribed in the succeeding sections. The authority to modify an award is found in said section 2375. Concededly the record here presents no ground for modification.

"The authority to vacate such an award is found in said section 2374, and is limited to four classes of cases, viz: (1) corruption, fraud, or other misconduct in procuring the award; (2) evident partiality or corruption on the part of one or more of the arbitrators; (3) misconduct of the arbitrators in refusing to postpone or refusing to hear material evidence, or other misbehavior to the prejudice of a party; and (4) where the arbitrators have exceeded their powers, or have so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made. No ground for vacating the award within these provisions is presented."

* *

Upholding a decision of the arbitration board of the Oklahoma Grain Dealers' Association in a controversy arising upon rejection of an overdraft covering the price of a lot of corn, the Oklahoma supreme court said, in the case of Burke Grain Co. vs. Stinchcomb, 173 Pac. 204:

"Where an arbitration is had, and the board of arbitrators acts within the scope of its authority, and notice of the time of hearing is given the parties, and the evidence received, and the amount of the award is not so excessive as that fraud may be presumed therefrom, the award made by such arbitrators determines the rights of the parties as effectually as a judgment by regular legal procedure, until it is regularly set aside or its validity questioned in a proper manner."

Where the arbitration has been regularly conducted, the court holds, in line with well-established law, that the decision on the questions involved is just as binding upon the parties as if it were the verdict of a jury or the judgment of a court.

* *

The validity of an award made by the Texas Grain Dealers' Association's arbitration committee in a controversy concerning defendant's liability for breaking a contract to sell two cars of corn was involved in the case of Early Grain & Elevator Co. vs. Kelsey, 206 S. W. 849, decided by the Texas court of civil appeals at Amarillo.

Both parties were members of the Texas association, and it appeared that when defendant joined that body he signed an application promising "strict compliance with all conditions and requirements of the constitution and by-laws of the association, and all amendments thereto, and all rules and regulations and all orders or awards issued by the executive or arbitration committees."

Each party submitted his statement of the facts concerning the contract to the arbitration committee, but in neither statement was the committee authorized to fix the place for payment of any damages that might be awarded in favor of the grain company.

The committee found in favor of the company for the amount demanded, $415, ordering payment to be made at Amarillo, where plaintiff's place of business was situated. Payment not being made, plaintiff sued on the award, and the court of civil appeals affirmed the judgment rendered in plaintiff's favor by the county court at Amarillo.

It was decided that defendant's membership in the association and his submission to the arbitration committee bound him to pay the award, and that authority for ordering payment at Amarillo existed under a provision of the written contract specifying that the agreement was performable there.

* *

The decision of the Missouri supreme court in the case of Louis Helm, receiver for Milliken & Spencer, against C. H. Albers Commission Co., 199 S. W. 1008, affirming judgment in defendant's favor, involved a question of the conclusiveness of an arbitration award made by the St. Louis Merchants' Exchange under defendant's unfilled contracts to deliver wheat.

The contracts called for delivery at fixed prices during a certain month, "in regular elevators," and "subject in all respects to the rules and regulations of the Merchants' Exchange of the city of St. Louis."

The court holds that the last-quoted clause made such rules and regulations a part of the contract, and that where, under such a contract, the contract purchaser of undelivered wheat applies to the directors of the exchange, under established rules, to have a bank deposit, posted by the seller as security for delivery, applied to the purchaser's claim for the excess of the market value of the wheat contracted for above the con-

tract price, with interest from the date of default, and the purchaser accepts an award allowing the claim less interest, he thereby precludes himself from suing at law to recover interest. The court said:

"We do not mean to say that Akin had to submit his claim to the board of directors, the judicatory named in the contract, because such question is not in the case. We do mean to say, however, that when Akin haled his adversary to this judicatory, and the parties fought it out there, and Akin accepted the fruits of the judgment, he is barred from claiming more in another and different form."

* *

On a question as to the validity of an award made by a committee of the St. Joseph Grain Exchange, the Kansas City court of appeals held, in the case of Redman vs. St. Joseph Hay & Grain Co., 239 S. W. 540, that the award was rendered void because the arbitrators and witnesses were not sworn, as required by the rules and regulations of the exchange and by the statutes of Missouri. The statutes require the oath to be administered by an officer authorized to administer oaths. In this case the oaths were administered by the secretary of the exchange, but he was not a notary public or other officer empowered to administer oaths. Hence it was decided that the arbitration award failed.

It is recognized that a party to an arbitration may expressly or impliedly waive administration of a valid oath to arbitrators or witnesses, but the court declared that where, as in this case, a party assumes that the person administering an oath is legally empowered to do so, he is not estopped from afterwards attacking the award on discovering absence of such power.

CHAPTER LIX

FRAUDULENT CONVEYANCES AND OTHER FRAUDS*

SECTION 500. CONVEYANCES IN FRAUD OF CREDITORS

THE Alabama supreme court, following the view expressed by other courts of the country, holds that the right of a creditor to have his debtor's voluntary conveyance of property to the debtor's wife or other third person set aside as being fraudulent is not limited to creditors whose debts were incurred before the conveyance was made, but extends to subsequent claimants.

But it is held that the right of a subsequent creditor to have the conveyance canceled depends upon the existence of actual fraud in the transaction. Fraud is never presumed, the court declares, and to defeat a transfer of a debtor's property on that ground fraudulent intent must be clearly established. Mere withholding of a deed from record on the part of the grantee is insufficient to show that the conveyance was made with improper motives. (Mathews vs. J. S. Carroll Mercantile Co., 70 So. 143.)

* *

In a suit brought by a West Virginia milling company to set aside a conveyance by an insolvent debtor to his wife as being in fraud of its creditors, the supreme court of appeals of that state decided that the burden was on the wife to establish by clear and convincing proof that the property was purchased for her with her own means. The court holds that if the evidence shows that the only means she had was money received from her mother's estate 25 or 30 years before her husband's conveyance to her, and that she turned the money over to him, taking no note or writing evidencing the transaction as a loan, and neither of them keeping an account thereof, the presumption must be that she intended to give him the money, precluding her from holding the property conveyed to her, as against his creditors. (R. D. Johnson Milling Co. vs. Read, 85 S. E. 726.)

* *

The giving by a corporation of a mortgage to secure payment of a note for flour or other supplies already furnished and those to be furnished for the purpose of enabling the company to continue its operations does not constitute a fraudulent conveyance as to other creditors of the corporation. (In re Grocers' Baking Co., 266 Fed. 900.)

* *

The right of a debtor to transfer goods to a creditor in payment of a bona fide debt, although operating as a disadvantage to other creditors, was upheld by the Colorado supreme court in the case of Farmers' Union Milling & Elevator Co. vs. Loveland Farmers' Co-operative Produce Co., 225 Pac. 256, and it was decided that possession of the transferred property having been given to the grantee creditor, there could be no subsequent valid attachment of the property by another creditor.

It is to be noted, however, that the facts in this case did not call for application of the rule under which a transfer made by an insolvent debtor within four months preceding bankruptcy proceedings is voidable when operating as a preference over other creditors.

SECTION 501. TRANSFERS FOR BENEFIT OF CREDITORS

A corporation being indebted to a milling company and others, its secretary and general manager signed an order directing payment of funds due the corporation to the milling company, in trust for itself and the other creditors. Plaintiff, one of the claimants, sought to subject these funds to satisfaction of his claim in full, to the exclusion of the other creditors, by garnishment proceedings, in which he asserted that the order was not in form a valid assignment for the benefit of the corporation's creditors, and was further defective for want of authority of the secretary and general

*See, also, Chapter LX and section 491.

manager to sign it. Reviewing the litigation, the Oregon supreme court held that, since the order provided for prorating of the funds among all the creditors, it was a valid assignment under the Oregon law. As to the authority of the officer to sign the order, the court decided that, in the absence of proof to the contrary, a general manager of a corporation will be presumed to have had authority to discharge the debts of the company by assignment of funds due it; and that express authority to do so may be established by oral testimony; a formal resolution of the board of directors not being required. (Mann vs. W. A. Gordon Co., 151 Pac. 704.)

SECTION 502. BULK SALES LAWS

See, also, the preceding sections.

Oregon, like many other states, has a law to the effect that a transfer of the stock or fixtures of a business in bulk shall be deemed to be fraudulent and invalid as to creditors of the seller, unless, before consummation of the sale, the creditors are given certain notice concerning the intended transfer; thus affording them opportunity to protect their claims.

The Oregon statute was involved in the case of Golden Rod Milling Co. vs. Connell, 164 Pac. 588, which was before the supreme court of the state.

In 1911, plaintiff bought from the Acme Mills Co. certain tools and machinery for use in plaintiff's mill in manufacturing cereal breakfast foods. Apparently, defendant held a pre-existing claim against the Acme company, but it was not reduced to judgment until 1914, when defendant sought to levy on the tools and machinery in plaintiff's mill as the property of the debtor company. To restrain such levy, the plaintiff brought suit, and was defeated in the trial court, but the supreme court decided the case in plaintiff's favor, on appeal.

It was held that, prior to the amendment of the Oregon bulk sales act in 1913, that law did not extend to such property of a debtor as was involved in this case, and that hence the transfer to plaintiff in 1911 was valid, although no notice of the intended sale was given the selling company's creditors.

It is to be inferred, however, that as the law now stands, the buyer of machinery used by the seller in an Oregon mill must conform to the provisions of the act, in order to protect his purchase against the claims of the seller's creditors.

* *

The Oregon Mill & Grain Co. sued to recover a debt due from one Hyde, a grocer. Hyde sold his business to one Kirkpatrick, and the mill sued the latter to recover what Hyde owed, relying upon Kirkpatrick's promise to Hyde to pay outstanding claims. The trial resulted in the company's favor, but the supreme court reversed the judgment, in 1913, because the company's name did not appear in the list of creditors Kirkpatrick agreed to pay.

The company then sued Hyde, obtaining judgment. Kirkpatrick was summoned as garnishee. In the meantime Hyde sued Kirkpatrick to have their agreement reformed so as to include the company's name as one of the creditors to be paid by Kirkpatrick. This suit resulted in a decree reforming the contract and giving Hyde judgment for the amount of the mill's claim, apparently on the theory that Hyde was entitled to be reimbursed because of Kirkpatrick's assumption of the debt. But the supreme court reversed this judgment in 1915 on the ground that no valid cause of action was pleaded.

The milling company then proceeded with its garnishment steps and obtained judgment against Kirkpatrick, as garnishee, on the theory that Hyde's transfer of the grocery stock to him was invalid for want of compliance with the Oregon bulk sales act, and that Kirkpatrick therefore held property belonging to Hyde subject to seizure to satisfy Hyde's creditors' claims. Kirkpatrick appealed, and the supreme court affirmed the judgment. (169 Pac. 791.)

The main point decided on the last appeal was that when a merchant transfers his stock without complying with the bulk sales act an aggrieved creditor may either directly attack the transfer as fraudulent, or waive that right and treat the purchaser as a debtor of the seller to the extent of the creditor's claim, and hold the purchaser as garnishee.

One ground on which Kirkpatrick sought to evade liability as garnishee was that the milling company, by bringing the previous suit to charge him on a claimed promise to pay Hyde's creditors, elected between its legal remedies, and could not afterwards shift its position by asserting liability because of noncompliance with the bulk sales act, but the supreme court decided that the case did not fall within the general rule of law that, where suit fails, plaintiff cannot maintain an inconsistent suit subsequently brought on the same transaction. It was held that where one commences a

suit in ignorance of substantial facts affording a different remedy he may, upon acquiring such information, adopt the alternative remedy.

* *

In the case of Olean Milling Co. vs. Tyler, 235 S. W. 186, decided by the Kansas City court of appeals, the plaintiff won a point in a contest between it and a bank concerning the assets of a common debtor, the defendant.

A bank held a chattel mortgage on furniture and fixtures used in defendant's store. The bank took possession of this property with the defendant's consent, but without complying with the Missouri bulk sales act, which, like similar laws in other states, requires all creditors of a merchant to be notified of an intended transfer of his stock of goods, fixtures, etc. Because of this noncompliance, the mill instituted garnishment proceedings against the bank to charge it with these assets in its hands belonging to defendant. The bank unsuccessfully defended the garnishment proceedings on the ground that it took and recorded the chattel mortgage on the property in question before the mill's account was incurred.

* *

The case of Anthony Wholesale Grocery Co. vs. Otto Weiss Milling Co., 227 Pac. 374, decided by the Kansas supreme court, involved the right of the mill to a preference over other creditors of a dealer who sold his stock of goods without compliance with the requirement of the bulk sales law that creditors be notified of the intended sale.

The mill unsuccessfully contended that it was entitled to priority of right over other creditors because it had obtained judgment against the debtor. The court said:

"The milling company contends that the institution of the suit by the milling company gave it a prior and superior right to the fund. That action was brought in justice court and judgment therein rendered a few days before the creditors' action was commenced by plaintiff. In the action no attachment of the goods was asked or garnishment process issued; no steps were taken by the milling company to acquire a lien on either the goods or the money paid for them.

"Because the goods were sold in violation of the bulk sales law the transfer was void as against the creditors of the vendor. It might be valid as against vendor and vendee, but by reason of noncompliance with the bulk sales law it is deemed to be fraudulent as to creditors, who may look to the goods or the vendee to whom they were illegally transferred, and an appropriate action may also be brought to subject the goods to the payment of the creditors' claims.

"A creditor has, of course, the remedy of attachment and garnishment, and the right to seize the property on execution where a judgment has been obtained. . . . The creditors could sue the original debtor or sue the vendee, and have held the latter personally liable up to the value of the goods illegally transferred to him, or if the goods were within the reach of the law they might have caused a seizure of the same by attachment or garnishment, . . . and if judgment had already been obtained, have seized them on execution. . . .

"Again, the milling company practically acknowledged that it had no lien or superior right when it intervened in this action and asked to share in the fund with other creditors. In its intervention it claimed a pro rata part of the fund which Cloud had paid for the stock and fixtures—an attitude wholly inconsistent with a superior right or prior lien. This was equitable and in accordance with the theory of the bulk sales law, of which it has been said the 'goods in a sense constituted a trust fund for the benefit of all creditors alike,' etc. . . . The act provides that to make a legal sale in bulk the seller must give the purchaser a verified list of all his creditors, and the purchaser is required to give notice to all creditors so listed. . . . In lieu of sending such notices the purchaser may receive from the seller a bond conditioned that the seller will pay the debts due all creditors, and such creditors may sue upon the bond and recover to the extent of the present value of the stock transferred. . . .

"The provisions referred to indicate a purpose to make an equitable distribution of the property or fund among the creditors, giving, of course, priority to those who have acquired express liens before the illegal transfer was made. It would seem that if the seller cannot give a preference to a creditor by selling to him the entire stock without compliance with the bulk sales law, a single general creditor whose claim had not even been converted into a judgment could not obtain a preference to the exclusion of other creditors."

The Kansas bulk sales law is substan-

tially the same as that in force in many other states.

* *

The Kell Milling Co. won an interesting lawsuit before the Texas court of civil appeals. (195 S. W. 342.) A retail grocer having become insolvent, a wholesale company secured from him a bill of sale to all his assets and disposed of the stock of goods, crediting the proceeds to a fund for the benefit of the retailer's creditors. The mill, being a creditor and not having participated in these proceedings, garnished the fund on the ground that the transfer of the assets was invalid for noncompliance with the Texas bulk sales act. The trial court decided the case against the mill, on the ground that this was a transfer for the benefit of creditors, and hence not within the statute.

On appeal, the court of civil appeals reversed the decision, deciding the controversy in the mill's favor, on the ground that the bill of sale running to the wholesale company was absolute on its face, and that there was nothing to show that the debtor intended it to operate otherwise than as an absolute sale to the wholesale company. Mere intention of the company to hold the proceeds of the property in trust could not alter the character of the transfer to it as being absolute within the meaning of the bulk sales act.

The transfer being found to have been invalid, the higher court holds that the mill was entitled to garnish the proceeds of the property in satisfaction of its claim against the debtor.

SECTION 503. FALSE CREDIT STATEMENTS

"The mere failure of a party, filling out a printed form at the instance of the representative of a wholesale merchant, from whom he is obtaining credit for the purchase of merchandise, to fill out one of the blanks at the end of one or more of the questions in the blank form, does not necessarily and of itself constitute a representation, upon which there can be based an action for fraud and deceit," declared the Alabama court of appeals in the case of M. C. Kiser vs. Pope, 88 So. 197.

See, also, section 232.

SECTION 504. MISREPRESENTATIONS IN SELLING PROPERTY

The Wisconsin supreme court has handed down a decision bearing on the right of a purchaser of a mill, or other manufacturing plant, to recover damages on account of misrepresentations made to him concerning the value of the property. The opinion was announced in the case of Swoboda vs. Rubin et al., 170 N. W. 955, and, in substance, was as follows:

The mere making of misrepresentations to induce a sale does not give a right of action in favor of the buyer; they must be made under such circumstances that he actually and reasonably relies upon them. But when it appears that a buyer has innocently and justifiably relied upon misrepresentations concerning the value and income-producing character of the property bought by him, he has a valid claim against the seller for damages, measured by the excess of the value of the property purchased as it was represented to be, above its value in its actual condition.

* *

The Washington supreme court affirmed judgment in favor of plaintiffs in the case of Warwick et al. vs. Corbett et al., 180 Pac. 928, a suit for damages arising from misrepresentations found to have been made by defendants concerning a mill exchanged for plaintiffs' ranch. The gist of the supreme court's decision is as follows:

The fact that the buyer of a mill inspects the property before buying does not preclude him from recovering damages for false representations made by the seller, inducing the purchase and concerning the value of the business and profits derived by the seller. Ordinary prudence on the part of the buyer of a mill does not require that he test the truthfulness of representations made to him by the seller as of his own knowledge, although the buyer may have an opportunity to ascertain the truth himself.

The damages which may be recovered against the seller for falsely misrepresenting the value of the property and business sold are to be measured by the excess of the value of the property and business as represented above their actual value at the time of the sale.

* *

Defendant sold to plaintiff a grain elevator business for $15,940, under a contract whereby plaintiff assumed outstanding contracts for the purchase of corn. Defendant represented that these contracts covered only 2,500 bus, whereas in fact they covered 8,854, as a result of which, in carrying out the contracts for the additional quantity, plaintiff lost $572.88. Plaintiff sued for damages sustained on account of the misrepresenta-

tion, and the Kansas supreme court affirmed judgment in his favor, in the case of Geiger vs. Cardwell, 163 Pac. 613.

The defense to the suit proceeded upon the theory that because plaintiff had paid only $1,000 on the purchase price before he discovered the true extent of the outstanding contracts, and afterwards paid another installment on the agreed price, he waived any claim on account of the asserted misrepresentation. But the supreme court held that there was no such waiver; that, on discovering the untruth of the representation, plaintiff was entitled to either rescind his purchase or abide by it and claim an offset to the amount of his damage.

In response to an additional point sought to be made by defendant, that the representation was not made until after the contract was entered into and therefore was not such inducement to the making of the purchase as would support a valid claim, the court finds that there was sufficient evidence to warrant a conclusion that the representation formed part of the negotiations, although made after the actual signing of the contract.

SECTION 505. WAIVER OF MISREPRESENTATIONS

The main issue in the case of Upton & Walker vs. R. D. Holloway & Co., 102 S. E. 54, was whether defendant was entitled to excuse non-performance of a contract for the delivery of oats and bran, on the ground that plaintiff's representative had misrepresented that plaintiff had a contract for feed awarded to it by the government. Incidentally, question was raised as to whether defendant waived any rights by ratifying the contract after learning of the falsity of the representation.

In the course of an opinion deciding the case in defendant's favor, the Virginia supreme court of appeals says:

"No man will be held bound by a waiver of his rights, unless it plainly appears that he has full knowledge of his rights and a distinct intention to waive them. . . . 'When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence.' . . .

"All of the cases agree that, in order for a misrepresentation to be sufficient to void a contract, it must not only be false, but must have been believed to be true by the other party."

SECTION 506. FRAUDULENT USE OF THE MAIL

One inducing shipment to him of goods by means of a letter sent through the mail, with a present intention not to pay for them if credit can be obtained, is guilty of the crime of fraudulent use of the mails, although the letter may contain some such statement as this: "You can ship them B.L. attached, if you want to, or I will send you check as soon as they come in." It was so decided by the United States circuit court of appeals, fifth circuit, in the case of United States vs. Lewis, 259 Fed. 221.

See, also, section 645.

CHAPTER LX

BANKRUPTCY AND INSOLVENCY*

SECTION 507. NATURE OF BANKRUPTCY PROCEEDINGS

IN olden times, when a money changer became insolvent the "banco," bench or counter over which he did business was "rotto," broken. So, it happens that today English speaking people use a modified combination of these Italian words to indicate an insolvent debtor who voluntarily or involuntarily turns his assets over to a court for distribution among his creditors.

Two important principles constitute the foundation of the law of bankruptcy, although either or both may fail to apply to the facts of a particular case. One of these principles is that an honest but unfortunate debtor should be enabled to make another start in business, and experience tends to show that this humane attitude, with its incidental economic benefits to society, is greatly outweighed by the injustice resulting in those occasional instances when a dishonest but fortunate debtor makes a discharge in bankruptcy a shield against enforcement of his honest obligations. The other principle is that, before a debtor is to be discharged, he should permit an equitable distribution of his assets among his creditors.

A bankruptcy proceeding falls under the jurisdiction of the federal courts, and may be voluntary or involuntary. The bankruptcy act uses the word "person" in the sense of including individuals, partners and corporations.

"Any person, except a municipal, railroad, insurance, or banking corporation," may become a voluntary bankrupt. And the fact that one's creditors may have already instituted involuntary proceedings does not prevent the debtor from having his affairs administered in a proceeding subsequently brought on his own petition.

Proceedings may be brought in the United States district court for the district where the debtor resided or had his or its principal place of business for the preceding six months.

*See, also, sections 411, 414A, concerning insolvent corporations; section 427B, concerning insolvent banks; and Chapter LIX on fraudulent conveyances.

SECTION 508. EFFECT OF DISCHARGE IN BANKRUPTCY

Chronologically, about the last thing that happens in a bankruptcy proceeding is the granting of the bankrupt's discharge, but since it is the end attained by the proceedings, so far as he is concerned, it is interesting at the outset to consider what a discharge in bankruptcy accomplishes in a legal way.

The bankruptcy act declares that a discharge shall release all provable debts, excepting taxes, liabilities based on fraud, malicious injury, seduction, support of wife and children, alimony, etc., and excepting debts not scheduled in time for proof and allowance, unless the creditors affected knew of the bankruptcy proceedings, and debts based on fraud, etc., in a fiduciary capacity.

In a Georgia case—Brooks vs. Pitts, 100 S. E. 776—the Georgia court of appeals recognizes the rule that a discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or representations, and that such false representations may consist in buying goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency.

SECTION 509. INVOLUNTARY BANKRUPTCY PROCEEDINGS

"Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt," provides the bankruptcy act.

Before an involuntary petition lies against a debtor he must be insolvent, and he must have committed an act of bankruptcy within the preceding four months.

The debtor is "insolvent" "whenever

the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed . . . with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." And, as declared by one federal judge, "fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property." Or, as said by another judge, it is not what the debtor may deem his property worth, but what it is worth in the market. On the other hand, the valuation is not to be made at a point of depression produced by bankruptcy proceedings.

Such act of bankruptcy as will expose a debtor to the risk of involuntary proceedings "shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is, of course, open to a debtor to contest in court his creditors' contention that he is insolvent or has committed an act of bankruptcy. And proof in his favor of any such issue of fact entitles him to dismissal of the proceedings.

Involuntary proceedings may be instituted "by three or more creditors who have provable claims . . . which amount in the aggregate, in excess of the value of $500 or over; or if all of the creditors . . . are less than 12 in number, then one of such creditors, whose claim equals such amount."

* *

In involuntary bankruptcy proceedings against the Boulder Milling & Elevator Co., question was raised as to whether the petitioners were creditors of the company in such sense as to be entitled to prosecute the proceedings, or whether the company merely stood in the relation to them of bailee (custodian) of grain deposited by petitioners. Holding that petitioners were creditors, the United States district court for the district of Colorado said (283 Fed. 683):

"It appears that wheat was delivered to the milling company under an agreement that it would be stored with, and held by, the latter, and sold by it on any day directed by the petitioners within one year from date of delivery, and the difference between the market price prevailing on that day and the amount advanced on the date of delivery will be the amount due. While the amount due was on March 10 not liquidated, yet there was clearly an indebtedness existing which the farmer could have liquidated at any time he desired.

"It is also clear that all that could be demanded from the milling company was cash, and petitioners were not entitled to the return of their wheat—could not under this contract have maintained replevin, or an action for conversion. Therefore the relation was clearly not that of bailor and bailee."

* *

In the case of Rogers Milling Co., 102 Fed. 687, decided by the United States district court, western district of Arkansas, in 1900, a mill successfully resisted involuntary proceedings on the double ground that the petitioner was not qualified to apply for an adjudication of bankruptcy and that there was no insolvency at the time the petition was filed. The court said:

"It is, therefore, only creditors who have 'provable claims' who may file a petition to have one adjudged a bankrupt, and the claims of no creditor are provable, under these decisions, so long as he may hold an unlawful preference. But I am not disposed to rest the case upon that point. I am persuaded, after a careful review of the testimony in this case, that when the petition was filed the Rogers Milling Co. was not insolvent.

"The testimony shows that the plant of the Rogers Milling Co., consisting of four lots, a building, machinery and appliances therein contained, cost, when constructed, in the neighborhood of $25,000. It had been constructed 12 or 14 years. A considerable portion of the machinery had been placed in it at a much more recent period. It was in good repair. Of course, it was not as

valuable as when it was constructed—neither the machinery nor the building.

"In addition to this property, it had other real property, valued by some of the witnesses at $1,200 or $1,400, and by none of them at less than $800 or $900. It had other assets, consisting of grain, flour, mill products, notes and accounts, of the value of about $6,000. Its indebtedness amounted in the aggregate, when the petition was filed, to $15,820, including principal and interest.

"Allowing a reasonable and fair discount for natural decay, wear, and tear, and the use of the machinery, the court is of opinion that the weight of the testimony shows that the assets were greater in amount, at a fair valuation, than the liabilities, and for this reason the petition in this case should be dismissed at the costs of the petitioning creditor. It is so ordered."

* *

A trustee to manage the estate is to be selected by the creditors whose claims have been allowed. If the creditors fail to elect, an appointment is made by the court.

SECTION 510. PROPERTY PASSING TO TRUSTEE

The trustee becomes vested with title to the bankrupt's property that is subject to sale or distribution to satisfy the creditors' claims, including trademarks, books, papers, etc., as well as tangible personal property and real estate.

"A membership in a stock exchange, which has a money value, is property which passes to the trustee in bankruptcy, although it can be transferred only under the rules of the exchange and with the consent of the committee on admissions; and the court of bankruptcy may compel the bankrupt to execute all transfers or consents necessary to bring about a sale of such membership under the rules of the exchange." 7 Corpus Juris, 119.

As a general rule, the trustee takes no better title to property in the possession of the bankrupt than the bankrupt himself had. So, property held under mortgage, lease or conditional sale contract by the bankrupt passes to the trustee subject to the rights of the mortgagee, landlord or seller, except as such rights may be affected by failure to record instruments.

SECTION 511. RECOVERY OF GOODS BY SELLER

Sometimes the bankrupt makes a vain effort to restore to a seller goods delivered just prior to the adjudication in bankruptcy. For example, it was decided by the California district court of appeal in one case (86 Pac. 615) that, after an involuntary petition in bankruptcy had been filed and after a railway company had delivered grain to the bankrupt, it was beyond the power of the latter to reinvest the seller with title.

But where a mill has sold products to a customer under false representations made by the latter concerning his pecuniary condition, and discovery of the fraud, delivery of the goods and bankruptcy all occur about the same time, there is abundant authority for saying that the goods may be reclaimed from the trustee in bankruptcy.

* *

A grain and milling company, while known by its managing officers to be insolvent and without reasonable expectation of being able to pay the price, ordered certain supplies, and later became bankrupt. Under these circumstances, the United States district court for the northern district of Ohio decided that the seller could recover possession of the supplies as against the company's trustee in bankruptcy. (In re Sycamore Grain & Milling Co., 221 Fed. 468.)

* *

A seller of flour mill machinery insufficiently reserved a right to reclaim it, as against creditors of the bankrupt buyers, according to the holding of the United States district court for the western district of Pennsylvania in the case of Jacob F. Thaler & Co., 1 Fed. (2d) 461.

Thaler & Co. having become bankrupt, the Anglo-American Mill Co., Inc., filed a petition to require the trustee to return a roller mill sold to the bankrupts. The mill had been sold under a "license contract," which reserved title until payment of the purchase price. Without completing payment, the buyers mortgaged the premises on which the mill was installed. The conditional sale contract had been recorded, but the mortgagee of the premises had no actual knowledge of that fact. Disposing of the case, the court said:

"The referee held that the contract in question was a conditional sale, and in this conclusion we concur. Full possession being given under the conditional sale of the machinery in question, the petitioner's case must fail as against the creditors of the bankrupt, unless there was a full compliance with the provisions of the conditional sales act of Pennsyl-

vania. . . . Section 4 of that act, which specifies what the contract must contain, provides: 'F. A description sufficient for identification and location of such real property or chattels real.'

"No such description or identification appears in the contract. The only words bearing on that matter are, 'to be located at Erie, Pa., on land owned by the licensee.' As it appears that the latter was the owner of other real estate, it would be hard to conceive a more faulty description. This is a fatal departure from the requirements of the act. In other respects pointed out by the referee the provisions of the act of assembly were not strictly complied with.

"The order of the referee refusing the petition for the return of the property was in harmony with the law as we view it, and is therefore affirmed."

SECTION 512. RECOVERY OF GOODS BY BUYER

The right of a wholesale company's trustee in bankruptcy to subject certain flour to the claims of the creditors, as against claimants of the flour under contracts of purchase, was the point litigated in the case of Willen vs. Schillicci, 285 Fed. 12.

The company, Will V. Connell Co., Inc., had sold flour to several customers. Because the buyers did not have adequate storage facilities, it was agreed that future delivery should be made. They gave trade acceptances payable on actual delivery. Subsequently the flour was placed in a third concern's warehouse, receipts being issued to the buyers, who assented to this without knowing that the wholesale company was insolvent.

Affirming a decision of a lower court, the United States circuit court of appeals, fifth circuit, decided that there was no unlawful preference of the buyers as creditors of the wholesale company, and that they were entitled to the flour which had been placed in the warehouse to their credit. It was also decided that there had been a valid transfer of title to the flour from the company to the buyers, by the warehousing referred to, although there had not been a segregation of the flour belonging to the respective buyers.

See, also, section 515.

SECTION 513. RIGHT TO RECOVER CONSIGNED GOODS OR PROCEEDS

Where a bankrupt has received flour for sale on commission and is in possession thereof, or of its proceeds, on becoming bankrupt, the owner of the same is entitled to reclaim the flour or proceeds in the hands of the bankrupt. This was specifically decided by the United States district court for the district of South Dakota in the case of Larkin & Metcalf, 202 Fed. 572. Finding that flour had been consigned to bankrupts by a mill for sale on commission, the court said:

"The flour was and remained the property of the petitioners. The money collected therefor, less the commissions agreed upon, was, and remained, the property of the petitioners."

But in the last cited case the mill lost out because the proceeds, as well as the flour, had been disposed of before bankruptcy proceedings were filed. The proceeds had been used in running the bankrupts' business and toward paying debts. On this point, the opinion in part reads:

"If the petitioners [millers] were the owners of the flour and of the proceeds thereof intrusted to the bankrupts and their agents, by whom it has been misapplied, are they entitled to a general lien upon the assets of the . . . estate of the bankrupts for the value of such property, as against the general creditors, or have they such right to the moneys acquired about the time of the filing of the petition solely from the sale of other property of the bankrupts? . . .

"It is contended on behalf of the petitioners that the proceeds of the sale of this flour, even though wholly misapplied by the bankrupts to the payment of their debts and the expenses of managing the business, were impressed with the character of a trust fund, and that the trust may be enforced against any assets of the bankrupts in the hands of their trustee, and especially that they are entitled to a preference to the amount of their claim to the moneys in the hands of the trustee. . . .

"There is no recognized ground upon which equity can pursue this fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the petitioners. If the petitioners herein are to be permitted to follow the fund received by the bankrupts or their agents upon the sale of this flour, and recover it, it is because the property belongs to the petitioners, whether in the form in which they parted with its possession or in a substituted form. Under the earlier rule, petitioners would have been required to identify it as the very property which they had confided to another.

"The modern and more equitable doc-

trine permits the recovery of a trust fund from any one, not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished. . . .

"I am of the opinion . . . that it cannot be said that, because these bankrupts or their representatives misapplied trust funds and paid debts of the bankrupt, and paid the expenses of running the business with such funds, therefore, the general creditors of the estate are by that amount benefited, and that because of such benefit, therefore, equitable considerations require that the owners of the trust fund be paid out of the state, to the exclusion of general creditors. . . .

"By paying out of the general assets the amount of this trust fund that had been used for the payment in full of other obligations and the expenses of running the business the general creditors who are entitled to the general assets of the bankrupts are thereby required to contribute toward the payment in full of these creditors whose demands have been extinguished by the trust fund. It does not appear that the money for distribution in this case includes any part of that belonging to the petitioners herein. If it did appear, the lien of the petitioners would attach, and they would have preference. . . .

"In the case at bar, 'the minimum amount found at any one time' in the cash account of the bankrupts and their agents, after the collection and misappropriation of the proceeds of the sale of the flour in question, was absolutely nothing. . . . The identification of the original trust fund of the petitioners was lost when the whole of the proceeds of the flour in question were, with all of the other funds with which it had been intermingled, paid out to the creditors of the bankrupt, and for the payment of the expenses of the conduct of the business of the bankrupts. . . .

"In Farmers' & Traders' Bank vs. Kimball Milling Co., 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739, the property conveyed in that particular case could be identified and was acquired with fraudulently or unlawfully obtained funds. The property so obtained had been used in the purchase of other property, and it was there held that that particular property was impressed and chargeable with a trust in favor of the beneficiary to the extent of the fund traceable into the property."

* *

In the case of Ramey-Milburn Co. vs. Eaves, 283 Fed. 776, the United States circuit court of appeals, eighth circuit, ruled that there was an insufficient showing that mill products had been consigned to a bankrupt for sale on commission. Therefore, right to reclaim the goods from the trustee in bankruptcy was denied.

* *

The proceeding by the Valier & Spies Milling Co. vs. Foote, 277 Fed. 519, in which the mill attempted to enforce a lien against proceeds of flour in defendant's hands, as trustee in bankruptcy of J. F. Howard & Co., ended in a decision favoring the trustee.

The firm of J. F. Howard & Co., prior to bankruptcy, was engaged in the wholesale grocery business at Gulfport, Miss., and when adjudicated a bankrupt had on hand a lot of flour stored with other merchandise in its place of business, which flour was manufactured by the Valier & Spies Milling Co. The trustee in bankruptcy took charge of the flour, together with other merchandise and personal property of the bankrupt, and sold the same at a public sale under order of the referee.

After the sale the milling company filed a petition stating that the flour had been sold by it to the bankrupt under a contract whereby it retained title to the same, and prayed that the proceeds be paid over to it.

It appears that the petitioner contracted with the bankrupt to sell it flour at the market price, for which the bankrupt was to make weekly settlements; that the mill retained the right, in selling any of its flour outside of the territory of the bankrupt, to send such orders to the bankrupt which it would fill and ship from the stock then on hand, charging the mill 20c profit for each barrel so shipped, with the right to call upon the mill to replace such flour at the price it had cost without regard to any change in the market.

The mill retained title to the flour and carried fire insurance thereon in its own name, but held J. F. Howard & Co. responsible for any losses resulting from all causes except fire.

Disposing of the case, Judge Holmes, of the United States district court, southern district of Mississippi, said:

"It is clear that the bankrupt was doing business as a trader in the city of

Gulfport under the style and firm name of J. F. Howard & Co., with a sign displaying said firm name in front of its place of business, and that there was no sign showing that it was acting as the agent of any one in the sale of the flour or other merchandise which constituted the stock of goods.

"The flour in question was used and acquired by the bankrupt in carrying on its business, and under the undisputed facts the bankrupt had the right to sell any part or all of said flour in the usual course of business. The contract relied upon by the petitioner was not recorded.

"The petitioner had no lien for the purchase money on the flour, not only because it retained title thereto under an unrecorded contract, but because it delivered the flour to the bankrupt for the purpose of resale in the usual course of business. It is utterly inconsistent to retain title to personal property and at the same time claim a lien thereon for the purchase money.

"But if this were not true, the vendor of personal property held for resale by a merchant or trader to whom he has delivered it for the purpose of being resold has no lien thereon for the purchase money which he can assert against the trustee in bankruptcy of the buyer. See In re Wright & Weissinger, 277 Fed. 514.

"This case differs from the case last cited, however, in that by retaining title to the flour under a contract not recorded, and delivering it to a trader to be resold, under the circumstances above set forth, the petitioner brings the case squarely within the terms of the Mississippi sign statute, and obviates any discussion as to the applicability of Dodds vs. Pratee, 64 Miss. 123, 8 South. 167, holding that the sign statute does not derange the priority of liens.

"Section 4784 of the Code of 1906 is as follows: '4784 (4234) Business Sign, and What to Contain.—If a person shall transact business as a trader or otherwise, with the addition of the words agent, factor, and company, or & Co., or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property.'

"The trustee in bankruptcy not only took the title of the bankrupt, but was vested with all the rights of a creditor holding a lien by legal or equitable proceedings and also a judgment creditor holding an execution duly returned unsatisfied."

SECTION 514. RIGHT TO PROCEEDS OF WAREHOUSED GOODS

On bankruptcy of a grain warehouseman, one who had deposited corn with the bankrupt company, under a certificate authorizing commingling of the goods with other grain and providing for payment in cash on presentation of the certificate, was not entitled to a preference over other general creditors by way of payment of the full value of the corn out of the bankrupt's assets, without clearly proving that the proceeds of a sale of the corn made by the bankrupt went into a specific fund, or into specifically identified property, which came into the hands of the trustee in bankruptcy.

This point was decided by the United States circuit court of appeals, eighth circuit, in bankruptcy proceedings involving the B. A. Lockwood Grain Co., 257 Fed. 535.

Reviewing the evidence in the case, the court decided that the proof was insufficient to trace any proceeds from the bankrupt's sale of claimant's grain to property or funds which came into the hands of the trustee in bankruptcy, and therefore the claim to a priority was disallowed. It is held that a mere showing that the proceeds went into the bankrupt's general assets is insufficient to give claimant an equitable lien against the assets of the estate in bankruptcy.

* *

Thirty-nine propositions of law were decided by the United States district court for the northern district of Texas in the bankruptcy case of Elijah F. Ballard (279 Fed. 574), a bankrupt miller, who conducted two flour mills and a bank, and yet had sufficient leisure time in which to pursue the avocation of feeding swine on the mills' refuse. It took 15 lawyers and law firms to present and defend the numerous claims which were asserted against the bankrupt estate, and the judge uncomplainingly avers that he "listened for a week or more to the arguments by counsel representing the contentions of their respective clients."

The decision embodies numerous legal principles having important application to the formation and conduct of milling

enterprises, as affected by intervening bankruptcy.

The first question taken up by the court related to the legal effect of mill receipts for wheat issued by the bankrupt. A large quantity of wheat had been received at one of the mills from various farmers who severally deposited small quantities, receiving receipts reciting that the depositor was "to receive in exchange —— pounds of flour, —— pounds of bran, and —— pounds of shorts."

The depositors, claiming the right to recover from the trustee in bankruptcy wheat remaining on hand, according to the quantities deposited, contended that the wheat was held in trust for them. The court, however, held that the effect of delivering the wheat to the mill and taking the receipts was to sell the grain, passing title to the mill, and that this title inured to the benefit of all the miller's creditors in common. The court followed the distinction made by the United States Supreme Court as to when a transaction of this general kind constitutes a sale, as distinguished from the creation of a trust or bailment:

"Where logs are delivered to be sawed into boards, leather to be made into shoes, rags into paper, . . . or wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or loan, and the title to the thing delivered vests in the manufacturer."

The court in Texas also approves the following conclusions reached by the referee in bankruptcy:

"When the farmers delivered their wheat and accepted a certificate which contained a promise to deliver them a certain number of pounds of flour, bran, or shorts for each bushel of wheat delivered, they parted with title to their wheat upon the instant delivery, and their only recourse upon the millowner from that time was a recovery of the amount of flour, bran, and shorts specified in their certificate, or damages for a failure to make such delivery.

"If, when the farmers left their wheat at the mill, they had received an obligation of the millowner to redeliver to them an equal number of bushels of the same grade of wheat delivered, although the contents of the bins had changed several times, the depositors would still, under the law, have been entitled to the wheat delivered, had there been sufficient to satisfy their demands and the demands of other tenants in common; but when they agreed to accept for their wheat a certain number of pounds of flour, to be delivered upon demand, the millowner became their debtor for the flour promised, and the depositors had parted with their right to compel a redelivery of their deposits.

"For the reasons stated, I have held that the various claimants of flour due them from the Cedar Hill Milling Co. are general creditors of the estate, and that their various claims for flour as proven will be reduced to money at the price for which the flour on hand at the time of bankruptcy was sold by the trustee."

SECTION 515. PREFERRING CREDITORS

One of the most important clauses of the bankruptcy act is that which provides that "a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of the creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The act makes such preferential transfers voidable at the instance of the trustee in bankruptcy, he being authorized to recover the property transferred or its value. But, as decided in the case of Summerville vs. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243, insolvency of the debtor at the time of the transfer is an essential element of a voidable preference; and the preferred creditor must have had reasonable cause to believe that the debtor was insolvent.

* *

In the case of Edwards vs. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764, it was held that where the question of a customer's insolvency is so close that it becomes necessary to list his assets and debts to determine the fact, a creditor is not held to be lacking in diligence in failing to ascertain the customer's solvency before accepting a transfer or security for indebtedness.

Taking of a renewal mortgage without knowledge of the mortgaging miller's

insolvency does not constitute a voidable preferential transfer on the miller being adjudged a bankrupt, although the new mortgage may not be recorded until after the holder learns of the insolvency. (In re Ballard, 279 Fed. 574.)

* *

The Washington supreme court decided in McKay vs. Sperry Flour Co., 163 Pac. 377, that there was no invalid preference of the flour company as a commission company's creditor under the following stated facts:

The commission company owed the flour company several thousand dollars on account, and became insolvent at a time when one Brachvogel, a stockholder of the commission company, owed $3,300 on his stock subscription. His mother-in-law mortgaged land to the flour company for the amount due from him on the subscription, he agreeing to indemnify her against loss. The commission company then credited his subscription as paid. At the time the commission company was insolvent, and it became bankrupt within four months.

The decision of the supreme court proceeds upon a theory that the somewhat complicated transactions involved no transfer of the commission company's assets to the flour company in payment on account of the former's debt to the latter.

* *

The Scott County Milling Co., a Missouri corporation, was sustained before the Mississippi supreme court on an important point of law relating to the right to retain payments made by a bankrupt on account within four months preceding bankruptcy. (73 So. 792.)

One Coor, local agent for the mill at Jackson, Miss., agreed to take stock in a wholesale grocery company, payable in flour. The mill was not advised of this arrangement, although its district agent was. Flour worth $8,000 was shipped to Coor on open account covering some time, and he turned it over to the grocery company, of which he was manager, and it was sold in the course of that company's business. Payment was made to the mill through checks of the grocery company.

Coor never paid for his stock, and, according to the court's finding, "departed for parts unknown" about the time the grocery company became bankrupt. The payments to the mill having been made within four months immediately preceding bankruptcy, the trustee for the creditors sought to recover them as having amounted to voidable preference of the mill as a creditor.

Reversing a judgment in favor of the trustee, the supreme court holds that there was no invalid preference, because there was nothing to show that the milling company was advised at the time that the checks were received that the grocery company was insolvent, if it was then so. It was decided that such knowledge on the part of Coor could not be imputed to the mill, although he was its agent, for it is a well-settled rule that knowledge obtained by a corporation's representative will not be regarded as constructive notice to the company if it pertains to a matter in which he has acted adversely to the interests of the corporation.

* *

There are various other qualifications and exceptions pertaining to the rule against preferential transfers. Among these, two are indicated in the case of Grocers' Baking Co., 266 Fed 900, wherein it was decided that mortgages given by a baking company to flour dealers did not constitute an invalid preference, where the bankrupt baking company had thereby become enabled to continue its operations and its estate had thereby been augmented. The court said:

"The directors of the bankrupt and Connell & Baldwin [the flour dealers] believed, and had apparent good reason to believe, that the concern would be tided over a temporary embarrassment, and would, by the advancement made by Connell & Baldwin, be able to continue business and preserve the estate. Connell & Baldwin subtracted nothing from the assets of the estate when they took the papers from the baking company. On the contrary, they added to the estate, by furnishing flour, lard, etc., for its operation, in harmony with the major purpose of making the notes and mortgages. To constitute a preferential transfer within the meaning of the bankruptcy act, there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate."

* *

Where a wholesale dealer in flour contracted to sell quantities to retail dealers, they giving trade acceptances in payment, and flour was deposited to their credit in a warehouse, it was held by the United States district court, northern district of Alabama, that the wholesaler's trustee in bankruptcy was not entitled to reclaim the flour for the benefit

of creditors on the ground that the deposits of the goods constituted a voidable preference in favor of the buyers. (In re Will V. Connell Co., 278 Fed. 288, affirmed, 285 Fed. 12.)

The decision rests partly on findings that the transactions were conducted in good faith, that the buyers had no reason for believing that the bankrupt was insolvent when the goods were delivered to them, and that they did not receive more goods than were sufficient to satisfy their respective trade acceptances.

The evidence showed that 30 days or more prior to the adjudication of bankruptcy, each of the claimants executed separate trade acceptances, due approximately 60 days after date, to cover the purchase of flour and lard from the bankrupt. These trade acceptances were immediately discounted by the Birmingham Trust & Savings Bank, the bank with which the bankrupt did business, and the cash was then placed to the credit of the bankrupt. The money thus obtained by the bankrupt was used by it in the due and regular conduct of its business.

About 30 days after the bankrupt had obtained the money upon the trade acceptances, the bankrupt "phoned" each of the respective claimants that it expected a large shipment from the "Hazel Milling Co." upon consignment, that their flour was in its warehouse, and that the bankrupt needed its warehouse space and desired claimants to remove their flour at once.

The claimants' stores were small and some miles distant from the bankrupts' store, and it was not convenient for them to take the flour at once; thereupon, at the suggestion of the bankrupt, the bankrupt caused each of the claimants' flour to be hauled to the public warehouse of the Harris company, and there stored separately in the name of each of the respective claimants, causing uniform warehouse receipts to be issued to each claimant, describing thereon the specific property stored in the warehouse. These receipts were at once delivered to the claimants. There was no fraud, collusion, or bad faith between the warehouse company and the bankrupt, nor between the warehouse company and any of the claimants.

Disposing of the case, the court said: "On this hearing it was not asserted that there was any fraud in fact. However, the referee concluded that 'no specific article was separated from the mass of the property, so as to give the claimant title thereto.'

"Upon the evidence in this case I am forced to conclude that this finding of the referee was erroneous, and not based upon any evidence or facts. The evidence shows that the flour and lard described in the respective receipts were delivered to the public warehouse, and there stored and held for the purchasers who had previously paid for such goods. To each claimant a separate uniform warehouse receipt was issued, describing his specific property. These facts constituted a complete sale and delivery of the goods to each claimant.

"It is not true that the purchasers were unable to identify their specific property, for the facts show that some of the claimants did go to the warehouse, present their receipts, and withdraw from the warehouse part of the flour as it was needed by them in their retail business, prior to the bankruptcy of the Will V. Connell Co., the bankrupt here.

"The bankrupt had no right, legal or equitable, to disturb the claimants in the enjoyment of the merchandise it had sold and delivered to them; especially so in view of the fact that the bankrupt had collected all of the purchase price for the goods prior to their delivery. It cannot be maintained that the trustee has any greater right in this case than the bankrupt had. The rights of the trustee are those of a judgment creditor of the bankrupt.

"As I have said, these goods were sold, delivered, and the money collected therefor some days prior to the bankruptcy; and all of the dealings and transactions had by and between the claimants and the bankrupt and the claimants and the warehouse storage company were regular, and without any taint of or even suspicion of fraud. Upon the day these claimants' merchandise was delivered to them at the warehouse there was no judgment creditor to complain, and no other one occupying such position. The bankrupt had no control over the flour and lard after they were delivered to the warehouse company. The claimants had no control over them until the warehouse receipts were presented, storage charges paid, and delivery demanded. Manifestly, therefore, it was immaterial as to how the goods were stored by the warehouse company in its warehouse. The company was compelled to deliver to each respective claimant the specific flour and lard called for in each individual receipt, upon demand. This is elementary common law. . . .

"I am clearly of the opinion from the

evidence in this case and from the terms of the warehouse receipts themselves that the warehouse company, when the goods described in the respective receipts were received by it, immediately became both the agent and bailee of the claimants, and therefore, as a matter of law, this consummated a perfected sale and delivery of the goods to the respective claimants.

"Now, taking another view of the case, there is no doubt from the evidence that the bankrupt estate was not in any way depleted by the transaction had with these claimants and sought to be impeached by the trustee. The claimants executed lawful acceptances approximately 30 days before the delivery of the goods in question, payable to the order of the bankrupt. . . .

"Here the bankrupt discounted the claimants' trade acceptances. . . . It received in return for the acceptances their full face value, and used the money thus obtained in the proper and ordinary course of its business. Subsequent to the receipt of the money, and prior to the bankruptcy, the bankrupt delivered to the claimants the goods due under and by virtue of the terms of the trade acceptances. The bankrupt received full pay for the merchandise now claimed by these petitioners. All the creditors of the bankrupt estate enjoyed the fruits of their money put into the bankrupt estate."

See, also, section 512.

* *

The trustee of a bankrupt estate has no power to agree to allow a deduction in favor of a creditor of the estate, holds the Minnesota supreme court in the case of Park, Grant & Morris vs. Shannon & Mott Co., et al., 170 N. W. 555.

Plaintiff, a corporation, claimed that, in dealings with the named defendant, plaintiff overpaid for a car of flour, and also became entitled to credit for some of the flour that proved to be spoiled and unfit for sale. In the meantime, however, the Shannon & Mott Co. had assigned its assets to the B. A. Lockwood Grain Co. for the benefit of the former's creditors, and later the Lockwood company was adjudged bankrupt.

Plaintiff, having ordered another car of flour, refused to pay draft drawn for the price, unless allowed to deduct the amount of the two claims above mentioned. Permission for the deduction being refused, the draft was rejected, and plaintiff attached the flour on its arrival at Fargo to secure payment of such claims.

Upon this somewhat complicated state of facts, the Minnesota court held that, even if the trustee in bankruptcy had agreed to pay the plaintiff's claims, as asserted by plaintiff, the agreement was void, as involving an attempt to prefer plaintiff as a creditor, and hence was not enforceable against the bankrupt estate of the Lockwood company. And it was further decided that the attachment proceedings were invalidated by failure to perfect service of summons against the Shannon & Mott Co., so far as that company is concerned. It is intimated that plaintiff's only remedy for the enforcement of its claims was to have filed a claim in bankruptcy in the proceedings against the Lockwood company.

SECTION 516. DISTRIBUTION OF ASSETS

In ascertaining what claims against a bankrupt estate are entitled to share in distribution of available assets, any creditor whose claim has been allowed may object to another claim, allowance of which affects the objector. And, of course, the trustee in bankruptcy, as representative of all the legitimate creditors, is entitled to, and should, object to allowance of an improper claim.

After the extent and nature of a bankrupt's assets and liabilities have been arrived at, the assets are to be disposed of so far as they will go in meeting different classes of obligations of the estate, according to right to precedence.

Taxes due Uncle Sam, the state, county, district, or municipality are to be paid first. Then comes the "actual and necessary cost of preserving the estate subsequent to the filing of the petition," filing fees by creditors in certain cases, and costs of administration, including "one reasonable attorney's fee," etc.

Until a few years ago, the bankruptcy act might just as well have stopped right here. After the "costs of administration" were paid, it often happened that there was not enough left to keep the creditors supplied with toothpicks for a week. Too often the attorney didn't happen to be "reasonable," and some fees allowed attorneys in bankruptcy cases were so large that even many a surgeon would have hesitated to charge as much for removing an appendix.

Within my own professional recollections—and I claim to be a young man yet—the dollars of bankrupt estates have been treated, like wild ducks, as belonging to the first man to bring them down. The main difference between hunting ducks and dollars lay in the fact that there was no closed season on bank-

ruptcy proceedings. Trustees, receivers and attorneys being within close range of the dollars when they started to fly, didn't let many of them get away, but sometimes a few flew in the direction of creditors.

Now, however, there is a general recognition of the fact that a bankrupt's creditors are entitled to what can be conserved on a reasonably economical administration of the estate. If an attorney asks too large a fee, some creditor is apt to ask questions concerning equitable ownership of the proceeds that remotely remind one of the Negro who protested against his lawyer retaining a watch as a fee for securing the darkey's acquittal on a charge of stealing the selfsame watch. Sam very plausibly asked, "Say, boss, who stole dat watch?"

After satisfying charges of administration, the next class entitled to priority includes "wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the commencement of the bankruptcy proceedings, not exceeding $300 to each claimant." This clause, it seems, is clearly broad enough to cover a bankrupt mill's salesmen who have worked on commission, but not commissions due independent brokers.

The next class, in order of priority in distributing a bankrupt's assets, covers debts given priority under state laws.

SECTION 517. PRIORITY OF LIENS

Where subscribers contribute money toward the erection of a mill, but fail to perfect the intended incorporation, and the business is conducted by one becoming bankrupt while holding legal title to the property, the claims of machinery creditors must be paid before the subscribers can be reimbursed on account of their contributions. (In re Ballard, 279 Fed. 574.)

* *

It is to be noted that mortgages and similar liens created before the bankruptcy proceedings do not depend upon the bankruptcy act for priority. "Unless assailable as a preference or voidable transfer, or of such character that it is invalid as against creditors, or is dissolved by an adjudication of bankruptcy, an outstanding lien or incumbrance on property of a debtor is not affected by his bankruptcy; but the trustee takes the property subject to such lien, and the rights of the lienholder remain unimpaired, and he is entitled to enforce his lien according to the terms of the agreement under which it was acquired, and to be paid the full amount secured by such lien out of the property or its proceedings [proceeds?] before any part thereof is applied to the payment of the claims of general creditors." (7 Corpus Juris, 185.)

Priority of rights between creditors of the bankrupt New Orleans Milling Co. was the subject of adjudication before the United States district court for the eastern district of Louisiana (263 Fed. 254).

The Anglo-American Mill Co. sold flour mill machinery to the milling company before it became bankrupt, under a contract purporting to reserve title in the seller until payment of the price. During the administration of the bankrupt estate the seller filed claim for a balance due, asserting a right to lien against the machinery or its proceeds. Disposing of the matter in favor of the claimant, the court said:

"The question presented can be easily determined by reference to the Louisiana law and jurisprudence. Conditional sales are not recognized in Louisiana. . . . The decisions only go to the extent, however, of holding the retained title to be void, and the sale vests title in the purchaser.

"Another line of decisions holds that, where the purchase is made through an agent in Louisiana, or by correspondence, and title passes to the buyer only by the appropriation of the goods in another state, the contract is governed by the laws of that state. . . . The trustee relies on these decisions, but they are not in point.

"In this case title did not pass by the signing of the contract, nor by the appropriation of the goods, nor by their shipment. The purchaser had the right to reject the mill after 30 days' trial in New Orleans. This was a suspensive condition, and made the contract executory in Louisiana. . . .

"Under the law of Louisiana the vendor has a lien, or privilege, as it is called in the civil law, without the necessity of recording, on the movables sold, for the unpaid part of the purchase price, as long as the goods remain in the possession of the purchaser and can be identified. The giving of notes does not affect the lien, and it is not defeated by a seizure and sale of the goods under execution at the instance of a third person. . . .

"As the sale from the mill company to the bankrupt must be regarded as a Louisiana contract, it follows the referee

was in error in denying the lien on the proceeds in the hands of the trustee."

* *

The case of Rader vs. Star Mill & Elevator Co., 258 Fed. 599, passed upon by the United States circuit court of appeals, eighth circuit, involved priority of right between the parties to the assets of the bankrupt Oklahoma milling corporation, the Gage Roller Mills.

Rader claimed a lien upon real estate which he had conveyed to the bankrupt, the lien resting on the fact that the purchase price had not been fully paid. It appears to have arisen under the statutes of Oklahoma, and not by virtue of a mortgage or other written instrument. Subsequently the Gage mill gave a mortgage to defendant, Star Mill & Elevator Co., to secure a loan, but the mortgage was void because not attested by the seal and the signature of the secretary of the mortgagor company.

The court held that, since the Rader lien attached prior to four months before the Gage mill became bankrupt, the fact that it was not judicially established until within that four months' period did not invalidate it under the provisions of the bankruptcy law.

It was further decided that the circumstance that Rader was a stockholder of the bankrupt company did not estop him from asserting the invalidity of the Star mill's mortgage, as against his vendor's lien; the mortgage having been given without his knowledge or consent.

It was also decided that Rader could not be held to have waived his statutory lien, in the absence of clear and convincing proof that he had evinced intention to forego his lien right, and such proof is found to have been wanting.

Finally, the court declared that the Star mill had waived any right to claim rights under its void mortgage superior to those of unsecured creditors of the bankrupt mill in general, through having failed for more than a year to assert rights under the mortgage or to attempt to have the same reformed by suing, as the mortgagee might have done, to have the mortgage reformed by supplying the necessary attesting signature and seal.

* *

SECTION 518. EXEMPTION CLAIMS

A bankrupt miller conducting his own business, although under a trade name, is not entitled to claim funds of the business exempt as constituting salary. (In re Ballard, 279 Fed. 574.)

Question was once raised before a division of the New York Supreme Court as to whether, under a statute exempting "flour" to debtors for the support of their families, meal might be claimed as exempt. (15 N. Y. Supp. 490.) By a vote of two judges to one it was decided that meal must be regarded as flour in applying the law; following an earlier decision that flour is the "finely ground meal of wheat or any other grain." The third judge dissented, however, on the ground that "flour and meal are different articles." But in another New York case, no real difficulty was encountered in reaching a conclusion that wheat could not be regarded as "flour" within the same exemption law. (36 Hun. 12.)

SECTION 519. BANKRUPT'S DISCHARGE IN GENERAL

After one month after being adjudged a bankrupt, and within 12 months, the bankrupt may apply for a discharge in bankruptcy. This time may be extended six months where application has been unavoidably delayed.

The application may be opposed by the trustee or other parties in interest. Discharge is to be granted unless it appear, on proper hearing, that the bankrupt "has (1) committed an offense punishable by imprisonment as herein [bankruptcy act] provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material questions approved by the court: provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

There is a legal principle related to bankruptcy, arising after one has been discharged from his debts, that is interesting, although seldom applied. We re-

fer to the principle that, since the moral obligation of unpaid debts continues despite discharge of the legal obligation, a debtor may become bound, after his discharge in bankruptcy, by a new promise to pay. But the promise must be clear and unequivocal. Ordinarily, it need not be in writing.

SECTION 520. REVIVOR OF DISCHARGED CLAIMS

But few debtors who have been discharged in bankruptcy avail themselves of the privilege of paying debts from which they have been released. They regard them as "paid," and paid with as much satisfaction as if they had been paid in gold.

That the law recognizes the validity of a promise by one who has been discharged in bankruptcy to pay a debt which would otherwise be unenforceable on account of the discharge is shown by the decision of the Kansas City court of appeals in the case of Boone County Milling & Elevator Co. vs. Lowery, 248 S. W. 623. Affirming judgment in plaintiff's favor in a case of that kind, the court said:

"It is noted that the petition charges that defendant, 'after he had been adjudged a bankrupt, for a good and sufficient consideration, by a new promise, then and there made, promised and agreed to pay plaintiff the full amount then due.' It will not be contended, we take it, that a mere agreement by plaintiff to extend additional credit to defendant would not be a good consideration for a new promise to pay the old account. Any testimony tending to show a new promise is admissible. But there is no evidence of record tending to prove that the additional credit was granted by plaintiff because of defendant's promise to pay the old account. However, such proof is not essential to plaintiff's case. A moral consideration is sufficient if the promise be made after the commencement of bankruptcy proceedings, and either before or after final discharge. . . . The only question on this point for our consideration is as to whether there was evidence from which the jury could find that defendant made such promise after the commencement of the bankruptcy proceedings."

The court then set forth evidence from which it is found that such promise was made.

* *

An owner of a mill and other property was adjudged to be bankrupt, and made a composition with his creditors, including plaintiff, who held a note against him. Afterwards he wrote to plaintiff: "In regard to your claim against me, you will be paid every dollar of it with interest as soon as I sell the mill."

These facts were held by the New York court of appeals in the case of Herrington vs. Davitt, 115 N. E. 476, to have obligated the debtor to pay the balance due on plaintiff's original claim, notwithstanding the composition in the bankruptcy proceedings and the debtor's consequent release; it appearing that the mill was sold after he made the promise above quoted.

But the court declares that before a discharged bankrupt may be held on a claim released by the bankruptcy proceedings it must be shown that since his discharge he has made a distinct promise to pay; mere payment of part of the debt or of interest on it is insufficient to show a binding undertaking by him to waive the benefits of his discharge in bankruptcy.

CHAPTER LXI

TELEGRAPH COMPANIES

SECTION 521. DUTIES AND LIABILITY IN GENERAL

THE receipt by a telegraph company of a telegram for transmission does not absolutely bind the company to make delivery promptly, or at all, but it does impose certain well-defined legal obligations to use all proper diligence either to make prompt delivery, or to inform the sender in advance of any foreseen conditions which are apt to entail delay. Broadly stated, the duty is to use all the diligence reasonably to be expected under given circumstances.

The following stated facts have been held by the courts to afford no excuse for failure to make prompt delivery of a message, after having received it for transmission:

That the charges were not prepaid, if credit therefor was expressly or impliedly given; that the message was written in cipher or foreign language, if the letters or figures could be transmitted readily; that a strike of operators or wire trouble existed, if the condition was known or anticipated when the message was accepted, and the telegram was not taken subject to delay and the sender was not notified of the probability of delay; or, in case of wire trouble, if that trouble was due to the company's own negligence, as distinguished from a storm or other cause against which reasonable diligence on the part of the company could not be expected to have guarded.

Ordinarily, it is held that there is no liability for failure to transmit a message on Sunday, unless it pertains to some charity or necessity.

The courts accord to telegraph companies the right reasonably to restrict their office hours, and, unless there is an express agreement that a message will be delivered by a stated time, the sender is presumed to assent to delivery with regard to whatever reasonable office hours may be observed at the destination. Acceptance of the message for transmission does not imply a promise on the company's part that there will be immediate delivery, without regard to such office hours, and there is no duty to inform the sender what those hours are.

As a general rule, a telegraph company is liable for damages resulting from delay due to failure to transmit a particular message in the order in which it was received with reference to other messages received by the company, except that, by statutes, preference is required to be given some messages, such as those relating to governmental affairs.

A telegraph company being liable for negligent failure to promptly deliver a message, it follows that, for stronger reasons, there is liability for inexcusable failure to deliver at all. But the test of liability is omission to use ordinary care to make delivery. So, it has been held that a telegraph company was liable for forgetfulness of an operator under which a message was not transmitted.

Assuming that receipt of the message at the delivery office has not been prevented by some unforeseen and unavoidable cause, such as an unexpected strike, or breaking of wires by storm, the grounds on which the company is excused from failure to deliver usually pertain to inability to locate the addressee. On this point the following statement at pages 1672-3 of 37 Cyc. is supported by numerous appellate court decisions:

"It is not sufficient for the company, without making reasonable efforts to find the addressee elsewhere, merely to inquire at his residence or place of business, or at the address given, or to inquire at his office without also inquiring at his residence; and if the addressee or his whereabouts is unknown the company should consult the city directory and perhaps make inquiry at the post office; but is not required to make a house-to-house search for him, or to send a messenger into every store, saloon, or other public place to inquire for him.

"If the company is unable to find the addressee or deliver the message, it should, if practicable to do so, and if its own regulations so require, notify the sender of such fact, and request a better

address. . . . So also, although the company is not negligent in failing to deliver, it may be liable for negligently informing the sender of the message that it has been delivered. The fact that a message which the company undertook to transmit was not delivered is prima facie evidence of negligence; but such presumption may be rebutted by evidence showing that the company exercised due care, or was prevented from making delivery by causes over which it had no control."

The sender's omission to give the addressee's local address, or his name correctly, will excuse the telegraph company from making delivery, when the company could not readily supply the omission or make delivery to the proper party notwithstanding the mistake. But here, again, the courts apply the test of reasonable diligence, considering the facts of the particular case.

Delivery must be made to the addressee personally, or to some one expressly or impliedly authorized by him to receive it, as, for instance, the employees of his office or the clerk of the hotel at which he is stopping. Delivery must also ordinarily be made by copy of the message, and not by telephoning, unless the latter mode has been adopted by agreement or customary dealings with the addressee.

Although there is much conflict in the decisions of the courts of the different states on the subject, it is generally recognized that the conditions printed on the back of telegraph forms are enforceable when reasonable.

Although, as a general rule, a telegraph company's liability in damages for delay in delivering, or failure to deliver, a message is limited to such damages as were reasonably contemplated at the time the message was filed for transmission, it has been decided that the damages may include reimbursement for loss directly due to the company's default if the telegram was sufficient to apprise the company that it was an order or offer to buy or sell goods.

However, among numerous qualifications of this rule, there is an important principle that the aggrieved party must take all reasonable precautions to minimize his loss, and cannot recover damages so far as they might have been readily avoided by making advantageous sales or purchases to hedge against loss under the sale or purchase lost through the telegraph company's fault.

See section 524 on the subject of limitation of liability.

SECTION 522. DELAYED MESSAGES

Delay in delivering a telegram addressed to the sender's broker, directing a sale of goods, gave rise to the suit of A. Engelhard & Sons Co. vs. Western Union Telegraph Co., 197 S. W. 435, passed upon by the Kentucky court of appeals.

The trial court awarded judgment in plaintiff's favor, which was affirmed on an unsuccessful appeal taken by plaintiff on the ground that the award was too small. In disposing of the case the court of appeals decided the following points:

When a telegraph company receives a telegram for transmission, knowing that its lines are not then working, but without advising the sender of the fact and leading him to believe that prompt transmission will be made, it may be held responsible for loss resulting from a delay, although its lines may be interrupted through causes beyond its control.

But the liability will be limited to such damages as result naturally from the delay. The telegraph company is not liable for loss resulting from ambiguity in or misunderstanding of the broker's reply message, although it would not have occurred had the original message not been delayed, since the telegraph company could not have reasonably foreseen such result.

When the sender of a telegram discovers that it has been delayed or incorrectly transmitted he must take all reasonable steps to minimize his loss, and the telegraph company will not be responsible for consequences which he could have avoided in the exercise of reasonable care.

* *

The broad rule of law that one who breaks a contract is liable to the other party for all damages sustained by the latter as a consequence of the default, if such damages were within the contemplation of the parties at the time the agreement was entered into, was applied by the North Carolina supreme court to fix liability on a telegraph company for failure to promptly transmit a telegraphic order for goods intended for resale.

Although the company is not liable for losses which it could not have reasonably foreseen, in determining what damages were within the reasonable contemplation of the parties, resort must be had not only to the language of the message itself, but also to any other information imparted to the company at the time the telegram was delivered to it for trans-

mission. So, when the company is apprised that goods ordered by wire are intended by the sender of the message for resale, negligent failure to promptly deliver the telegram subjects the company to liability for profits lost by the sender as a natural and direct consequence of the company's negligent act. (Gardner vs. Postal Telegraph-Cable Co., 88 S. E. 630.)

But see section 524.

SECTION 523. MISTAKES IN TRANSMITTING MESSAGES

As to limitation of liability, see section 524.

The rights of parties to contracts for sale of flour, grain, or other commodity, to recover damages against a telegraph company for making a mistake in transmitting a quoted price are comprehended by the decision of the Maryland court of appeals in the case of Victor G. Bloede Co. vs. Western Union Telegraph Co., 96 Atl. 685. The court approves the following general rules of law:

Where, in a message quoting a price, the price is changed to a larger amount, which is paid by the buyer, he is entitled to recover the excess of the incorrect amount above the one intended to be quoted by the seller.

When the mistake causes the telegram to quote a lower price than stated in the message as delivered to the telegraph company for transmission, the difference may be treated as the measure of the sellers' recoverable damage when the goods are delivered to the buyer before discovery of the mistake, when the sender accepts payment on the basis of the lower price, and when he could not reduce his loss by disposing of the goods in some other manner.

* *

Right to recover against a telegraph company on account of a mistake made in transmitting a message instructing grain brokers to buy corn was upheld by the Arkansas supreme court in the case of Harris vs. Western Union Telegraph Co., 206 S. W. 52.

Plaintiff sent a telegram from a point in Arkansas to grain merchants in Chicago reading, "Sell ten July corn stop *five* cents both ways." Through a mistake of defendant's operator, the message, as delivered, contained the word "four" instead of "five." Acting on the telegram, the brokers sold 10,000 bus of corn at its market price of $1.41, and no controversy arises on that transaction. But admittedly, the wire, as incorrectly worded, directed the brokers to buy 10,000 bus of corn on the market going up or down 4c.

The market advanced 4c and the brokers bought for plaintiff. The price then went up ¼c and, without reaching 5c advance, declined 8c below $1.41. The brokers, having bought on the advance, did not buy on the decline.

Plaintiff sued the telegraph company for $400 lost on the purchase made for his account, and for $500 as profits lost. This claim, of course, proceeded upon the theory that, had the message been correctly transmitted, the brokers would not have bought on the advance but would have done so on the decline.

"No judgment can be recovered because of the loss of profit, as it must always remain speculative what this profit would have been," says the supreme court. "Even though it be conceded that, if the brokers had not purchased at $1.45, they would have purchased at $1.36, still the profits are conjectural. The market continued to go down until it reached $1.33, and, if the transaction had been closed at that figure, there not only would have been no profit, but there would have been a loss of 3c a bushel.

"If the plaintiff had bought at $1.36, and the market had kept going down, he might have sold at a loss before it reached $1.33, or he might have sold when the market had so far recovered as to let him out whole, and we hold, therefore, that no recovery of profits can be had, for any finding in relation thereto must be speculative and conjectural. . . .

"We have a different proposition as to the actual loss sustained. The brokers had no authority to purchase at $1.45, and would not have done so had the message been correctly transmitted, and the telegraph company is therefore liable for the damage approximately resulting on that account."

* *

Plaintiff, a grain dealer, sent a telegram offering a carload of oats at 45c per bu f.o.b. destination, but the telegraph company made a mistake in transmitting the message whereby the price was changed to 40c. The addressee accepted the offer, and plaintiff, not knowing of the mistake, shipped the car, and afterwards accepted settlement on the basis of the lower price, bringing suit against the telegraph company for damages. In affirming judgment in his favor, the South Dakota supreme court said:

"To determine his loss, then, it was proper to show what he could have received for such oats at the regular terminal shipping point, Chicago, where of course there was an open market for oats at all times. What, then, was the value of those oats to plaintiff? Was it the sum at which like oats could be purchased, or the value of these very oats for purposes of shipment and sale? Clearly the latter; such oats having been purchased and being held by a dealer therein for the purpose of shipment and sale. There was no duty devolving upon plaintiff to purchase other oats to replace these oats sold, and thereby to reduce defendant's liability. . . . There may have been no other oats that could have been purchased; but, even if there were, plaintiff had the right to purchase such oats and make a profit by selling them just as he might have done if he had suffered no loss in this shipment to Miles, and the fact that he could purchase other oats is absolutely foreign to any issue in the case." (Carlon vs. Western Union Telegraph Co., 153 N. W. 375.)

* *

When a telegraph company makes a mistake in transmitting an offer to buy goods, by stating a higher price than that actually offered by the sender of the message, the latter is not legally bound to pay the higher price, and has no cause of action against the telegraph company for the full amount involved in the mistake, according to a decision of the North Carolina supreme court, 89 S. E. 21.

The theory of the decision is that the sender was entitled to rescind the contract on account of the mistake, on discovering it; the telegraph company being no more the sender's agent than the addressee's. But when the sender proceeds with the contract with knowledge of the mistake, when not legally obligated to do so, he has no valid claim against the telegraph company.

If, however, the sender elects to rescind the contract, he is entitled to recover all damages directly flowing from the mistake such as expenses necessarily incurred in the rescission.

* *

When a telegraph company undertakes to deliver a business message, it becomes liable to the sender for any mistake negligently made in its transmission, whereby he sustains loss, and, under the statutes of Nebraska, the company's liability is not affected by any clause to the contrary printed on its blanks.

In this case a message was delivered to defendant cabling an order for payment of "eighty" thousand francs for the purchase of property in Belgium, to be shipped by a certain vessel. Owing to a mistake made by an operator in transmitting the message, the order called for the payment of only "eight" thousand francs, the letter "y" being carelessly omitted. In consequence, shipment was delayed and the Nebraska supreme court held that the telegraph company was liable for the resulting loss sustained by the sender of the message. (151 N. W. 240.)

* *

But a mistake made by a telegraph company in transmitting a business telegram does not subject it to liability for damages which could reasonably have been avoided by the complaining party, notwithstanding the mistake. For instance, plaintiff received a telegraphic offer of 79c per bu for grain, whereas the telegram as delivered for transmission called for only 70c per bu. Plaintiff accepted the offer as received, but was advised next day that the actual offer was 70c. Plaintiff then delayed acceptance of the latter offer for four or five days, and in the meantime the market value dropped to 63c. On these facts, the Kansas City court of appeals decided that plaintiff had no cause of action against the telegraph company on account of the mistake. (Harrington vs. Western Union Telegraph Co., 174 S. W. 169.)

SECTION 524. LIMITATION OF LIABILITY

There is a conflict of decisions on the question as to whether such limitations of liability as are provided on the back of telegraph blanks are valid, as applied to intrastate telegrams, but decisions of the highest court of the land establish the validity of those provisions as to interstate telegrams.

Interpreting federal statutes, the United States Supreme Court decided in the case of Western Union Telegraph Co. vs. Esteve Bros. & Co., 41 Sup. Ct. 584, that a telegraph company may limit its liability on unrepeated interstate and foreign messages, as is provided for on the backs of most telegraph blanks, if the limitation is covered by the tariff and rates filed with the Interstate Commerce Commission.

The court said, in the course of an extended opinion:

"The question presented for our decision is whether, since the amendment of June 18, 1910, to the act to regulate

commerce, the sender is, without assent in fact, bound as matter of law by the provision limiting liability, because it is a part of the lawfully established rate. . . .

"The act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. . . .

"The repeated rate, offering greater accuracy and greater liability in case of error, was open to any one who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it."

* *

Under a decision of the Kansas City court of appeals in the case of Poor vs. Western Union Telegraph Co., 196 S. W. 28, defendant secured reduction of a judgment for a mistake made in transmitting a telegram.

Plaintiff's customer in Kansas delivered to defendant for transmission to plaintiff in Kansas City, Mo., a telegram directing a purchase of 15,000 bus of wheat. Through a mistake of one of the defendant's operators, the telegram read "50,000 bus" when delivered to plaintiff, who bought the latter quantity on the strength of the message. On discovery of the mistake, and refusal of the customer to take more than the quantity of wheat ordered, plaintiff sold the 35,000 bus excess at a loss of $712.50, and sued the telegraph company for reimbursement.

He obtained judgment for this amount in the circuit court in Kansas City, but the court of appeals modified the judgment by ordering reduction of the amount to 40c, the amount of the fee paid by the sender.

* *

However, the Arkansas supreme court held in the case of Des Arc Oil Mill vs. Western Union Telegraph Co., 201 S. W. 273, that the attempted exemption from liability is void both as to interstate and intrastate telegrams. A majority of the judges of the Arkansas court decided that this holding does not place any burden upon interstate commerce nor conflict with the power given by Congress to the Interstate Commerce Commission to regulate rates and classify messages.

Two of the judges, however, dissented, taking the view that, as applied to interstate telegrams, the validity of the condition in question had been conclusively sustained by the federal courts, and that the decisions of those courts were binding upon all state courts in suits involving interstate messages.

* *

The Kansas supreme court holds that a condition imposed by a telegraph company, in transmitting a message, that the company shall not be liable for errors in transmission beyond the toll paid, is unreasonable, and must be regarded as invalid, so far as concerns Kansas intrastate messages. (Shawnee Milling Co. vs. Postal Telegraph Co., 166 Pac. 493.)

The principal facts of this case were as follows: The milling company, at Topeka, sent a code message to the Wagner Grain Co., at Wichita, accepting an offer to sell wheat. The telegraph company's operator converted the word "fluting," which called for 10,000 bus, into "flirting," which called for 6,000 bus only. Apparently, there were no confirmations exchanged, and the milling company suffered loss of $265 in supplying itself with the additional 4,000 bus from another source on discovery of the mistake.

The telegraph company refused to reimburse the mill against this loss, on the ground of its established regulation under which it disclaimed liability for mistakes or delays in transmitting unrepeated messages, beyond the amount received for sending the particular telegram.

The mill attacked this position on the grounds that the message in question was not written by the mill on a blank containing any such condition, and that, in any event, the condition was invalid for unreasonableness. The Kansas court overruled the first of these grounds and sustained the other.

It is held that in such public service as is furnished by a telegraph company, rules of liability must operate uniformly as to the same class of service, and that if a telegraph company has a valid regulation limiting its liability, the fact that a patron is accommodated by being permitted to telephone a message to the transmitting office for sending instead of being required to write the message on a regular sending blank bearing the regulation, can make the telegraph company's liability no greater and no less than if the telegram had been so written.

As to the reasonableness of a condition limiting liability to the mere amount of tolls charged, the court said:

"Here the stipulated limitation is for a return of the cost of the message, probably 25 or 40 cents. All the annoyance, delay, business inconvenience, and financial damage so commonly attendant on a telegraph company's failure to perform its self-assumed public service are limited to an insignificant trifle. Here the actual damage was $265. The stipulated reparation is a few dimes.

"With all due deference to the great judicial tribunals which have countenanced and enforced this stipulation, and which we have been likewise constrained to enforce in interstate matters, we cannot give our independent assent that such a limitation is reasonable. It is unreasonable, and it will not be applied in intrastate business, where this court would have to assume the responsibility of giving countenance to it."

The court quoted the following language of a textbook writer on the law of telegraph companies:

"Any rule which seeks to relieve them from exercising their employment with diligence, skill, and integrity contravenes public policy as well as the law; and whenever they attempt to avoid these duties, they do so at the expense of and injury to their patrons."

As an independent point, the telegraph company in this case sought to avoid liability on the ground that the mill's damage was of such remote and speculative character that the company should not be held liable, but the court gave effect to customs of the grain and milling trades under which the mill was entitled to treat its acceptance of the grain company's offer to sell wheat as a binding contract when the grain company failed to expressly confirm or reject.

"This matter seems intricate and involved," said the court, "but its intricacy lies in the highly complex maneuvers of the grain and milling trade, not in the legal principles which govern liability for default. The law is simple enough, and once the weird necromancy and cabalistic symbols of the milling markets are understood, the damages are seen to be certain, proximate, and a recovery seems proper."

There is a principle of telegraph law that a telegraph company is not liable for damages arising from negligent handling of a message, where there was nothing to indicate the probability of pecuniary loss or other damage flowing from such neglect, and the defendant in this case sought to apply this rule because the message was largely composed of code words.

"But," replied the court, "code messages in the milling and grain business are common, and are known by the telegraph companies to be important. In this case the message was only partly in code, and the manager of the telegraph company admitted that he knew it was a business message; and even to one unfamiliar with the grain dealer's code the message disclosed that something or other involved in the grain and milling business was booked on Kansas City basis. That was all the defendant needed to know about it, to charge it with notice that a failure to transmit the message correctly would probably lead to serious consequences."

* *

In the case of C. S. Tredway vs. Western Union Telegraph Co., 158 N. W. 247, the Minnesota supreme court held that the telegraph company was liable for damages sustained by plaintiff through non-delivery of telegram.

Mr. Tredway filed a message at Pipestone, Minn., instructing a Minneapolis grain firm to buy for his account 5,000 bus September wheat. The message was never transmitted or delivered. Mr. Tredway later had to pay the difference

between the market at the time he filed the message and the time when the mistake was discovered.

The court held that the clause in the telegraph company's form limiting liability to $50 had no standing in law, and assessed damages sustained by plaintiff at $466.

CHAPTER LXII

AGENTS AND EMPLOYEES*

SECTION 525. AGENT'S PERSONAL LIABILITY

IN preparing a lawsuit for trial, an attorney found it advisable to have an analysis of a sample of flour made, and employed plaintiff laboratories company to make the analysis, stating that he was acting for his client. Later the company sued to recover compensation for the services rendered, seeking to hold the attorney personally liable in a suit brought against him and his attorney jointly.

Applying the general principle of law that where an agent makes a bargain as representative of a disclosed principal the agent cannot be held personally liable on the contract, the appellate term of the New York supreme court held that the attorney was not liable in this instance.

"An agent of a disclosed principal is not liable unless he charges himself personally," said the court. "Both the agent and the principal are not liable for the same debt, in the absence of an agreement to that effect. The defendant attorney engaged plaintiff, but plaintiff admits he told it he was acting for the R. & L. Bakery. There is absolutely no reason for judgment against the attorney, particularly where the client was also sued." (Research Laboratories, Inc., vs. Harrison, 166 N. Y. Supp. 706.)

SECTION 526. UNDISCLOSED PRINCIPAL'S LIABILITY

Where an agent transacts business in his own name, without disclosing his agency to the other party, who extends credit to him personally, the other party will not afterwards be heard to make an inequitable claim of liability against the agent's principal. So holding in the case of Southern Railway Co. vs. W. A. Simpkins Co., 100 S. E. 418, the North Carolina supreme court decided that where a railroad marked bills of lading "freight prepaid" and gave credit for transportation charges to the shipper, who represented an undisclosed principal, the principal was not liable to the railroad for the freight, on the agent failing to pay it; the principal having settled with the agent in good faith and without intimation that the freight charges had not been actually paid.

SECTION 527. LIABILITY OF THIRD PARTIES UNAUTHORIZEDLY DEALING WITH AGENT

An elevator company is entitled to recover, against brokers, money unauthorizedly paid to them by its manager of an elevator in grain speculations, the brokers being chargeable with notice that the money belonged to the company. So held the Nebraska supreme court in the case of Hinds & Lint Grain Co. vs. Farmers' Elevator Co., 156 N. W. 1045, wherein defendant was permitted to offset, against plaintiff's claim for failure to deliver certain grain, a counterclaim for money received by plaintiff from defendant's agent in private speculations of the agent.

The court finds that plaintiff was chargeable with notice that the agent exceeded his authority in drawing defendant's checks in settlement of his own deals with plaintiff, by reason of the fact that the checks bore indorsements to the effect that the checks were payable for grain only, and that gross, tare and net pounds must be noted on stubs attached to the checks.

"There can be no doubt that the plaintiff had ample notice that the agent was transcending his authority and was using the money of the defendant without any authority to do so," declares the court. "Under such circumstances, the plantiff was liable to the defendant for this money so appropriated by it."

SECTION 528. HOURS OF LABOR LAWS

The right of a state to penalize employment of mill workers for more than a given number of hours daily, by requiring the employer to pay extra wages for overtime, is supported by the decision of the United States Supreme Court in

*See, also, sections 398-406, dealing with the powers, etc., of corporate officials, and the chapters on salesmen and sales agents, brokers and commission merchants, and injuries to employees.

the case of Bunting vs. State of Oregon, 37 Sup. Ct. 435.

In 1913, the Oregon legislature enacted a law making it a misdemeanor to employ any person "in any mill, factory or manufacturing establishment in this state more than 10 hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one half of the regular wage."

Franklin O. Bunting was convicted of violating this statute by employing one Hammersly for 13 hours in one day in a flour mill belonging to the Lake View Flouring Mills, and successive appeals were made to the Oregon supreme court and the highest court of the land, defendant losing in both courts on a contention that the law in question was unconstitutional.

The federal, as well as state, judges refused to concede the claim made by Bunting's counsel that the law was an attempt to fix wages in violation of the right of all persons to contract freely as to the amount to be paid for personal service. It was determined by the courts that the statute constitutes a valid exercise of the state police power to regulate hours of service in the interest of the public health; and that the provision for time and one half for overtime is to be regarded as in the nature of a penalty to discourage overtime work. This view is fortified by reference to the fact that the law fixes no maximum or minimum wage rate.

Replying to a contention also made that the law, even regarded as regulating hours of service, was not supportable on any ground of necessity or usefulness as a means of promoting the health of mill employees, the courts find that it is a matter of common knowledge that custom does not sanction a longer service than 10 hours a day.

Finally, it was held by the United States Supreme Court that, regarded as an hours of service regulation, and not as a wage law, the statute was not vulnerable as an unconstitutional discrimination against mills and manufacturing establishments by requiring "that a manufacturer, without reason other than the fiat of the legislature, shall pay for labor one and one half times the market value thereof, while other people, purchasing labor in like manner in the open market, are not subjected to the same burden."

Chief Justice White and Justices Van Devanter and McReynolds dissented from the conclusion reached by a majority of the members of the Supreme Court, thereby intimating an opinion that the Oregon law should be declared to be invalid.

SECTION 529. RIGHT TO COMPENSATION

See, also, sections 99, 115, 117.

The appellate term of the New York supreme court reversed judgment for $1,680.10 against Lorenz G. Spindler, awarded one Galwey by a lower court on a claim for commission claimed to be due for effecting a sale of 16,800 bbls flour.

Plaintiff Galwey was employed by defendant as a stenographer at $14 a week, on an understanding that he would be engaged as a flour salesman on showing qualifications. About two months after he was employed, defendant's representative told plaintiff that a car of flour was coming from the mill and that there was a good chance for plaintiff to show his ability as a salesman by trying to effect a sale to some near-by broker, promising that if he should succeed he would be paid the regular brokerage, 10c per bbl. Plaintiff failed to effect any sale.

Some time later, and while still employed as stenographer, plaintiff told defendant that he knew a certain firm that might be obtained as a customer. Defendant told plaintiff to go ahead and see what he could do with the firm. The head of the firm told plaintiff that he would be glad to help him, but no sale was effected by plaintiff to the firm, although he submitted samples, explained the qualities of flours offered, etc. A month later a sale was made by defendant to the firm without knowing of the negotiations or assistance on plaintiff's part. Dismissing the suit, the court said:

"This judgment can be sustained only if the plaintiff shows that he was employed by the defendant to make such sale, that the defendant expressly or impliedly agreed to pay him the usual compensation paid to salesmen for any sale made by him outside of his regular duties of stenographer, and that he was the procuring cause of the sale for which he claims commission. . . .

"So far as I can see from this record, his claim for commission is based solely upon a claim that he introduced the business to the defendant. Although the plaintiff was authorized by the defendant to undertake to make specific sales, there is nothing in the evidence to show, and it is not claimed, that he was employed as a

regular salesman, or that the defendant promised him any remuneration in addition to his regular salary for any work done, unless he consummated the particular sales which he was authorized to negotiate.

"He was trying to show the defendant that he would be useful to the defendant as a salesman, and the work which he did in introducing the defendant to the firm of Frame, Leaycraft & Co. was such work as a salaried employee might well do under his general employment, and certainly the defendant cannot be held to have promised the plaintiff to pay him full commissions for sales not negotiated by him, merely because of such introduction.

"It must be remembered that this is not the ordinary case where an owner of property employs a broker to sell his property, and the broker introduces to him a party willing and able to meet the seller's terms, and the seller thereafter himself conducts the negotiations leading up to the sale. In such case the broker may well be considered the procuring cause of the sale.

"In the present case the plaintiff was in the general employ of the defendant at a fixed salary. He was not employed outside of his duties to procure a purchaser for this particular lot of flour. He merely introduced the buyer as a possible customer for flour which the defendant might have to sell. He had nothing to do with the sale for which he claims commissions.

"If he is entitled to commission for such sale upon a finding that he was the procuring cause thereof, then I cannot see why the plaintiff would not also be entitled to commissions on every sale by the defendant, even after his discharge, to the same customer. In the absence of some form of agreement that he was to be paid commissions upon sales to any customers introduced by him to the defendant, there is no basis for the present judgment." (168 N. Y. Supp. 648.)

SECTION 530. RATE OF COMPENSATION

An employee transferred from one department of a concern's business to another, without any agreement as to the salary to be paid for his new work, is presumed to have entered upon it at the old rate. This is what the Arkansas supreme court decided in the case of Rice vs. Westbrook Grain & Commission Co., 189 S. W. 39, wherein it appeared that plaintiff was transferred from employment in defendant's wholesale business to the management of a retail feed store. He claimed additional compensation, but the court refused to allow it, because there was nothing to show that there was any mutual understanding that his salary should be raised.

SECTION 531. RIGHT TO BONUS

The case of Swaller vs. Williamson Milling Co., 226 Pac. 1001, decided by the Kansas supreme court, involved plaintiff's right to a percentage of earnings in the last year of his employment as manager of defendant's mill at Clay Center.

The contract of employment provided for a monthly salary of $300 and for a bonus on earnings above operating expenses, interest on preferred stock and indebtedness, and a fixed sum to cover depreciation and obsolescence. There was to be paid a 5 per cent bonus on excess earnings up to $8,000 per year, 10 per cent on excess earnings above $8,000 and up to $18,000, and 15 per cent on earnings above $18,000.

The contract specified that power was to be purchased, as the mill did not include a power plant. The supreme court decided that the price of power was an operating expense, and that whatever power cost, so long as the terms were fair, the price was deductible from earnings in reaching a basis for computing the bonus. It also was ruled that repairs were operating expenses, and not chargeable to depreciation and obsolescence. Other points decided by the court were as follows:

Excess profit derived from operating the mill while under government control during the war, and paid to the government, was not a tax, but was a penalty for unfair practice, and was not earnings on which a bonus was computable.

Validity of the bonus contract was not affected by the adoption and enforcement of the government regulation limiting profit, lawful as a war measure.

Expenses incurred by the company in resisting an unjustifiable claim for excess profit made by the government were operating expenses, as were federal income taxes.

Items not involving expenditure within the fiscal year, such as depreciation in value of sacks and a tax suspense account, were not operating expenses for that year.

In the controversy over excess profit, the government contended that the bonus should be charged to surplus. The mill successfully contended in that controversy that the items should be charged to expense. The Kansas supreme court held,

in the manager's suit for a bonus, that the company was not estopped by its attitude in the controversy with the government to ask for correction of the amount of the bonus on account of a discovered mistake in the method of computation.

SECTION 532. APPLYING SALARY TO STOCK PURCHASE

Legal aspects of an agreement under which a mill superintendent retained his position on an understanding that part of his salary should be credited to a subscription to stock of the company were involved in the case of Alfred vs. Great Northern Flour Mills Co., 195 N. W. 15, before the Minnesota supreme court.

Plaintiff was employed by defendant's managing director at $3,000 per year, it being verbally agreed that plaintiff should buy stock of the milling company of the par value of $5,000 for $3,750, and pay for it at the rate of $500 per year, to be deducted from his monthly salary. Since the company could not issue the stock at less than par, it was arranged that two of the stockholders should each deliver 25 shares to plaintiff, and receive payment monthly through the company as deductions should be made from plaintiff's salary.

For more than three years plaintiff retained his position and the company turned over part of his salary each month, according to the agreement referred to. But when the mill elevator burned and plaintiff refused to submit to reduced salary pending rebuilding of the structure, the mill being in the meantime shut down, he was discharged. Thereupon he sued to recover from the company the amounts which had been deducted from his salary, relying on an agreement with the managing director that if his employment should be terminated before payment for the stock he could cancel the purchase and would be reimbursed for what he had paid on it.

The trial court found that there was an understanding to the effect claimed by plaintiff, and ordered judgment in his favor. The supreme court affirmed the decision, holding that the evidence was sufficient to support the trial court's finding. The higher court also ruled that the milling company, having received the benefit of plaintiff's services under the contract made by its managing director, impliedly ratified the terms of that agreement, even if the managing director exceeded his authority or the company's charter powers in the first instance in making the contract.

SECTION 533. EMBEZZLEMENT

The Hecker-Jones-Jewell Milling Co. won a novel suit brought against a former employee, one Markel, in which the company replevied $247 in currency which was found in Markel's shoes after a slightly larger amount was missing in the mill's pay-roll department. (178 N. Y. S. 335.)

When defendant Markel was suspected and money was found stored in his shoes, corresponding in denominations and wrapping to the missing bills, the mill got out a writ of replevin to impound the funds. Sustaining the writ, the appellate term of the New York supreme court said:

"It is true that the grand jury failed to indict the defendant on the plaintiff's complaint, but it does not follow that he is thereby relieved from liability herein. The plaintiff in this case was obliged to sustain the burden of proof, not beyond a reasonable doubt, but by a fair preponderance of evidence. This I believe the plaintiff has done. Its witnesses, one of whom was wholly disinterested, told a straightforward story, which, with the circumstances of the case, presented ample ground for a verdict requiring the return of the money to the plaintiff."

SECTION 534. DISCHARGING EMPLOYEES

The rule of law, that where no duration of a contract to pay a broker or salesman a commission on sales of goods made to customers of the employer is specified, the latter may terminate the employment on reasonable notice, was recognized by the Massachusetts supreme judicial court in the case of Emerson vs. Ackerman, 124 N. E. 17.

* *

Affirming judgment for plaintiff in the case of Green vs. Golden Rod Mills, 230 S. W. 1089, for damages on the ground that defendant was inexcusably discharged before expiration of a five-year period for which he had been employed, the Texas court of civil appeals laid down some of the more important rules governing an employer's right to terminate a contract of this kind:

"Where the master, contractor, or employer retains no absolute right to discharge an employee for unsatisfactory work to him, but the employee merely contracts to give satisfaction in his work, and no absolute right of discharge is reserved, under the very nature of the contract such right can be made an issue of fact. Indeed, whenever, in the exercise of the right to discharge, the

employer acts fraudulently, or so arbitrarily as to amount to a fraud, the employee is entitled to have the good faith of such act determined through the intervention of the courts. To annul and cancel a contract upon the ground that the agreement is to perform satisfactory service does not mean to give the arbitrary right, without cause, of discharge during its existence, but such act must be done in good faith in the honest exercise of the power. No one should know better than an employer whether the work of the employee is satisfactory or not. But that may not be conclusive however impossible it may be for a jury to see into the heart of the employer to determine whether the employer was in fact dissatisfied, or that by virtue of a sham, caprice, or fraud he invented a reason to get rid of a competent person who was in fact performing his contract in such way as should give satisfaction. . . .

"It may be said, in every contract of employment, there is a mutual obligation of fair dealing, implied on both parts, and that the employee will perform his work with diligence and fidelity. There is not much difference between such an implication of duty under every contract of employment from the one here that it will be 'for satisfactory service.'"

As to the measure of damages recoverable by an employee wrongfully discharged before expiration of the full term for which he was engaged, the court holds that he is entitled to collect what he would have earned under the contract had he been permitted to carry it out, less anything actually earned in other employment, using reasonable diligence to secure other employment.

* *

When a salaried employee in any line of business is unjustifiably discharged before termination of a definite period of time for which he has been employed, and sues for damages, an important question arises as to how an award in his favor is to be measured.

The courts throughout the country are almost unanimous in the view that the amount to be allowed is the total wages or salary that would have been earned by the discharged employee under his contract during the unexpired portion of the term thereof, less compensation derived by him in other employment during such time, or less such compensation as he might have earned in similar employment by using reasonable efforts to secure another position. As said by a standard legal authority, "a discharged servant cannot lie by unemployed for the remainder of his term, and then claim full compensation; he is bound to make the best use of his time, and seek other employment." (26 Cyc. 1013.)

But, as noted by the same authority, "while it is the duty of a discharged servant to seek other employment, he is only required to use reasonable diligence to obtain employment of substantially the same character and grade as that in which he has been employed, and he is not bound to accept employment in a different place, nor under a contract requiring his services for a period in excess of the unexpired term. But where an employee is offered the same or like employment to that from which he has been discharged, for the same period and on the same terms, and before he has sustained any injury by reason of the discharge, he cannot recover any damages. A servant is not entitled to recover his expenses in seeking other employment, in an action for wrongful discharge, although his earnings in such other employment are charged in reduction of his damages."

Affirming judgment for $631.65 in favor of plaintiff in a suit for damages for wrongful discharge as manager of defendant's elevator before expiration of a contract period of employment, the Iowa supreme court held, in the case of Seelman vs. Farmers' Co-Operative Co. of Northwood, 165 N. W. 31, that the discharge could not be justified on the ground that there had been a falling off of business at the elevator under plaintiff's management, in the absence of specific proof that this falling off was due to fault on plaintiff's part.

Further excuse for dismissing plaintiff, that he had failed to give bond, was disallowed on proof that no objection was made to such failure until after it became desirable from defendant's standpoint to terminate the contract, the elevator having been leased for operation by some other party, and on further proof that a resolution of the directors calling for a bond had been withdrawn.

Right to dismiss plaintiff was also claimed under a provision requiring his services to be "satisfactory" to the company, but was denied, the court saying:

"Having kept him in its service under the contract until it had disposed of the business, and then discharged him when it no longer required the service of anybody as a manager of the elevator, it is entirely too late, when sued for damages, to fall back on its reserved right to dis-

charge him for failure to do his work satisfactorily."

* *

A decision of the California district court of appeal, in line with what courts throughout the country hold, lays down the law of an employer's right to dismiss an employee before expiration of a period for which he has been engaged (Ehlers vs. Langley & Michaels Co., 237 Pac. 55).

The substance of the holding is that "before the law will allow an employer to ignore the specific terms of a contract of employment, which requires notice to be given the employee of its proposed termination, it must appear that there has been some rule, order, or instruction of the employer violated, and that such violation was committed willfully and deliberately on the part of the employee." But the opinion makes it clear that the employee's objectionable act need not be "perverse or malicious." The rule is "grounded upon the theory that willful disobedience of specific instructions of the master, if such instructions be reasonable and consistent with the contract of employment, is a breach of duty—a breach of the contract of service; and, like any other breach of contract, of itself entitles the master to renounce the contract of employment."

SECTION 535. STRIKE MEASURES

A limitation upon the measures which striking employees may adopt to coerce a manufacturer into settlement of a labor dispute is indicated by a decision of the New Jersey court of chancery enjoining a conspiracy between former employees of a manufacturer of food products and affiliated trades-unions to ruin the manufacturer's business on account of his persistence in maintaining an open shop. The court finds that defendants undertook to establish a boycott against complainant's business by circularizing his customers with matter that contained untrue statements and threats to boycott them if they should continue to deal with complainant. "It is quite clear that in the case at bar the action of the defendants consisted in a conspiracy or combination to injure, not only the complainant, but all persons who as merchants or otherwise dealt in or purchased the complainant's products. If it were lawful to go so far as this, there is no limit to the mischief to the public which such combination and confederacy would not reach to." (A. Fink & Son vs. Butchers' Union, 95 Atl. 182.)

* *

The decision of the United States district court for the eastern district of Missouri in the case of Kroger Grocery & Baking Co. vs. Retail Clerks' International Protective Association, Local No. 424, et al., 250 Fed. 890, is instructive on the question as to how far a boycott may be carried against an employer at controversy with his employees.

The court granted a preliminary injunction against continuance of certain acts tending to destroy plaintiff's business, holding that, "while the court is not willing to say that an unjustifiable strike in times like this [war] is treason, it comes mighty close to it, morally."

But the court recognizes as a matter of legal principle that employees may lawfully quit their work, singly or collectively, and with or without good cause, and that striking employees may lawfully use peaceably persuasive methods of inducing others to refrain from working for or patronizing the employer affected. On the other hand, the decision leaves it clear that injunction may be granted against use of force, threats or intimidation to establish a boycott against the complaining person. The use of insulting language toward customers patronizing the boycotted store or shop will sustain an injunction.

The court further finds that "if these defendants, by reason of their acts caused a loss of all this perishable food, they were certainly guilty of a violation of" the food control act of Congress, which makes it unlawful to "knowingly commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, or distribution." After referring to the fact that defendants' acts caused 85 of plaintiff's 140 retail stores in St. Louis to be closed, the court added:

"The owner of this perishable food would be entitled to the aid of a court of equity of the United States to restrain them from acts which will cause still greater destruction of food. The evidence shows that this plaintiff, in every one of the stores, dealt in meats, butter, eggs, . . . and other perishable goods; that they were also bakers, and dealt in breads, cakes, pies, and pastries; and, of course, these defendants, who had been employees of the plaintiff, knew these facts, and they must have known that, if the stores were closed, especially on Friday and Saturday, that these food products would naturally deteriorate, if not altogether spoil and be wasted."

The injunction granted was made broad enough to include prohibition against repetition of the acts of one Cohn, who,

although not interested in the success of the strike so far as it affected the employees, abetted the strikers in their acts and aided them by contributing funds. It is found that he was a competitor of the plaintiff company, conducting a store across the street from one of plaintiff's stores, and that he had said that he would give $100 if the strikers would close plaintiff's place. By making himself an accomplice, it is decided that he became just as much liable as the strikers, and that "there is no reason why injunction should not go against him."

* *

At El Paso, Texas, the municipal authorities found a workable remedy against the practice of labor unions in posting men in front of business establishments to dissuade persons from patronizing proprietors found to be "unfair." The city adopted an ordinance, making it a misdemeanor punishable by a fine of not more than $200, for one to walk back and forth or loiter in a street or on a sidewalk for the purpose of persuading, by word of mouth, or by signs carried, any person against entering an abutting place of business to transact business therein.

The ordinance contains a proviso recognizing the legal right of unionists to dissuade any person against accepting employment from, or remaining in the employment of, an employer at outs with a union. In sustaining the validity of the regulation, the Texas court of criminal appeals says, in the case of Stout, 198 S. W. 967:

"Instead of being unreasonable, it is most reasonable, under the circumstances. . . . The acts of relator which are denounced by the ordinance were clearly intended to intimidate and coerce all union labor folk and their sympathizers and others from going into said restaurant or café and getting their meals or having any other business transaction with the owner; in other words, to injure and break up the proprietor in business.

"Such conduct as his would naturally lead to disturbances. . . . There can be no doubt but that the owner of the restaurant had a right to conduct his business to suit himself, and to employ union or nonunion laborers as suited him, and no one has a right to injure or disturb his business because he so chose to run it."

CHAPTER LXIII

INJURY TO EMPLOYEES*

SECTION 536. RESPONSIBILITY IN GENERAL

PASSING upon the liability of a milling company in damages for death of an engineer employed in the company's mill, the appellate court of Indiana applied the following rules of law:

In an action for death of or injury to an employee, plaintiff makes out a prima facie case of negligence on the part of the defendant employer by proof that the accident resulted from a defect in the working place or in machinery or an appliance provided for the employee's use. The burden then shifts to the employer to show that he did not know of the defect and was not chargeable with knowledge of it in the exercise of ordinary care to provide his workmen with a reasonably safe place to work.

A question as to whether an employee has been guilty of negligence contributing to his own injury is to be determined by considering what a reasonably prudent person would have done in the same circumstances. In the absence of assumption by him of the duty of inspecting the place where he works or the appliances which he uses, as part of his employment, the law does not place that duty upon him, it being primarily the obligation of an employer to make reasonable inspections to determine the safety of the places to which his employees are assigned to work. (Deer vs. Suckow Co., 110 N. E. 700.)

* *

Since milling companies and other corporations can be negligent only through their duly constituted representatives, acting within the course of their employment and authority, it sometimes becomes important to determine whether a given employee stood in the relationship of mere employee or possessed broader powers or responsibilities at a given time. The point is illustrated by the decision of the Illinois supreme court in the case of Gogerty vs. Decatur Cereal Mill Co., 180 Ill. 197, decided several years ago.

Plaintiff sued on account of loss of an arm caused by a defective condition of the rope on a car puller used in defendant's elevator. The principal issue on appeal from a judgment in plaintiff's favor was whether he was at the time of the accident the superintendent of the plant in such sense that his own neglect to discover and guard against injury from the defective condition was the cause of the accident.

The testimony disclosed that plaintiff was employed in defendant's mill and elevator as clerk and bookkeeper. It was not his duty to operate or assist in operating the car puller. For some time before the accident, owing to a press of business, it had become necessary to work in the elevator at night. One Turner, the superintendent, and other employees, had worked the night before. On the morning of the accident Turner directed plaintiff to take charge of the elevator that day, so that he could go home to rest. It did not appear that plaintiff was intrusted with authority to employ or discharge men in the elevator, nor that he was clothed with power to make contracts for defendant. He was merely left in charge of the work about the elevator for the day. Said the supreme court:

"Under such circumstances it cannot be said that appellee was, on the day of the accident, a general superintendent of appellant's elevator and mill, or a vice principal, but, on the other hand, was a bookkeeper, as he had been before, with temporary authority to look after the work in the mill and elevator while the superintendent was absent during the day."

* *

Mere proof of the fact of the accident and resulting injury to plaintiff employee does not establish his right to damages. It must be shown, further, that the employer was aware of the defect or would have known of it if proper inspection of the appliance had been made.

*For matter pertaining to awards for injuries under the workmen's compensation acts, see the second subdivision of this chapter, pages 634-643.

Where a defect arises in the course of the use of tools or appliances, the employer is not responsible, in the absence of proof of sufficient time and opportunity before the accident in which to discover the flaw.

Such incidental dangers arising in the course of the employment are risks which the employee takes upon himself. He has better means of observing the imperfections than has the employer, and it is his duty to use proper care to discover them, and report them to his employer (Weaver vs. Wohlsen, 98 Atl. 1078, decided by the Pennsylvania supreme court.)

* *

The Kentucky court of appeals reversed a decision in the case of White's Administrator vs. Kentucky Public Elevator Co., and granted plaintiff a new trial. (216 S. W. 837.)

The suit was one for damages on account of death of an employee who seems to have been smothered while obeying orders from a superior to sweep out a concrete grain tank. The trial judge directed the jury to find in favor of defendant, on the ground that the evidence failed to make out a case of liability. The court of appeals reversed the decision on appeal, holding that the jury should have been permitted to pass upon the questions raised as to whether defendant's superintendent was negligent in ordering decedent into the tank on an assurance that it was nearly empty when, in fact, it was not; whether the danger was so obvious that decedent was guilty of contributory negligence in going to work in the tank; and whether carelessness on his part after he discovered the condition in the tank contributed to the accident.

The opinion on appeal applied the rule that an employee ordered into such a place of work was entitled to assume that his superintendent had inspected the place and assured himself of its reasonable safety.

SECTION 537. RESPONSIBILITY FOR INDEPENDENT CONTRACTOR'S NEGLIGENCE

Was a mill's local warehouseman at a distributing point an "employee," in the ordinary sense of that term, or was he an "independent contractor"? On this question the Indiana appellate court determined the liability of the Washburn Crosby Co. for injury to one Cook, who was kicked by a delivery horse used in delivering flour in Indianapolis.

The company had engaged the services of J. C. Smith, who undertook to make deliveries for the mill, which furnished the wagons; he furnishing all other necessary equipment and drivers. The contract made Smith the mill's agent for the purpose of making collections, as well as for delivering flour to customers. His compensation was paid on a weekly salary basis.

At the time of the accident, one of the horses owned by Smith, but used in the mill's service, was standing near a street crossing in Indianapolis. As Cook passed, the horse kicked him and litigation followed.

The appellate court affirmed a judgment of the circuit court for Indianapolis fixing liability upon the milling company. It was found that Smith was not an "independent contractor," but an "employee," within the following stated rule laid down by the higher court:

"The general proposition is well established that one who lets to another a contract for certain work to be done, and retains no control over the details, means, or plans by which such contract is to be executed, and looks only to the ultimate results to be thereby obtained, according to the standard agreed upon, is not responsible for the negligence of such contractor or of those who perform the work provided for in such contract." (120 N. E. 434.)

The opinion on appeal sustains the jury's finding that the mill retained control over Smith in details pertaining to deliveries, thereby constituting him a mere employee, in the strict legal sense. And, it also being found that he was previously advised as to the vicious propensities of the horse, and negligently having permitted the animal to occupy a place in the street where he should have foreseen that some such accident might have occurred as did occur, it was adjudged that the mill must respond in damages for its employee's carelessness.

The general rule that there is no liability for negligence of an independent contractor would apply to a case where a milling company awards a contract for the erection of a building or the installation of machinery, paying an agreed price for completion of the work according to certain specifications, but leaving it to the contractor to employ and pay his own workmen, and to direct the details of the work.

In such case, should one of the workmen carelessly drop a brick upon a pedestrian passing below, the responsibility to the injured man would rest against

the contractor, and not the milling company.

SECTION 538. INJURY CAUSED BY OUTSIDERS

The presence of a military guard around an industrial plant not in the employment of the owner of the plant does not make him liable for injury inflicted negligently upon an employee or other third person by a soldier of the guard.

This is what the Texas court of appeals decided in the case of Sweetman vs. Laredo Electric & Railway Co., 204 S. W. 701, in affirming a judgment which denied plaintiff redress for being shot while going to work at defendant's power plant, under mistaken belief, by a member of a soldier guard, that plaintiff was a trespasser bent on evil.

The suit proceeded upon alternative theories that the soldier who fired the shot which injured plaintiff was an employee of the defendant company, or that defendant was negligent in failing to take proper precaution for the safety of plaintiff, as one of its employees.

It appearing that the soldiers were present under orders of a commanding general of the United States army for the protection of public interests when a Mexican raid was threatened, and not for the private interest of the defendant company, and not under the company's control, the court declared that the soldiers could in no sense be regarded as employees of the company.

A survey of the evidence in the case led to a conclusion that the jury was justified in finding that, by posting notices of the dangers attending the presence of the guard and by providing a regular gateway as an entrance and exit for employees, the defendant discharged its full duty to plaintiff.

Plaintiff's case was materially weakened by the fact that he was entering the plant through a hole in a surrounding wall and at night when shot.

SECTION 539. DUTY TO WARN EMPLOYEES

Wherever an employee is engaged at a hazardous occupation, as in the operation of dangerous machinery, the courts recognize that there is a limited legal obligation on the part of the employer to warn the worker, depending largely upon the employee's previous experience and opportunity for appreciating the risk to which he is subjected. This duty was declared by the Alabama court of appeals in the following language:

"While the law imposes no duty on the master to warn and instruct his employees as to dangers which are patent and obvious to persons of ordinary intelligence, yet the master is bound to disclose to the servant the latent defects and dangers of which he has knowledge, or of which he ought to have knowledge in the exercise of reasonable care, attention, and diligence, and of which the servant has no knowledge and which are not discoverable in the exercise of reasonable care on the part of the servant; and even when the danger is patent or open to observation, it is the duty of the master to warn and instruct in regard to it, if through inexperience, or any other cause, the servant, to the knowledge of the master, does not understand fully and appreciate the nature and extent of it." (70 So. 193.)

* *

The Minnesota Supreme Court ordered judgment against the Marshall Milling Co. in favor of a young man formerly employed by the company as a helper, for injuries sustained through attempting to grasp a broken cable on rapidly moving grain cups in an elevator leg—an inclosed chute. In the trial court, plaintiff was awarded a verdict by the jury, but the trial judge set it aside and ordered judgment in the milling company's favor on the ground that the evidence showed that the accident was due to the employee's own negligence.

In reinstating the verdict on appeal, the supreme court decided that, in view of the plaintiff's youthfulness (18 years old) and his inexperience, it was for the jury to say whether he was guilty of contributory negligence, especially in view of evidence tending to show that he acted under directions from his foreman.

On the question of the foreman's negligence, which the court imputes to the company, the opinion of the higher court says: "If a master, with knowledge of the dangerous character of an act he desires done, commands a young and inexperienced servant to perform it, without apprising him of the danger or giving adequate instructions how to do it with safety, the master may properly be found guilty of actionable negligence." (157 N. W. 993.)

* *

John Obrigewitsch, operating the Dickinson (N. D.) Roller Mills, secured a decision by the North Dakota supreme court dismissing a suit brought against him by a former employee to recover damages on account of crushing of the latter's fingers between the rollers of a feed mill. (168 N. W. 45.)

The machine became choked, thereby causing the rollers to cease revolving, although the driving belt continued to revolve. While Hanel, the employee, was unclogging the machine, having placed his hand through an opening in such manner that his fingers came near the rollers, the rollers commenced revolving again and caught his hand.

In suing for damages, plaintiff relied upon claims that defendant was guilty of actionable negligence in not warning him against the danger which resulted in his injury, and in failing to provide a belt reasonably well suited to driving the machine. Trial of the action resulted in judgment in plaintiff's favor, but the supreme court reversed the judgment and dismissed the suit, applying the following rules governing such cases:

The rule requiring the employer to instruct his employee and to warn him against dangers is designed merely to supply the worker with information he is not supposed to already know. Actionable negligence of an employer cannot be predicated upon his failure to tell the workman something he already knew, or ought to have known.

An employee is presumed to see and understand all dangers that a prudent and ordinarily intelligent person of the same age and experience would see and understand under similar circumstances.

The danger of having one's fingers crushed if placed close to the rollers of a machine, while power is applied to the machine, is too obvious to require special instruction on the subject, in the case of an adult employee.

On the point as to whether the belt was sufficient to properly drive the machine, the supreme court said:

"Perhaps larger belts would have prevented the choking, though of this we are by no means certain. The case, however, is very similar to that in which one is employed to drive an automobile, which has no self-starter, and who breaks his arm while cranking the machine. It may be true that there would have been no accident if a self-starter had been furnished. No court, however, would hold the master liable for the lack of the equipment.

"The question, then, which is presented to us is: Where a person is employed to work in a mill and in the grinding of grain at a machine which is so equipped that it is liable to clog when grain is run therethrough, and when no specific instructions are given as to the machine and as to the method of cleaning it when the clogging takes place, and when, soon after the employment, the machine does clog and the employer uses a method to relieve the difficulty which is dangerous and palpably dangerous to any one, can an adult employee, merely because the employer has used that method, continuously continue doing so without complaint, and later, and when injured, recover damages, because he was not told that the method used was dangerous?"

The court answered this question in the negative.

SECTION 540. EQUAL MEANS OF KNOWING OF DEFECTS

Judging from some of the arguments that are made in the courts when it is attempted to hold an employer liable for injury to a workman, one might infer that an employer is supposed to be omnipresent and omniscient, and that the workman is excusable in having possessed no information whatever that would have assisted him to avoid the particular accident. It is a matter of hourly occurrence where a personal injury lawsuit against an employer is being prosecuted somewhere on a theory that the circumstances attending an accident were such that the employer should have plainly foreseen it, whereas the injured man is to be justified in having remained blissfully ignorant of the danger, albeit he may have been the one person who actually knew more about the instrumentality causing the injury than any one else in the world.

The courts have laid down an important rule applicable in many cases of this kind, and that is that an employer is not bound to inspect simple appliances, concerning the safety of which the using employee is just as able to know as the employer, if not better able. The rule was applied by the Minnesota supreme court several years ago in the case of Dessecker vs. Phoenix Mills Co., 98 Minn. 439.

Plaintiff was employed in defendant's mill to oil machinery. He was provided with an ordinary ladder for use in his work. An iron peg had been placed at the bottom of each rail of the ladder, to keep the ladder from slipping on the floor. But one peg had come off, and had not been replaced. This permitted the ladder to slip, and plaintiff was injured. Affirming a judgment in favor of the mill, dismissing the suit, the supreme court said:

"But there is no evidence that defendant knew of this condition of things, and the facts disclosed are not such as to im-

pute to it notice of the defect, nor was it chargeable with the duty to inspect the same. A ladder of the character of this one is not a complicated instrumentality, nor were there any latent defects in the construction of the one in question. It is a simple appliance, to which the rule requiring the master to inspect for the purpose of discovering possible defects caused by its use does not ordinarily apply. The rule can have no application to the facts here shown.

"Plaintiff was an experienced workman in this line of employment. He had been engaged in it nearly all his life, and entered defendant's service after long experience in oiling mill machinery, and with a thorough understanding of his work and the nature and manner of its performance. He had used this particular ladder every day for about two months, and had found it, on all occasions except the one in question, in good condition.

"By what means, or for what reason, the brad came out of the bottom immediately previous to the accident is not made to appear, though it is probable that it became loosened by its ordinary use. An inspection of the ladder, which was produced in court, disclosed no defect in the material, no natural decay or wear, and no reason is shown to justify the conclusion, either by a jury or the court, that defendant owed plaintiff, a well-informed and experienced workman, the duty of inspecting the same. The least effort on his part would have disclosed the defect, and we conclude that, on the evidence presented, the question whether defendant was chargeable with negligence was one of law for the trial court, and that it properly resolved it in favor of defendant.

"For the reason that defendant owed plaintiff no duty to inspect the ladder in question—the only defect complained of being that it was out of repair, not that it was in a defective condition when originally furnished for use—no actionable negligence is shown, and the order appealed from is affirmed."

SECTION 541. RISKS ASSUMED BY EMPLOYEES

A Kansas feed store having caught fire, an employee undertook to carry sacks of bran from the burning building, and was injured through slipping on an ice-covered sidewalk in front of the store. He sued his employer for damages, but the supreme court of the state ordered dismissal of the action, on the ground that plaintiff must be deemed to have assumed the risk of the accident, since it was shown that he knew of the condition of the sidewalk. The opinion in the case says:

"It may well be doubted whether the obligation of the employer with respect to furnishing a safe place in which to work extends to such a situation as that here presented. But assuming that such is the case, and that the evidence tended to show negligence on the part of the defendant, we are of the opinion that . . . the plaintiff must be deemed to have assumed the risk arising from the slippery walk." (Barnes vs. Akins, 166 Pac. 474.)

* *

An employee in a flour mill who was injured through the fall of a sack of grain from an endless belt elevator assumed the risk of such injury, if the elevator was of the kind generally in use in such mills, and if the danger of the sack falling was fully appreciated by the employee, according to the decision of the Minnesota supreme court in the case of Johnson vs. United Flour Mills Co., Sleepy Eye, Minn., 150 N. W. 902.

SECTION 542. CONTRIBUTORY NEGLIGENCE

A case illustrating the legal principle that a mill employee's own careless contributing to his injury will preclude recovery of damages by him is presented in the decision of the Kentucky court of appeals in the suit of Bright vs. Collins, 205 S. W. 905, in which plaintiff was defeated on a $10,000 personal injury claim.

Bright, with 20 years' experience as a miller, was employed in defendant's mill as head miller. On the occasion of his accident corn was being ground, and the pipe or spout which fed it into the mill became choked. Bright, belying his name, opened the casing around the rollers of the mill, and pushed a stick up the feed pipe to remove the clogged condition, without stopping the machinery. The corn, being released, descended with such force and suddenness as to bring his hand in contact with the rollers, resulting in the injury complained of.

The rollers were properly incased, and presented no danger excepting as one might open a small door and insert his hand in the mill. The machinery could have been readily stopped by means at hand.

Disposing of the case on the ground that plaintiff was debarred of right to recover because of his own carelessness, the court said:

"It is admitted that Bright was thoroughly acquainted with the machinery and premises, and was in charge thereof.

He was the foreman of the work, and an experienced miller. He knew exactly how the rollers operated, and says that he had unchoked the mill many times before. No one directed him how to unchoke the mill on the occasion of his injury. Collins [defendant employer] was not present. Bright acted upon his own initiative. In opening the mill, and placing his hand where it was subject to be thrown into the rollers and crushed, Bright was guilty of contributory negligence but for which he would not have received his injury.

"It might further be said that Bright assumed the ordinary dangers incident to the business of operating the mill, when he undertook the employment, and, as shown by the evidence, the feed pipe in this mill, as well as other mills, would sometimes become choked. This was one of the ordinary incidents of his employment. The safe way to have unchoked the mill was to have stopped it, which would have occupied very little time. When the mill was shut down, there was absolutely no danger in unchoking it.

"Bright knew how to close down the mill. . . . The rule is, where there are two ways of performing work, the one dangerous and the other safe, and the servant is familiar with both ways, and, knowing that one is safe and the other dangerous, elects to do the work in the dangerous way, and is injured, he is without remedy."

* *

That a mill has failed to comply with a state law requiring dangerous machinery to be safeguarded, resulting in injury to an employee, does not render the employing owner liable if the accident is directly attributable to contributory negligence on the part of the injured man. The Enid (Okla.) Mill & Elevator Co. secured a ruling to this effect before the Oklahoma supreme court in a suit against the company brought to recover damages for death of an employee in its mill caused by injuries sustained by him while working near unguarded shaft and set screws. (157 Pac. 355.)

The court finds that the company negligently failed to properly guard the machinery, but reversed judgment in plaintiff's favor and ordered a new trial for error on the part of the trial judge in instructing the jury that the defenses of assumption of the risk and contributory negligence were not available to the company. The supreme court approves the general rule of law that, although violation of a statutory duty imposed upon an employer may constitute negligence in itself, and is actionable when injury results therefrom, statutes are not to be interpreted as abrogating the ordinary rules of contributory negligence unless such construction is plainly required by the language used by the legislature.

SECTION 543. EMPLOYEE DOING UNAUTHORIZED ACT

The legal principle that an employer is not liable for injury to an employee sustained by the latter in voluntarily doing an act beyond the scope of his or her employment was applied in favor of the Quaker Oats Co. by the Iowa supreme court in a suit brought against the company by one Haller, for injury sustained in the company's mill at Cedar Rapids. (164 N. W. 863.)

Plaintiff, a girl, was employed to put coupons in containers afterwards filled with rolled oats. A chute from which the boxes fell to her working table became clogged, and she was injured by placing her hand up into the chute, an act which the court finds was beyond the scope of her duties. On this ground the court denied recovery of damages.

It is also held that the fact that plaintiff's act was customary, or that she had seen others unclog the chute in the same way, did not justify her in doing what she understood was beyond the scope of her duties, and the court declared that, since no similar accident had previously occurred at the chute, the company could not be deemed to have been negligent in failing to promulgate rules or warning against the danger to which plaintiff exposed herself.

Finally, it was decided that the fact that plaintiff was under the age at which she might be employed at dangerous work, such as unclogging the chute, did not render the company liable, since she was engaged to do only such work as was lawful, and the company did not authorize or consent to her departure from the scope of that work.

SECTION 544. METHODS OF WORK

Plaintiff and another employee in a Texas flour mill were engaged in removing waste material in sacks from the second story of the mill. Plaintiff was arranging the sacks in a wagon into which his co-employee threw them, and was injured by being struck by a sack which was thrown down without warning. In reversing judgment for $2,500 in his favor and against the milling company, the Texas court of civil appeals decided these propositions:

An employee assumes the risk of being injured by doing his work in a customary manner.

A foreman in a mill who has no power to employ or discharge men working with him is a "fellow-servant," and not a representative of the milling company, within the rule which entitles an employee to recover for injuries sustained through negligence of the employer or his representative, as distinguished from negligence of a fellow-servant.

The fact that the company in this instance had promised to install a chute for lowering of sacks, and had not done so, did not obviate the injured employee's assumption of the risk of being injured through sacks being thrown down as they were, and had customarily been, thrown in this case.

A milling company is under no legal obligation to its employees to adopt the best method of doing work, to promote their safety; adoption of a reasonably safe plan is sufficient. Medlin Milling Co. vs. Mims, 173 S. W. 968.

* *

An employee in a mill or elevator is not to be conclusively deemed to have been guilty of contributory negligence, barring right to recover damages for his injury, through attempting to unclog a cob chute by using his hands, instead of using a stick or other instrument, where it appears that he used a customary method and had been shown no other. This is the gist of the decision handed down by the Kansas City court of appeals in the case of Longacre vs. Farmers' Elevator, Mercantile & Mfg. Co., 246 S. W. 632. In this case plaintiff was awarded damages for injury to his hand, which was injured through contact with revolving paddles of the chute.

* *

The Texas court of civil appeals affirmed judgment for $4,500 in favor of plaintiff in the case of Scharnberg vs. Marshall Mill & Elevator Co., 190 S. W. 229, for injuries sustained by him in falling down a shaft when struck by an elevator bucket while he was engaged in making repairs at the top of a shaft, standing on a narrow joist.

The defendant is found to have been negligent, through its superintendent directing plaintiff to do his work in a dangerous manner.

One of the principal points urged on the defendant's appeal was that the award of $4,500 was excessive, but the court of civil appeals held that this was not so, considering the fact that plaintiff's arm was broken and his fingers permanently stiffened, and that he sustained severe injury to his head and shoulders.

SECTION 545. NEGLIGENCE OF CO-EMPLOYEES

Confusion of tongues in particular working groups frequently raises the interesting question as to whether an employer may be held in damages for injury to one worker caused by negligence of another on the mere ground that the latter was unable to understand his English-speaking fellow-employees, imputing to the employer negligence in exposing the injured man to the perils of working with an incompetent co-employee.

This question arises under the legal principle that an employer is liable for negligence of an injured man's fellow-servant when caused by incompetence of the latter previously known to the common employer.

The point was before the New York court of appeals in the case of Barber vs. Smeallie, 117 N. E. 611, and it was decided that the mere employment of a man who has not become accustomed to the language of our country does not make the employer liable for injury accidentally inflicted by him upon a co-employee. To fix responsibility, it must appear that the foreign employee's ignorance of the language of his associates naturally disqualified him for the duties intrusted to him, and that the accident was directly caused thereby.

But where, as in this case, the negligent worker's act producing injury has no connection with his ignorance of English, e. g., where he starts machinery knowing that a co-employee is thereby exposed to a peril, the mere fact of employing a non-English speaking man affords no basis for holding the employer responsible; the liability must rest on the negligent man's previously known incompetence and the employer's retention of him in the service.

SECTION 546. ASSAULT BY CO-EMPLOYEE

It will take no citation of legal authority to establish the point that a milling company is not liable for an employee's breach of a marriage promise, that being plainly beyond the pale of an employer's responsibility for his employee's acts. But between examples of extremes showing liability and no liability there is a middle ground as to which it is sometimes difficult to determine questions of responsibility.

It is believed that the true general rule

has been accurately stated in a decision handed down several years ago by the Texas court of civil appeals in a suit brought against a flour-milling company by its former night engineer on account of injuries which it seems are to be attributed to a previous practice at the mill of the old employees to "initiate" newcoming workers, rather than to any malicious violence such as was alleged in the plaintiff's petition.

It was averred in the petition "that for a long time . . . it had been a custom or rule of defendant's manager and miller or superintendent, and its other employees in the mill, to whip servants employed by defendant . . . at the time of, or shortly after, their employment, which custom" had been authorized or acquiesced in by the mill's corporate officers. Holding that the petition, if truthful in its averments, stated a cause of action against the mill, the court said:

"The petition alleges an assault and battery upon plaintiff by defendant's servants, which assault was committed by the express or implied authority of the defendant. The master is not liable for a wrongful act done by his servant, unless authorized by him, or done while the servant is acting within the scope of his employment. When a servant turns aside from the duties of his employment and commits a wrong, to further his own pleasure or gratify his own whim, in no way connected with or beneficial to his master's business, no liability rests on the master for the wrongful act. It is unlawful to commit an assault and battery, and the master would not be liable for the acts of his servants in committing such assault, unless done with his authority. If the master authorizes his servant to commit an unlawful act, whether beneficial to him or not, the master is liable for such act." (49 Tex. Civ. App. 485.)

This statement of the law by the Texas court appears to be in line with what the courts of other states have decided.

SECTION 547. UNSAFE MACHINERY AND APPLIANCES IN GENERAL

How a milling company may be rendered liable in damages to an employee injured through negligent orders of a foreman is shown by the decision of the Kansas City court of appeals in the case of Craven vs. Midland Milling Co., 241 S. W. 658.

Plaintiff was employed in defendant's mill as a sweeper and oiler and cleaner of machinery on two floors of the plant. During a brief shutting down of the machinery, she was directed by her foreman to do certain oiling and cleaning above one of the roll machines. It was disputed whether the foreman directed her to stand on the metal door of the machine to perform the work. There was evidence tending to show that the foreman did so direct her, after expressing impatience because she had spent some time in trying to find a stepladder. As she stood upon the door, she slipped and fell to the floor, suffering serious injuries, for which she brought suit. From a judgment in favor of defendant mill, plaintiff appealed, and the court of appeals awarded a new trial. In the course of its opinion, and after summarizing the evidence presented on both sides, the court remarked:

"The slick metal door, made still more slick, no doubt, by the dry flour passing over it, was not a reasonably safe place for her to stand, certainly not as safe as a ladder, and the foreman says it was not. His saying he told her not to get on the door is also a concession that it was not safe, and he agrees with her in saying he told her to get a ladder, though he denied telling her to get on the door.

"A case was presented for the jury under at least one and perhaps more of the alleged grounds of negligence stated in the petition, namely, either in failing to furnish plaintiff with a reasonably safe place to work, . . . or in failing to supply reasonably safe instrumentalities for plaintiff's use in performing the work she was directed to do, . . . or in ordering the plaintiff to stand on the door, . . . or in assuring plaintiff the place was safe. . . .

"There cannot be, as a matter of law, either assumption of risk or contributory negligence on her part, for to so hold would be to say that conclusively the master was not negligent, and that plaintiff was not ordered to stand upon the door, but that she voluntarily chose to do so herself."

* *

The Hobart Mill & Elevator Co. was exonerated by the Oklahoma supreme court from liability for injury to a mill employee whose arm was caught by a spliced belt while he was oiling machinery. (150 Pac. 458.)

Plaintiff grounded his suit upon the triple claim that the belt had been so defectively spliced as to leave a rough surface, that the oil cups on the machinery were defective, and that the company negligently failed to provide safeguards

to avoid such accidents. The company successfully defended the suit on the ground that plaintiff's injury was caused by his attempt to oil the machinery in an unsafe manner, whereas a safe one was open to him, and that he assumed the risk of the accident. After concluding that the evidence was sufficient to sustain the jury's verdict in favor of the company, the supreme court decided that the trial judge committed no error in permitting the company to show that the state factory inspector had inspected the machinery in question before the accident, and had not condemned it. The court holds that this circumstance was not conclusive that the milling company had not been negligent, but that it was a point properly to be considered by the jury in determining whether the company had been negligent in failing to maintain reasonably safe appliances.

* *

The Nebraska supreme court affirmed judgment against the Nebraska Elevator Co. for $18,900 damages, in favor of one Hellerich, on account of injuries sustained through starting of elevator machinery while he, as a special employee of the company, was engaged in adjusting a pulley on a shaft. The suit proceeded under charge of negligence in four respects: (1) That a belt shifter was defective and would not keep the belt on a loose pulley, as it should have done; (2) that statutory requirement for a rest hook to keep the belt away from shafting was not observed; (3) that the engine of the elevator was permitted to run while plaintiff was in a position of peril; and (4) that plaintiff was not provided with a reasonably safe place in which to work.

The supreme court held that the evidence adduced at the trial substantially supported these allegations, and that, considering the fact that plaintiff suffered very painful injuries, including loss of his right arm, the award of $18,900 could not be said to be grossly excessive. (178 N. W. 919.)

SECTION 548. UNGUARDED MACHINERY, ETC.

The Indiana supreme court affirmed judgment for $5,500 against the American Maize Products Co., in favor of a former employee, one Widiger, for injuries sustained in the course of the latter's employment. Although the opinion does not disclose the precise nature of the accident involved, it seems that liability was based on failure of the company to adequately guard a dangerous condition in connection with machinery. On this point the court, referring to the Indiana statute which requires machinery to be safeguarded, said:

"It is not pointed out in the statute by what particular means or manner the dangerous machinery is to be guarded, but it is clear that guards to such machinery, within the legislative meaning, are such appliances, whatever they are and by whatever name they may be called, as will accomplish the legislative purpose of protecting the operator of the machine."

The court also held, incidentally, that where a fact is disputed in a lawsuit the jury trying the case is not bound to find one way because that side is supported by the larger number of witnesses. In other words, a verdict may be sustained by the evidence of one credible witness, although there be several witnesses who contradicted him on the point of fact in issue. (114 N. E. 457.)

* *

The Illinois supreme court affirmed judgment for $6,000 in favor of plaintiff in the case of Wahlmann vs. C. Becker Milling Co., 117 N. E. 140, on account of fatal injuries sustained by defendant's head miller, Victor Hahn, when he became entangled in a belt revolving on a pulley which operated one of the rolls in defendant's mill at Red Bud, Ill.

The accident occurred while Hahn was applying belt dressing to a slipping belt, and the suit proceeded upon the theory that the injury was attributable to the mill's failure to comply with the requirement of the Illinois statutes "that all power-driven machinery including . . . drums, cogs, gearing, belting, shafting, . . . mill gearing and machinery of every description . . . shall be so located, wherever possible, as not to be dangerous to employees, or shall be properly inclosed, fenced or otherwise protected," etc.

In defending the suit, the mill replied upon two grounds: (1) that the "doping" of the belt constituted the making of "repairs" within the Illinois statute which forbids repairing of moving machinery; and (2) that Hahn was superintendent of the mill, and that any neglect to equip the machinery with necessary guards was his neglect, of which complaint could not be made in the suit.

Both points were ruled against the mill; it being decided that applying dressing to a belt, to avoid its slipping on a pulley, cannot be regarded as a "repair"; and that the mere fact that Hahn was head miller did not charge

him with the duty of equipping the mill machinery with safeguards.

The evidence tended to show that Hahn had no authority to incur expense except when directed to do so by the manager of the mill. "Hahn could not be held accountable for the failure to guard the machinery," says the courts, "unless it were a part of his duty to see that it was properly guarded. . . . Proof that he was superintendent of the mill, considered alone, would not establish the duty upon Hahn to guard the rolls."

The decision, however, recognized the point that if the pulley could not have been so guarded that the belt might have been "doped" without removing the guard, the mere omission of a hood or other safety device would not make the mill liable. But it was found that there was sufficient evidence to warrant the jury in finding that it was practicable to have maintained a guard at the point where the accident occurred that would have prevented the injury. The supreme court suggested that the proof showed that the danger could have been avoided by properly placed bars and cross bars.

* *

In affirming a judgment against an elevator company for death of an employee who was mangled by a stationary engine, which he had been directed by his superintendent to stop, the Minnesota supreme court held that such companies, as well as other employers, must exercise an ordinary degree of care to safeguard machinery and stairways from which employees are apt to fall. (Mitton vs. Cargill Elevator Co., 152 N. W. 753.)

* *

In a case decided by the St. Louis court of appeals, it appeared that a mill foreman was twirled about a shaft and killed when his clothing caught on an unguarded set screw. In affirming judgment against his employers on account of the accident, it was decided that the foreman was not necessarily guilty of contributory negligence in attempting to replace a belt on a pulley without stopping the machinery, that being the usual and most effective way of replacing the belt; that he was not guilty of carelessness in stepping over the shaft, since that was the only way he could reach the place where his duties required him to go; and that a foreman of a mill has the same right to performance by his employers of the statutory duty of safeguarding dangerous machinery as any subordinate employee has. (Daniels vs. Goeke, 176 S. W. 301.)

* *

A decision of the Oklahoma supreme court affirmed a judgment for $10,000 in favor of plaintiff in the case of Simmons vs. Alva Roller Mills, 185 Pac. 76, for injuries sustained by plaintiff while working in defendant's mill.

The suit proceeded upon a theory that defendant had failed to provide plaintiff with a reasonably safe place in which to work, particularly in not providing loose pulleys and belt shifters on shafting in the mill, in omitting to properly guard the main-line shaft, pulleys and set screws at the point where plaintiff was required to work, and in failing to maintain the mill's conveyors and elevators in such condition as to avoid choking and clogging. It was charged that, as a natural consequence of these supposed items of neglect, plaintiff was injured, while attempting to place a belt on one of the conveyors, through being caught in the belt and jerked against the main-line shaft in the mill.

The supreme court held that there was sufficient evidence to support a verdict in plaintiff's favor on the ground of the negligence asserted. The court remarked that $10,000 was a large award, considering the fact that the injury was largely confined to a shattering of the bones of a shoulder and arm, but declined to reverse the judgment as being grossly excessive.

Incidentally, the supreme court decided that, under the Oklahoma statute which requires dangerous set screws to be safeguarded, a mill employee does not assume the risk of being injured through his employer's neglect to comply with the law, although the employee may know of the unguarded condition.

* *

In sustaining the right of a mill employee to recover for injury, caused by his hand being caught between grinding rollers, when he removed a cover to remove clogged corn, and when his foot slipped, the Kansas supreme court decided that he was not necessarily guilty of contributory negligence. (Baillod vs. Nelson Grain Co., 145 Pac. 895.)

The accident occurred in Missouri, and the court held that the law of that state which requires dangerous machinery to be safeguarded is sufficiently broad to require mill machinery to be equipped with guards under covers where employees are required to work at such machinery while it is in motion, and while

the covers are off, if guards are practicable in such cases.

SECTION 549. ELEVATOR ACCIDENTS

The Kentucky court of appeals affirmed judgment against the Lexington (Ky.) Roller Mills Co. for $3,900 on account of injury sustained by one Fields while employed in the company's mill as second miller, on account of a defective elevator on which he was riding to the third floor of the plant. (207 S. W. 477.)

It appeared that, to the knowledge of the head miller, cogs of gearing which operated the elevator had become worn by 14 or 15 years' use, but he regarded them as being safe. On the morning of the accident, plaintiff, Fields, had moved the elevator six or seven feet from the second floor when it ceased ascending, and began to jerk violently. Fearing that he might be injured should he remain on the elevator, he jumped to the second floor, crushing his heel so seriously as to render him a cripple for life.

Reviewing the evidence adduced at the trial, the court of appeals finds that the jury were warranted in concluding that the milling company, through its head miller, was negligent in failing to keep the elevator in reasonably safe condition, and that, since plaintiff's duties did not extend to the inspection of the elevator, he did not assume the risk of being injured while using it.

"To say that this was not evidence that the elevator was in an unsafe condition," declared the court, "or to deny plaintiff's position of apparent and real peril, is to ignore the only reasonable deduction therefrom, and the fact that plaintiff did not clearly and at once apprehend just what had happened to the elevator, or what might happen to him in consequence thereof, does not in the least alter the defendant's liability if its negligence had in fact, or as it reasonably appeared to plaintiff, placed him suddenly in a position of peril.

"Nor does the fact that plaintiff would have avoided injury, as it later appeared, had he remained on the elevator and stopped it, as he might easily have done, necessarily defeat his right to recovery."

* *

The Kansas City court of appeals affirmed judgment for $5,000 in favor of plaintiff in the case of Baird vs. Larabee Flour Mills Corporation, 220 S. W. 988, covering damages sustained by him, as an employee in a mill operated by defendant near St. Joseph, through being injured by starting of a man lift from which he was alighting. The court found, in effect, that the evidence was sufficient to warrant the jury in finding that the accident was caused by negligence of a foreman in the mill in permitting the lift to be started at the particular time.

SECTION 550. UNGUARDED PASSAGEWAYS

The Kendrick (Idaho) Warehouse & Milling Co. lost a suit before the Idaho supreme court, involving liability for injury to one Riley, an employee, who walked off a truckway in the dark in leaving the mill when a day's work was done. (170 Pac. 105.)

The truckway was about 4½ feet wide, except that it was 18 inches wider for 12 feet near the mill, and it was at the point where the way narrowed that he stepped off. Although the truckway was primarily intended for the handling of freight, it had been customarily used by employees as a means of entrance to and departure from the mill, with the acquiescence of the milling company, although there was a surface roadway of doubtful suitability for travel that might have been used.

There was a conflict in the evidence as to whether plaintiff knew that there was a lantern available to light his way along the truckway. Plaintiff was permitted to recover on the theory that the defendant was negligent in failing to either light the way or guard it with banisters. Affirming the judgment, the court said:

"It is the duty of an employer to use ordinary care and diligence to furnish his employee a reasonably safe place to work and a reasonably safe means of access to and exit from the place of employment. . . .

"We cannot say, as a matter of law, that appellant exercised ordinary care and diligence to furnish respondent a reasonably safe means of exit from the mill; that the road provided was in a suitable condition for travel by a pedestrian, and that the respondent should have traveled over it instead of the truckway when leaving his work; that he was guilty of contributory negligence in not procuring, or waiting for, a light; nor that, from all the facts and circumstances disclosed by the record, appellant was not guilty of such negligence in failing to build banisters, or light the truckway, which it knew was customarily used by its employees as a means of access, . . . as to render it liable in damages to respondent for the injuries he received in falling from it."

The decision of the supreme court was

not reached by a unanimous vote of the judges. Chief Justice Budge dissented for the following stated reasons, which seem to be based upon some considerable common-sense:

"The respondent was familiar with the truckway; he knew that it was not protected by any guard rail and that it was not lighted. He also knew that by descending the steps immediately outside the mill maintained by his employer expressly for the use of employees he could have reached the road provided, and proceeded in safety; the mere fact that the road was muddy would not justify the respondent in assuming an unnecessary risk. He knew that the night was dark; that he could not proceed over the truckway without incurring the danger which he encountered. These facts are not disputed. Nevertheless, he deliberately walked forth onto the truckway in the dark, to his injury. It is my view that these facts are sufficient, as a matter of law, to make respondent guilty of contributory negligence."

* * *

A mill is liable for injury to an employee, directly resulting from negligence of a foreman in permitting timbers to obstruct a dark passageway used by such employee, declared the Kansas City court of appeals in the case of Campbell vs. Aunt Jemima Mills Co., 245 S. W. 620.

* *

Where only one means of egress from a mill is open to employees in leaving the premises after a day's work, and that one lies across railroad tracks which are traversed by frequent and rapidly moving trains, the mill owner must maintain a watchman at the crossing or adopt some other efficient means of avoiding injury to an employee. This is the gist of a decision handed down by the appellate division of the New York supreme court, which declares that an employer must afford a safe means of ingress to, and egress from, his plant.

There is nothing in the decision, however, which exonerates an employee from using a reasonable degree of care for his own safety, and it would seem to be no authority for holding a mill company responsible for an accident which can be shown to have been directly attributable to the injured employee's own careless act.

Furthermore, the decision appears to have been affected by the fact that there were nearly two hundred employees who were compelled to go upon the "tracks of the most used railroad in the United States, where the swiftest trains in the world are constantly passing."

* *

When employees of a mill customarily cross private railway tracks on the mill premises, with the express or implied assent of the employer, the latter is under legal duty to adopt reasonable measures to avoid injury to such employees in the movement of cars, according to the decision of the Iowa supreme court in Arnold vs. Douglas & Co., 155 N. W. 845. In this case the court upheld liability of defendant for death of an employee who was crushed between two cars on a private switch track while passing from one building of defendant company to another, in performance of his duties.

A tunnel had been constructed under the tracks and notice had been posted directing employees: "Use the tunnel instead of crossing the tracks. Avoid any danger." But the court found that because the tunnel was frequently flooded and was a less convenient passageway, defendant company acquiesced in the employees' use of the surface crossing at which decedent was killed; the superintendent having directed that cars standing on the tracks at that point be separated to keep the crossing open.

In these circumstances the supreme court decided that it was open to the jury to find that the defendant was negligent in failing to enforce proper rules governing movement of cars, with a view to avoiding accidents such as occurred in this case. It was intimated that either a watchman should have been stationed at the crossing or signals should have been given warning against sudden movement of cars.

* *

A decision of the West Virginia supreme court of appeals states law applicable to cases where employees of a mill are injured beyond the mill premises but while necessarily crossing railroad tracks as a means of reaching or leaving their place of work.

The decision was handed down in the case of Wilkins vs. H. Koppers Co., 100 S. E. 300, and is to the effect that where the only means of ingress to and egress from a place of employment is across railroad tracks not under the control of the employer, and there is provided for the use of the employees a public crossing, properly guarded and reasonably convenient, the legal duty of the employer to provide reasonably suitable means of access has been sufficiently complied with. If an employee for his own person-

al convenience disregards such crossing, taking a shorter but more dangerous way across the tracks, he does so at his own peril.

SECTION 551. SLIPPERY PLATFORMS

A miller may be held liable in damages for injury sustained by an employee through slipping on a platform negligently permitted to remain in a slippery condition, through accumulation of flour dust, etc., and action of the elements. It was so decided by the St. Louis court of appeals in the case of Mueller vs. Ralston Purina Co., 254 S. W. 720. Plaintiff sustained injuries through slipping while shoving a truck loaded with chicken feed along a loading platform. Melting snow, ice, flour dust, grain dust, etc., produced the condition. Affirming judgment in favor of plaintiff, the court decided the following propositions of law:

An employer is bound to use reasonable care to provide his workers with reasonably safe places in which to work and reasonably safe appliances. Responsibility for breach of this duty cannot be avoided by delegating performance of the duty to a third person, such as a foreman or superintendent.

An employee does not assume, as an incident of his employment, risks of injury arising from negligence of the employer.

If the slippery condition which resulted in plaintiff's injury was due to defendant employer's negligence, plaintiff was not debarred from recovering damages, on a theory of contributory negligence in remaining at work in a dangerous place, unless the danger was so obvious that no reasonably prudent person would have encountered it.

SECTION 552. UNINSULATED ELECTRIC WIRES

The Indiana supreme court affirmed a $5,000 judgment against the Goshen Milling Co. in favor of the dependent family of a painter who was electrocuted while painting the cupola of one of the mill buildings, due to his coming in contact with an uninsulated wire carrying a high voltage of electricity. (114 N. E. 869.)

The court held that liability was sustained by the provisions of the Indiana employers' liability act, under which it is declared that an employee shall not be deemed to have assumed employment risks arising from the employer's failure to comply with statutory requirements, among which requirements is the duty of insulating dangerous wires at places where workmen's duties necessitate their presence.

SECTION 553. GRAIN DUST EXPLOSIONS

The operator of a grain elevator or other place in which there is danger of injury to employees through the explosion of grain dust is under a legal duty to take all the precautions to avoid such an accident that ordinary prudence requires, according to the holding of the Illinois appellate court in the case of Schultz vs. National Brewing Co., 195 Ill. App. 386.

It appears that plaintiff's husband received fatal injuries through explosion of grain dust in an elevator, attributed to the defendant's failure to properly provide for the removal of dust, and in maintaining open gas jets in the place. The trial court directed a verdict in favor of defendant employer on the ground there was no liability, but the higher court reversed the decision, holding that, grain dust being highly explosive, an employer in whose place of work such dust is present in large quantities must exercise a degree of care commensurate with the danger to guard against explosions; and that the jury should have been permitted in this case to determine whether that degree of care had been exercised.

SECTION 554. FALLING SACKS

The Gallatin Valley Milling Co., Belgrade, Mont., won a suit before the Montana supreme court involving questions as to the liability of the company for injury to an employee, one Scheytt, resulting from a fall of a tier of sacked flour in a warehouse in which he was employed as a roustabout. While Scheytt was climbing the pile, which was 12 or 14 feet high, to assist in passing sacks down for loading in a car, the tier fell, causing him to break a leg. (172 Pac. 321.)

In suing the mill, Scheytt relied upon claims that the flour had been negligently piled and that the mill management was guilty of negligence in failing to inspect the tier to ascertain its safety. A trial resulted in judgment in favor of plaintiff, but the supreme court reversed the decision and dismissed the suit on the mill taking an appeal.

The reversal was based on findings of the higher court that the evidence produced by plaintiff was insufficient to show that the sacks fell through any negligence attributable to the mill in the matter of piling or in making proper inspection. Plaintiff is found to have failed to meet the burden imposed upon him to prove, by the greater weight of the evidence, that the accident was directly caused by some careless act attributable to the mill.

Said the supreme court: "There is no evidence showing with any degree of certainty how the accident occurred, and whether it was the result of the unstable condition of the pile or whether the plaintiff carelessly pulled the sacks down upon himself in his attempt to gain the top of the pile as he did."

* *

But a trucker of sacks of mill products assumes obvious risk of being injured through the fall of piled bags where the danger is as manifest to him as to any one else, held the Arkansas supreme court in the case of Francis vs. Arkadelphia Milling Co., 239 S. W. 1067.

Plaintiff was engaged in trucking sacks of feed from a warehouse to railroad cars, other employees doing the unstacking. Customarily the bags were taken down in such way as to leave the piles in the form of steps. In this instance, however, the bags were removed in such way as to leave perpendicular and unstable piles. While plaintiff was working near by several sacks fell upon him, and he sued the mill for damages.

Affirming a judgment dismissing the suit, the supreme court remarked: "An employee of ordinary intelligence, experienced in the line of his duty, and not working under the immediate direction of a superior, assumes the risk of dangers incident to conditions produced through the negligence of his employer which are obvious and imminent, and which he must necessarily have known and appreciated, in the exercise of ordinary care for his own safety, in the performance of his duties. . . .

"The evidence reflects that the appellee [appellant, the plaintiff (?)] was familiar with the place where he was working, and that the condition in which the sacks were left, through the negligence of the employees of appellee, was obvious and imminent to any one working around the stacks of sacks. In fact, the danger was so patent and open that it might have been observed by casual observation. The stack, as left, was not only perpendicular, but it was leaning or bulging out at the top. The record does not indicate that appellant [the employee] was too young or inexperienced to appreciate the dangers incident to the condition in which the stack was left after a part of the sacks had been removed.

"Appellant was 20 years of age at the time the injury occurred, had been in the employ of appellee [the mill] as a trucker for about three months, and understood how the feedstuff should be stacked and unstacked, with a view to the safety of the employees. The condition complained of, which produced the injury, being perfectly obvious and of such simple character that one of ordinary intelligence and experience would necessarily have known and appreciated the dangers incident thereto, the court correctly declared, as a matter of law, that appellant assumed the risk."

SECTION 555. DEFECTIVE DELIVERY VEHICLES

The duty of a mill to cause reasonable inspections of its trucks and other delivery vehicles to be made in the interest of the safety of its drivers was recognized by the Kansas City court of appeals in the case of Bollmeyer vs. Eagle Mill & Elevator Co., 206 S. W. 917.

Plaintiff, a teamster employed by defendant, was injured through the collapse of the wagon he was driving in making a delivery, and sued for damages. Judgment was entered against him in the trial court, but on appeal the Kansas City court of appeals remanded the case for a new trial on account of erroneous rulings made by the trial judge.

Among other points determined on appeal, it was decided that a driver of a truck assumes the risk of his team running away when he knows of the particular horses' propensity to do so; and that there can be no recovery by such employee for injuries resulting from his own voluntary act in overloading his truck. But where he is directed by his superior to overload and is not apprised of the danger, he may recover against his employer for consequent injury.

It was further held that, to exonerate an employer from liability for an accident of this character, on the ground that the particular vehicle had been inspected for defects, it must appear that the inspection was made by a competent person, and that the particular defect was not discoverable in the exercise of a reasonable degree of care for the safety of the driver.

SECTION 556. INJURY TO MINOR EMPLOYEES

A case tried before at least two juries and argued three times on appeal was finally dismissed under order of the Missouri supreme court, thereby exonerating defendant mill from liability for injury to plaintiff (Berry vs. Majestic Milling Co., 263 S. W. 406).

While working for defendant, and then 15 years old, plaintiff had his hand so badly injured in a corn mill as to necessitate amputation. He brought suit,

alleging that defendant was negligent: (1) In employing a youth under 16 years of age at machinery; (2) in setting him at dangerous work without warning against the dangers. The second ground was abandoned at the trial, and the jury returned a verdict for $5,000 on the first ground.

On appeal to the supreme court the recovery was set aside on the ground that the statute on which it was based, making it unlawful to employ children under the age of 16 in such employment as plaintiff was engaged, was unconstitutional, on account of a defect in its enactment (a defect which probably has been corrected).

Plaintiff brought a new suit based on the second ground of negligence above mentioned, the ground voluntarily dismissed at the first trial. A second trial resulted in another verdict against the mill, and an appeal was taken to the court of appeals at Springfield, Mo. That court reversed the lower court, but certified the case to the supreme court for final decision. The supreme court held that there was no cause of action, and ended the litigation.

SECTION 557. CONTRACTION OF DISEASE

In the case of Heath vs. New Jersey Flour Mills Co., decided by a New Jersey court, but apparently not reported in the law reports, plaintiff sued for $50,000 damages, claiming he had contracted tuberculosis, while employed as elevator man in the defendant's mill, due to the large amount of grain dust which he was continually breathing.

The plaintiff originally entered the employ of the company as a corn miller, and during the period of such employment claimed that two fans were operated, one in the basement and another on the top floor of the elevator, for ventilating purposes. On its ceasing to grind corn he left its employ, but returned again about one year later as an elevator man, at which time it was grinding wheat exclusively. He claimed that the miller did not operate the above named fans until about six months prior to his leaving his employ, and did not provide him with a respiration mask. He claimed, further, that he did not know the danger of his employment, although he had worked since 1907 in corn and rye mills.

The defendant contended that when it ceased to grind corn it discontinued the blower fan in the basement and suction fan in the top of the elevator, used up to that time for the cooling of corn only, but immediately installed the suction fan above for the elimination of dust from the wheat as it was run through the scale, conveyors and elevator legs, and that it also provided respiration masks for use when necessary during a chokeup. It further maintained that the conditions in the mill and elevator were the best that science could produce, and were far superior to most mills now operated.

Expert medical testimony was offered showing that tuberculosis is a disease which, though aggravated by breathing dust, is primarily caused by the physical condition, the inherited traits of the individual or by his living conditions outside the mill, and in no way could a miller be held responsible for one of his employees contracting tuberculosis, because of the noninjurious effect of vegetable dust.

SECTION 558. PROOF AS TO CAUSE OF ACCIDENT

In negligence actions the general rule is that it is incumbent on plaintiff specifically to show wherein defendant was negligent. To this rule there is an exception applying where plaintiff proves the occurrence of an accident under such circumstances that it fairly may be inferred that some sort of negligence occurred, as where a pedestrian has been injured through the fall of a barrel of flour from an upper story window of a warehouse. In such cases it is deemed sufficient for plaintiff to prove an occurrence from which carelessness reasonably may be presumed. This rule is known as the res ipsa loquitur [the thing speaks for itself] doctrine.

A limitation upon this doctrine is illustrated by the decision of the Oklahoma supreme court in the case of Smith vs. Acme Milling Co., 126 Pac. 190.

Plaintiff was engaged in defendant's mill in keeping a corn-chop mill free from clogging by cobs, etc. In doing this his fingers became caught in a coil of wire, which, by some unknown means, had fallen into the hopper, and at the same instant the rollers caught the wire and pulled it and plaintiff's fingers into their jaws. He sued for damages, but the trial judge ordered a nonsuit, which the supreme court affirmed on appeal, saying:

"It is contended by plaintiff that the doctrine res ipsa loquitur is applicable; that the injury was caused by the negligence of the defendant in not properly screening the corn, and thereby allowing the wire to get into the hopper, relying on the fact that the wire being in the

hopper raised the presumption of negligence in screening the corn.

"This contention, in our opinion, would be correct if there were any evidence tending to show that the wire came through with the corn from the machinery above. This of itself might raise the inference of negligence. . . . But there is not the slightest testimony that such was the case. The plaintiff testified that he did not know how the wire got there. None of his witnesses pretended to know where it came from or how it got there.

"Not the slightest defect in the machinery or any of its appliances was proved by the plaintiff; nor does it appear from any of the testimony . . that the presence of the wire in the hopper, or the probability of such wire getting into the hopper through the sieves and machinery above, was a matter to be anticipated or reasonably expected and guarded against by defendant.

"Plaintiff's right of recovery is based wholly upon the negligence of defendant in allowing the wire in question to get into the machinery. Such negligence must of necessity consist of some defect in the machinery above or some negligent act of some employee on the floor above. This is not shown by plaintiff. There is a total lack of evidence tending to show whether the wire came from above, or whether, by some accidental means, it dropped into the hopper from some place on plaintiff's floor.

"We think it is going too far to hold that the mere presence of the wire in the hopper raises the presumption that it came through the machinery from above; the evidence showing no defect in the appliances, but showing them, on the contrary, to be so constructed as to render it very improbable that such a thing could take place at all. We think the evidence wholly fails to show that the injury was caused by a failure of defendant to do some duty which it owed to plaintiff."

In short, the court determined that the case fell within the general rule of law that, where proof concerning the cause of an injury is consistent with a theory that it resulted despite exercise of due care on the part of defendant and his employees, the plaintiff has the burden of proving the specific act of negligence bringing about the accident.

* *

In an action for death of a foreman in an elevator, where meal was sacked after grinding in a near-by mill and being moved through a fan conveyor, the accident being caused by an explosion on the floor of the elevator where the meal was received, it was held by the Illinois appellate court that negligence on the part of the employer could not be presumed from the mere occurrence of the explosion; that there could be no recovery without proof of some specific negligent act attributable to the employer and directly causing the explosion; and that recovery could not be based upon a mere expert opinion of a witness that the explosion was caused by a fire in the mill which was communicated to the elevator through the grain conveyor.

* *

The rule that a mill, or other employer, is not to be held responsible in damages for death of an employee on mere surmise as to the cause of an accident is illustrated by the decision of the St. Louis court of appeals in the case of Weber vs. Valier & Spies Milling Co., 242 S. W. 985.

Plaintiff's father was employed in defendant's mill in St. Louis. A man hoist and near-by stairway afforded means of passing from floor to floor in the building. The hoist was operated through circular openings in the several floors. Plaintiff's father's body was found on the floor near the stairway and near one of these openings, he having apparently fallen.

In suing for damages, plaintiff alleged that the holes in the floors were not safeguarded as required by state law, and that flour was negligently permitted to collect near one of them, making the floor slippery, and that her father was thereby caused to fall to his death. No one saw decedent fall, and the circumstances of the fall were wholly uncertain excepting as they might be inferred.

The trial court entered a judgment for $5,000 in favor of plaintiff, under a verdict returned by the jury. The defendant milling company appealed, and the judgment was reversed on the ground that there was not sufficient evidence to sustain the verdict.

The court of appeals held that the plaintiff failed to sustain the burden of proving that negligence on the mill's part caused the accident. There was no evidence supporting the claim that the floor was slippery, and it was held by the higher court that there was no evidence warranting an inference that he must have fallen through the hoistway. The court of appeals said:

"As we view the evidence in this case, it is just as consistent to infer Weber's

death was caused by his falling down the stairway leading from the third to the second floor as that he fell through the opening on the ascending side of the elevator on the third floor, and it would be a mere speculation and conjecture as to which one of either of these was the way in which he came to his death. And, since the law requires that plaintiff, where there are two possible causes, must show with reasonable certainty which of the two causes produced the injury, and if the evidence, as here, shows that it could have resulted from either of two causes, for one of which the defendant is liable, and for the other of which it is not liable, the plaintiff is then required to show to which of these causes the injury was due. In other words, plaintiff must offer sufficient evidence to enable the jury to trace the casual connection between defendant's negligence and plaintiff's injury. . . .

"We can come to no other conclusion than that the question as to how Weber came to his unfortunate death is, under the record in this case, a matter of pure surmise and conjecture."

* *

But in the case of Berkbigler vs. Scott County Milling Co., 275 S. W. 599, the Springfield, Mo., court of appeals affirmed judgment in favor of plaintiff on account of the death of her husband. While walking along a two-inch pipe over boilers to reach a stopcock, decedent, employed at the mill as fireman, fell, and there was some uncertainty as to just what caused his fatal fall. The court said:

"But plaintiff was not required to make such proof. If she showed all the surrounding circumstances, the dangerous position of the stopcock, unsafe footing, insufficient light, and lack of banisters or hand rests, as alleged in the petition, a jury might find with reasonable certainty the deceased's death was the result of defendant's negligence in the respect so alleged. . . .

"Plaintiff's case is also aided by the presumption that the deceased was engaged in the discharge of his duties and was exercising ordinary care for his own safety at the time he was killed."

The opinion showed that there was strong evidence tending to prove that the mill was not negligent, but the court, following well-settled rules of law, declared that evidence to the contrary made it a matter within the exclusive province of the jury to determine whether or not the accident was directly due to negligence on the part of the mill.

SECTION 559. RELITIGATION OF CLAIMS

A litigant, having had his day in court, will not be permitted to relitigate a claim on a theory previously abandoned by him, held the Springfield, Mo., court of appeals in the case of Berry vs. Majestic Milling Co., 240 S. W. 829. The decision was a sequel to previous litigation between the same parties.

Plaintiff sued for injuries sustained while employed in defendant's mill at Aurora, Mo. He originally averred negligence on the part of the defendant in two respects: (1) In permitting plaintiff to work in the mill before he was 16 years old, in violation of a Missouri statute. (2) Negligence in failing to warn plaintiff of the dangers to which the work exposed him.

The mill answered in the original suit that it was not negligent, that the accident was due to plaintiff's own negligence, and that the statute referred to was unconstitutional. At the trial plaintiff dismissed his theory of negligence on the part of the mill, excepting as to violation of the statute. The jury returned a verdict for $5,000 in plaintiff's favor, and the mill appealed to the supreme court, which decided that the statute was unconstitutional. The judgment was reversed, without any remand of the case to the lower court.

Thereafter plaintiff brought a new action to recover damages, relying on the ground abandoned at the trial of the first case. A jury awarded a verdict of $4,500, and again the mill successfully appealed, this time to the Springfield court of appeals. That court said:

"He had his day in court on his right of action against defendant for having negligently caused him injury, and after final judgment in that case he cannot relitigate any question that could have been made a ground for recovery in that action. To permit a proceeding of that kind would allow a party to split up his one cause of action for having negligently caused injury to him into as many separate and distinct causes of action as there may have been separate acts of negligence, and prosecute one after another until he secured a favorable verdict, or until he tried each in a separate suit. This cannot be done. All issues which might have been litigated in the former action are as completely barred as if they had been included and adjudicated."

The decision in this case was affirmed by the Missouri supreme court (263 S. W. 406).

WORKMEN'S COMPENSATION ACTS

SECTION 560. WHO ARE "EMPLOYEES"?

S. W. Bowne, president and majority stockholder of a corporation engaged in manufacturing cattle feed, was injured while assisting employees of the company in manual work, and filed claim for compensation under the New York workman's compensation law. An award was made on the theory that an executive officer of a corporation may become an ordinary employee for the time being while doing the work of such an employee, so as to be entitled to all the legal rights of a workman.

But the New York court of appeals set the award aside, interpreting the compensation act as being designed for the benefit of ordinary workmen only. Referring to Mr. Bowne, who was shown to have received $30,000 in one year as dividends on his stock, in addition to a salary of $70 a week, the court of appeals said:

"Theoretically he was subject to the orders of his corporation, and was liable to be discharged for disobedience. Practically he was the corporation, and only by a legal fiction its servant in any sense." (116 N. E. 364.)

* *

The decision in the Bowne case is not to be interpreted as depriving one of an award where his principal duties are manual in their nature, held the New York industrial commission in the case of Pike vs. C. P. McDonald Milling Co.

For several years Pike was employed exclusively at physical labor in a small mill. On incorporation of the business, he was given a share of the stock and afterwards acquired $1,800 of the $15,000 capitalization. He was elected secretary of the company, but his principal work consisted, as it had before, in the doing of manual work about the mill. Actual control of the mill was vested in a majority stockholder. Pike was injured while performing labor in the mill, and question arose whether he was entitled to an award under the compensation act, in the light of the decision in the Bowne case.

"I do not believe that this day laborer who has come into the position of secretary of this small milling concern is an executive officer in any sense of the word," said Commissioner Lyon, in announcing the decision. "An executive officer, according to all definitions, is the man who has the direction and control of affairs. Certainly this workingman who had gotten the title of secretary of this little corporation did not direct or control anything, and I do not believe that the Bowne case is controlling in any sense."

The Bowne case is distinguished on the ground that there Bowne was a majority stockholder and the principal executive officer, and was injured while merely casually employed at physical labor, while in this case, Pike's main work was physical.

* *

A case presented to the Texas supreme court illustrates how difficult it is sometimes in the case of small milling companies to draw the line between "officers" and "employees." (Millers' Mutual Casualty Co. vs. Hoover, 235 S. W. 863.)

Hoover was one of the seven directors of a milling company, and was also its superintendent and head miller. At times he performed actual manual work. The ultimate authority to direct operation of the mill and to employ and discharge men rested with the general manager.

While acting as superintendent and head miller he was accidentally killed, and his widow applied for an award under the Texas workmen's compensation act. The act provides for awards for injuries to and death of "employees," but specially provides that a president, vice president, secretary, and other officers shall not be deemed to be "employees." Hence, the pivotal question was whether Hoover was an employee or an officer.

The court sustained a contention made on the part of Mrs. Hoover that persons who hold dual positions as officers and employees of a milling corporation, or other company are covered by the act while engaged in performing duties as employees. In part, the opinion said:

"Stockholders of a corporation are, in a sense, the owners of the corporation. Its directors have the sole management of its affairs, and their acts as such are its acts. The same may be said of its officers while acting within the powers delegated to them by the board of directors. But as individuals the stockholders, directors, and officers of a corporation are distinct legal entities, and are as entirely free to deal with the corporation by contract or otherwise, within certain well-defined limitations not essential to enumerate, as any other individual. . . .

"The underlying reason for excluding the officers and directors of a corporation from the provisions of the act is apparent. They do not come within the ordinarily accepted meaning of the terms 'workmen' and 'employees,' for whose benefit the legislation is primarily enacted. Their duties toward the corporation and its business are those of managing and directing heads, and they do not, as a rule, perform the ordinary tasks, nor are they subjected to the ordinary risks, of workmen engaged in the service of the corporation. Nor, as a general rule, is their compensation affected by their temporary disability caused by injury while engaged in their employment. On the other hand, where, although occupying an official position with the corporation, they are employed as workmen in the ordinary sense of those terms, and come clearly within the provisions of the act, there would appear to be no substantial reason for excluding them from those benefits merely because they also hold official positions with the corporation; and the legislature should not be presumed to have intended so to exclude them unless the language employed be clearly not susceptible of any other construction."

SECTION 561. WHEN IS EMPLOYMENT "CASUAL"?

Under some of the state workmen's compensation acts it is provided that such laws shall not apply to injuries to "casual" employees. Difficulty has been frequently encountered by the courts in interpreting and applying this provision to concrete cases. For instance, in the Illinois case of Allen vs. American Milling Co., 209 Ill., App. Rep. 73, it appeared that plaintiff was injured while employed temporarily by the mill as carpenter and millwright in the course of the construction of an addition to the company's plant.

Question was raised as to whether he was a "casual" employee in such sense as to take his injury outside the terms of the Illinois workmen's compensation act, and the appellate court, second district, answered the question in the negative, holding that, although the manufacture of food products was the principal business of the milling company, the erection of a plant or of an addition to engage in that business was such a natural incident of the enterprise as to prevent saying that it was "casual." Therefore, the act was held to apply to this case.

The trend of judicial authority is to hold that an employment is "casual" only when arising upon an accidental or unexpected cause.

Another point decided in the Illinois case was that where an employee has accepted payments for some time as being paid under the compensation act, he precludes himself from afterwards denying that his accident arose in an employment covered by the act, as a basis for maintaining an ordinary personal injury action against his employer. And this is so, although dispute may arise between the parties as to the amount to be paid in further satisfaction of the injury. The remedy against such dispute is resort to arbitration proceedings, as provided for in the law.

* *

The appellate court of Indiana affirmed an award made by the state industrial commission in the case of Caca vs. Woodruff, brought under the Indiana workmen's compensation act. (123 N. E. 120.)

Defendant, the owner of a mill at Noblesville, Ind., employed plaintiff, a carpenter, to make certain repairs and additions on the mill buildings. The employment was by the day, for a period of two or three weeks, and plaintiff acted under directions of defendant, not being an independent contractor. In the course of the work, plaintiff sustained accidental injury and claimed compensation.

Defendant objected that plaintiff was not such "employee" as is covered by the workmen's compensation act, but the appellate court approves a conclusion reached by the industrial commission that the case did fall within the law. The section of the act involved reads:

"The word 'employee' shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."

"It is quite clear," says the court, "that under our statute a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

"The defendant was engaged in the milling business, the proper conduct of which required a building and machinery. Buildings and machinery used in such a business at times need to have additions and repairs made thereto. These addi-

tions and repairs must be expected and provided for. They are necessary in any business such as that in which defendant is engaged. The making of repairs was a necessary part of his business which he was required to anticipate when the necessity of his business demanded, or his convenience dictated."

SECTION 562. EMPLOYEES WORKING OUTSIDE OF STATE

Minnesota grain and milling companies engaging employees for service in other states are affected by the decision of the Minnesota supreme court in the case of State on relation of Chambers vs. District Court, Hennepin County, 166 N. W. 185.

Mrs. Chambers' husband was engaged by C. C. Wyman & Co., Minneapolis grain brokers, to solicit business in Minnesota, North Dakota and elsewhere, the firm furnishing him an automobile for the purpose. While performing his duties in North Dakota, of which state he was a resident, Chambers was killed by accidental overturning of the automobile, and his widow applied for an award under the Minnesota workmen's compensation act. The district court sustained the employer's contention that the law did not authorize an award for an injury occurring outside Minnesota. But the supreme court reversed the decision, saying:

"The statute requires compensation of the employer, when the employer and employee have elected to become subject to the act, 'in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, without regard to the question of negligence, except accidents which are intentionally self-inflicted or when the intoxication of such employee is the natural and proximate cause of the injury.' . . .

"The statute evidences no affirmative purpose to restrict the operation of the contract to accidental injuries happening within the state. . . . What the employee did, if done in Minnesota, was a contribution to the business involving an expense, and presumably resulting in profit. It was not different because done across the border in North Dakota. It was referable to the business centralized in Minnesota."

* *

In the case of State ex rel McCarthy Brothers Co. vs. District Court of Hennepin County, 169 N. W. 274, the named company resisted liability for death of an employee who was accidentally drowned while attempting to row across the Missouri River between Mandan and Bismarck, N. D. The employee, one von Hagen, was engaged to solicit shipments of grain from North Dakota to his employer in Minneapolis. He resided at Bismarck, and was on his way home to spend Sunday when drowned, being prevented from taking a train to that town from Mandan by reason of flood conditions.

The supreme court held that, as von Hagen was furthering the interests of the employer's business, he must be regarded as falling within the protection of the Minnesota workmen's compensation act, the same as if he had been buying grain at some outlying point in Minnesota; that he was entitled to maintain headquarters on his territory, and was not to be deemed to step aside from his employment in going to and from his home; and that he was not guilty of such intentional or willful want of care on his part as to preclude his surviving wife from recovering under the act.

SECTION 563. EMPLOYMENTS INVOLVING STORAGE

Under then existing provisions of the New York workmen's compensation act, the appellate division of the New York supreme court said concerning the scope of "storage" as designating one of the industries covered by act (In re Roberto, 167 N. Y. Supp. 397):

"The farmer who deposits his grain in the barn until such time as in the natural and ordinary course of events he would market the same; the merchant who purchases the grain from the farmer, and temporarily deposits the same in some convenient place until opportunity presents itself to sell the same to a customer in the ordinary and natural routine of business; the miller who receives the grain from the merchant and keeps it in his mill for a day or two until the natural exigencies of his business permit him to grind it into flour; the manufacturer who buys a commodity and has it in his factory with a view to using it or transforming it into the manufactured product,—are all engaged in the storage business, within the meaning of group 29, if the employer in this case [a retail coal dealer] was so engaged. It is true that the employer was conducting a large and extensive business, but it is not the size or magnitude of the business which is controlling, but the manner in which it is conducted. . . .

"If a merchant purchases a stock of goods in excess of his immediate require-

ments, and holds the same for an advance in price, or for any reason does not expose or offer the same for immediate sale, he perhaps to that extent engages in the storage business within the meaning of group 29. But if his stock of goods is on hand for present sale at prevailing prices, and is immediately offered and exposed for sale, I cannot think that such stock of goods is being stored merely because the thrift and prudence of the merchant prompts him to have on hand a sufficient supply to meet the most pressing demands which may be made."

SECTION 564. EXCLUSIVENESS OF ACT

An opinion of the California district court of appeal, approved by the supreme court of the state, set aside a judgment for $3,500 against the Great Western Milling Co. in favor of one Helme; the same having been based on an accident suffered by Helme while employed in the company's plant. (185 Pac. 510.)

The injury was caused by plaintiff's clothing catching in unhoused gearing while he was attempting to replace a belt which had slipped from its pulley when a screw elevator became clogged.

The main question raised in the suit was whether plaintiff could maintain an ordinary personal injury action, or was limited to an award under the California workmen's compensation act. Disposing of this question in favor of the mill, the court held as follows:

As to employers and employees governed by that act, it affords an exclusive remedy for redress against industrial accidents, excepting the accident complained of can be traced to gross negligence or willful misconduct on the part of the employer, personally, or, in the case of a corporation, the act of an elective officer; and when the act complained of indicates a willful disregard of employees' safety.

It cannot be said that the milling company was guilty of gross negligence or willful misconduct, merely because it failed to house the gears in question, unless that was made a duty by some order of the industrial accident commission of the state, or by the law itself, and some elective officer of the company, with willful disregard of the safety of the employees, having actual knowledge of the peril, or having what is equivalent to such knowledge, consciously failed to house such gears, so as to avert the injury.

A mere recommendation made by the industrial accident commission's safety engineer in going through the plant, that the gears be housed, was not such order from the commission as made non-compliance with it willful misconduct, within the meaning of the rules above stated.

In the absence of any order by the commission, made and served in the manner provided by the California compensation and safety act, an employer's general duty in regard to dangerous machinery is to use such safeguards as are reasonably adequate to render the place of employment as safe as the work carried on will reasonably permit.

* *

In the case of Wegele vs. Ismert-Hincke Milling Co., 186 Pac. 130, the holding was that under the Kansas act, as re-enacted in 1917, all employers of five or more workmen engaged in industries characterized by the statute as especially dangerous were subject to the compensation system, except where notice to the contrary has been given subsequent to the adoption of the act of 1917, irrespective of whether notice was given under the old law and prior to that time.

Plaintiff sued defendant milling company for an injury received in the company's plant at Topeka in 1918. An answer was filed in the suit, setting forth facts relied on to show that when the accident occurred defendant was operating under the workmen's compensation act, and was therefore not amenable to a suit based upon violation of a common-law duty to use reasonable care for the safety of its employees, as distinguished from liability to pay an award under the compensation act.

A district judge at Topeka ruled that the answer was insufficient, and the mill appealed to the supreme court, which tribunal reversed the lower court's decision.

In December, 1915, the defendant's sole business was operating a mill at Kansas City, Kansas, which it owned. In that month it filed notice with the secretary of state that it elected not to come under the provisions of the workmen's compensation act, and has never filed any other declaration in relation thereto. In July, 1916, it purchased a mill at Topeka, which at the time was operated under the compensation law.

The attorneys for the mill contended that the plaintiff's remedy was confined to relief under the compensation statute, for two reasons: (1) because the Topeka plant was to be regarded as a separate concern from that at Kansas City, and its status with reference to the compensation act was not affected by a change

of ownership; and (2) because the compensation act of 1917 presented for the consideration of employers and employees what was substantially a new plan for adjusting claims for injuries, which became automatically applicable to all establishments within its purview, except where a notice of election not to accept its provisions should be filed after its enactment in that year.

Disposing of the case, the supreme court said:

"The question involved in the second proposition is the same as that considered and determined in Railway Co. vs. Fuller, which was argued and submitted together with this case. This court there decided (this case being under consideration as well) that under the workmen's compensation act of 1917 (chapter 226) all employers of five or more workmen engaged in industries therein designated as especially dangerous are subject to the compensation system, except where notice to the contrary has been given subsequent to its enactment, irrespective of what may have been done before that time. That decision determines that, under the allegations of the answer, the defendant was subject to the compensation law, and renders it unnecessary to consider the other proposition."

In reviewing a judgment for plaintiff in the case of Van Boeckmann vs. Corn Products Refining Co., 113 N. E. 902, for damages covering an injury sustained by plaintiff while employed in defendant's plant, the Illinois supreme court decided that the fact that both parties had previously elected to be governed by the provisions of the workmen's compensation act of the state did not preclude plaintiff from maintaining an ordinary personal injury suit on his showing that the accident was directly due to defendant's failure, through its managing officers, to safeguard mill gearing.

The court further held that, where an employer has elected not to be governed by the provisions of the workmen's compensation act, he is deprived of any right to assert assumption of the risk or contributory negligence as a defense to a claim for injury attributable to failure to install practicable guards on dangerous machinery.

SECTION 565. RELATION OF ACCIDENT TO EMPLOYMENT

The case of Waterman vs. Bachman, 121 N. E. 8, reviewed by the Indiana appellate court on application by claimant for an award under the Indiana workmen's compensation act, involved the question whether claimant's husband's fatal accident occurred while he was acting within the course of his employment as flour salesman for respondent, an Indianapolis miller, or whether decedent's day's work had been completed and he was on his way home.

The compensation act, like similar laws in other states, provides schedules of awards to be paid for injuries to employees engaged in so-called hazardous occupations, regardless of whether the employer has been guilty of negligence bringing about the particular accident.

Waterman was employed by respondent to solicit orders for flour and to make collections in Indianapolis, and late one afternoon was struck by an automobile while crossing a street either to take a streetcar home or to call on a customer, and died of his injuries.

"If at the time the duties of the day under his employment had not been completely performed, but, on the contrary, he was still doing the work he was hired and expected to do, if in his employer's interest he was proceeding to call on a customer or prospective customer, or if he was moving to wind up his day's work in a manner expressly or tacitly required and expected by his employer, then it follows that he was injured by an accident arising out of and in the course of his employment," said the appellate court, affirming a decision of the Indiana Industrial Board in claimant's favor.

It was held that allowance of compensation was proper, whether the proof be regarded as showing that decedent was on his way to call on a customer or was on his way home pursuant to a custom under which he telephoned his day's orders to the mill from that place.

* *

The case of Sparks Milling Co. vs. Industrial Commission of Illinois, 127 N. E. 737, before the supreme court of that state, involved a question as to whether the evidence warranted a finding that the mill was liable to pay an award under the Illinois compensation act for death of an employee, whose dead body was found on a pavement below the windows of the fourth floor of the plant. The court answered the question in the affirmative.

The employee, one May, was seen by the second miller in the plant to be at work sweeping near swinging sifters on the fourth floor of the mill. Thirty minutes later some one standing near by heard his body strike the pavement.

What the court said in disposing of

the case is instructive on points as to what proof is required to show that an accident was so related to the injured man's employment as to make it a proper case for compensation:

"Only one thing is certain and clear in this case: That William F. May was found in a dying condition, lying on the pavement below the windows of the fourth floor of this mill. There may be at least three theories, any one of which will account for his death. It might have been suicide; it might have been murder; it might have been an accident, and such accident may or may not have arisen out of the employment. All who saw deceased on the morning of the accident —his family and his fellow-workmen— testify that he was in his usual good spirits, and that, so far as was known, he had no enemies. There is no evidence ot suicide or murder, and therefore the presumption against the commission of a crime is sufficient to support the finding of the commission that his death resulted from accident. . . . Where the evidence shows deceased to have been in good health, and there is a complete absence of evidence showing suicide, it must be presumed that the death was accidental. . . .

"We think it cannot be seriously contended that the injury causing this death did not arise in the course of the employment. The only serious question presented is whether or not the injury arose out of the employment, and this question is not without its difficulty. An injury arises out of the employment, within the meaning of our workmen's compensation act, . . . when the accident results from a risk reasonably incidental to the employment. . . . The burden was on the executrix to show that the death of May was caused by accidental injury arising out of the employment, and to show it by direct and positive evidence, or by evidence from which such inference could be fairly drawn. . . . The proof of these facts may be circumstantial as well as by direct evidence. When it is said that the claimant must prove her case, it is not meant that she must necessarily prove it by direct evidence, and that somebody actually saw what took place, because in many cases that is impossible.

"While the commission cannot surmise, conjecture, or guess its conclusion, yet it may draw an inference from proven facts, so long as it is a legitimate inference. We think the facts proven clearly warranted the commission in finding that the windows on the fourth floor of the mill were open, that deceased was employed at his regular duties on this floor, and that he was either knocked from the middle window by one of the sifters, or that he fell from the fire escape while there recovering from exhaustion caused by the heat and dust inside the mill. . . .

"It was proven to be the established custom of the men to go to the windows for fresh air when the heated atmosphere became heavily saturated with dust. This case is clearly distinguishable from those cases where the employee was disobeying orders or otherwise misconducting himself."

* *

A decision covering cases where a mill or elevator employee is injured while proceeding along a railway track on an errand pertaining to his employment was handed down by the Nebraska supreme court in the case of Blanchard vs. Farmers' Grain & Supply Co., 178 N. W. 257.

Plaintiff's husband, an elevator manager, was killed by a train while going to a passenger station to mail a report to the Federal Grain Corporation for his company. Plaintiff's claim to an award under the Nebraska workmen's compensation act was resisted on the ground that the accident was not covered by the act, and that the injury was caused by decedent's own reckless indifference to safety. Holding that plaintiff is entitled to an award, the court said:

"The preparation of the report to the Grain Corporation was one of the duties which devolved upon Blanchard when the bookkeeper was absent, and the fact that the post office was six blocks distant from the elevator, while the station was only two blocks away, and that he was alone in the elevator, showed that he desired to spend as little time as possible away from his main post of duty. We are satisfied that the accident arose out of and in the course of his employment."

On the question as to whether decedent was guilty of such gross carelessness as prevented recovery under the act, the court holds that there was no proof of that fact, saying:

"'Reckless indifference to safety,' as used in the statute, means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance. We may well conclude that deceased believed there was ample space between the tracks in which he might move with safety. An error of judg-

ment of this kind would not evidence recklessness."

* *

In the case of Saylor vs. Gehley's Carpet House, before the Pennsylvania workmen's compensation board, an interesting question was raised: Does the compensation act apply to an injury received by an employee while attending an annual outing conducted by the employer at his own expense? The board answered the question in the affirmative on the ground that the outing furthered the employer's business by creating better fellowship among the employees and by affording publicity—such as is afforded when cars and trucks are driven through the public streets advertising the outing.

One Saylor was employed by defendant and was drowned at an annual outing of defendant's employees, and his widow was awarded compensation. The essential facts on which the award was sustained were that the outing was an annual affair, the expense of which was wholly borne by defendant; that it tended to promote co-operation among the employees and advertised the business; that it was conducted on a week day afternoon, without deduction of pay on account of the holiday.

SECTION 566. PROOF OF THE CAUSE OF INJURY

The Halstead (Kansas) Milling & Elevator Co. was relieved from liability under the Kansas workmen's compensation act for fatal injury to an employee, on the ground that there was no legal evidence as to the cause of the accident, and therefore no proof of responsibility under the law. (179 Pac. 360.)

After the injured man, one Lindsay, was hurt, he made statements to the milling company's manager tending to show that he was injured while replacing a pulley belt after it had slipped off through a choking of elevator machinery. These statements were embodied in a report made by the company to a liability insurance company as having been made by Lindsay.

At the trial of a suit brought by Mrs. Lindsay to recover under the act, after Lindsay's death, the only evidence tending to show that he had been fatally injured in the course of his employment in any specific manner was the fact that defendant had made the report above referred to. The Kansas supreme court held that this was insufficient to charge the milling company, because the report must be regarded as a mere hearsay statement as to the nature of the accident, if any accident actually occurred; not binding on the company as an admission of the truth of Lindsay's statements. (179 Pac. 360.)

* *

The Camp Spring Mill Co., an Illinois company, secured a decision by the Illinois supreme court upsetting an award made by the industrial commission of the state on a former employee's application for workmen's compensation (134 N. E. 30).

One Matthews, 54 years old, had been employed by the milling company as a common laborer. While assisting in moving flour from the mill to a warehouse by means of a truck running on a switch track, his head was struck by an overhead plank. He returned to work two weeks later and remained until discharged afterwards on account of slackness of business at the mill. His wages had been $18 a week.

After being discharged he applied for an award under the state compensation act, and the industrial commission allowed him $11.70 weekly for 320 weeks, with provision for a pension of $24.96 a month for the remainder of his life. The award proceeded on a finding that Matthews' accident had rendered him wholly and permanently incapable of work.

A circuit judge affirmed the award, but the supreme court reversed it. After referring at length to conflicting evidence concerning the nature of the employee's injuries, the supreme court said: "No reasonable man fairly weighing this evidence can come to the conclusion that defendant in error [Matthews] is wholly and permanently incapable of work. . . . The commission is not justified in finding for one party merely because by some strained construction some evidence can be found in the record which, standing undisputed, would justify its finding, nor is it justified in basing its finding upon testimony which all the facts and circumstances in the record show to be untrue.

"The workmen's compensation act . . . was adopted for the purpose of providing just compensation for injuries arising out of industrial accidents, and this beneficent purpose will be destroyed if the act is construed to be an act pensioning persons who suffer from disabilities and pre-existing diseases not caused by industrial accidents."

SECTION 567. HERNIA AS "ACCIDENT"

The decision reached by the Michigan supreme court in the case of Fribley vs. Michigan Milling Co., 190 N. W. 654,

contributed a precedent on the much disputed question as to whether hernia developed by an employee is to be regarded as an "accident," within the meaning of the workmen's compensation acts. It was shown in that case that claimant, while employed by defendant, had undertaken to place a heavy belt on a pulley, work ordinarily requiring two men. While he was in a cramped position and straining his muscles he sustained a hernia. The court said:

"We think the testimony . . . fully justified the department of labor and industry in reaching the conclusion that the hernia which plaintiff suffered was produced by an unusual strain when he was in an unusual position, attempting to lift this heavy pulley and put on this heavy belt, work that required the assistance of another man."

SECTION 567A. LOST SMELLING SENSE

The New York bureau of workmen's compensation considered and disallowed a novel claim made by a mill's grain inspector under the compensation act of the state. The claim arose on an accident to claimant, J. F. Galbraith, consisting in his being struck in the face by a sledge wielded by an assistant, while attempting to open a railway car door. He was allowed to recover for general disability caused by the accident, but not for loss of his smelling sense.

Claimant explained that his work required him to inspect grain in several ways, one of which was to smell it to determine whether it was moldy. But, because it appeared that he was earning more after the accident than before, the referee ruled that loss of the smelling sense could not be regarded as materially affecting claimant's earning power.

SECTION 568. BLOOD POISONING AS ACCIDENT

A decision of the Minnesota supreme court (165 N. W. 478) holds that when an employee sustains a physical injury, although a mere scratch, in the course of his employment, and fatal blood poisoning sets in, his death is to be attributed to the injury, making the employer liable under the workmen's compensation act.

In the case referred to it appeared that one of defendant's employees sustained a scratch in loading or unloading bags from a railway car, and that he died of resulting blood poisoning. The court found that the only serious question in the case was whether the scratch had been actually received while the man was at work, and concluded that, although there was no direct evidence to establish that fact, the circumstances sufficiently pointed to it.

SECTION 569. HEART FAILURE

The Minnesota supreme court affirmed a judgment of the district court at Thief River Falls denying liability against the Hanson-Barzen Milling Co. under the state workmen's compensation act for death of one Rinker, while employed as the company's head miller.

The deceased man's widow sought an award under the compensation act on the theory that the death resulted from accidental injury sustained by her husband in the course of his employment. He died of acute dilation of the heart a few days after he had been engaged in replacing windows on the mill building and in trucking some machinery, but the court found that the evidence was insufficient to show causal connection between this work and his death. (172 N. W. 311.)

* *

The New York state industrial commission denied application for an award under the state workmen's compensation act to cover a fatal accident, in the case of Scott vs. Grant. The evidence showed that an employee 50 years old died of heart failure 10 minutes after he had been engaged in lifting heavy sacks of feed, but the commission denied an award, on the ground that the proof was insufficient to warrant a finding that the death resulted from any strain sustained in the course of the deceased man's employment, as distinguished from some organically weak condition of the employee's heart.

The commission said that, if it should be permitted to assume that the death resulted from an accident, in the absence of proof legitimately tending to show that fact, it might be found that almost any person dying of heart disease while in the course of his employment died as the result of an accident arising out of it, within the provision of the compensation act.

SECTION 570. SINKING OF VESSEL BY SUBMARINE

In a New Jersey case, claimant's husband was one of the Lusitania victims, and in upholding her right to an award under the New Jersey law, the courts held that the peril was one which the employer was bound to have contemplated, and that the injury was as much the result of an "accident" as if decedent had been killed in the malicious derailment of a railroad train. (99 Atl. 624; 102 Atl. 1053.)

SECTION 571. WHO ARE "DEPENDENT" CLAIMANTS?

The Globe Grain & Milling Co., of Utah, and an insurance company indemnifying it against liability under the workmen's compensation act of that state, defeated a claim presented under the act by one asserting himself to be dependent father of an employee who was fatally injured in the service of the milling company. (193 Pac. 642.) The decision was handed down by the supreme court of the state, and indicates that mere relationship to a fatally injured employee is no justification for an attempt to mulct the employer. Holding that the evidence in the case was insufficient to support an award made in favor of claimant by the Utah industrial commission, and indicating the purpose of the law, the supreme court said:

"We remark that no hard and fast rule can be laid down which will control in all cases. Nor do we wish to be understood as holding that, in order to prove dependency, it must be shown that the contributions were made at the precise time of the injury. What we hold is that each case must, to a large extent, be determined upon its own particular facts and circumstances.

"To establish dependency, however, it is not sufficient merely to show that the deceased made some voluntary gifts or contributions at some remote time prior to the injury. Nor is it sufficient to show dependency that the deceased promised or intended, in case it became necessary in the future, to make contributions to his parent, or parents, who might become dependent. It is not sufficient to show potential or expected dependency, but under the compensation act the dependency must exist as an actual fact at the time of the injury which results in death.

"The compensation act is a most benificent law, and its manifest purpose and intent is to require the industry in which the injury resulting in death occurs to provide for the dependents of the deceased to the same extent so far as that can be accomplished, as he would have provided for them in case he had lived, and had continued to earn the wage he received at the time of the injury.

"The responsibility resting upon those whose duty it is to administer the compensation act is therefore of the utmost gravity and importance. Upon the one hand, the utmost patience and care should be exercised in order to protect all actual dependents, while, upon the other hand, the law should not be so construed as to require the industry to bear the burden unless the applicant comes within the provisions of the act."

* *

A question of liability under the Kansas workmen's compensation law was decided against defendant in the case of Slater vs. Ismert-Hincke Milling Co., 189 Pac. 908. This was an action under the workmen's compensation law by the parents of a minor son to recover compensation for his death. It was shown that his earnings, which averaged $17.45 per week, were turned over in full to his parents, and that the parents were partially dependent upon such earnings; that he paid no board, but that the expense to his parents for his support was $5 per week. It was held by the Kansas supreme court that, in ascertaining the average yearly earnings of the minor, and in fixing the degree of dependency of the parents, the employer is not entitled to a credit or deduction for the expense of the minor's board and support.

Mr. Justice Dawson, a member of the supreme court, dissented from the conclusion of his associates, saying:

"Monetary compensation for the injury or death of a workman is a cold-blooded proposition, but it is the only practical reparation that can be given in this imperfect world, and this heartless reparatory yardstick is to be used as an unsentimental matter of mathematical calculation. Whatever part of the boy's wages was devoted to feed, clothe, and shelter himself was obviously not used to support his parents. It is that portion of his wages which was devoted to his parents' support, not to his own support as well as theirs, nor to the support of all the family as well as his parents, that is the basis for determining the amount of compensation to be assessed against the defendant."

In the case of Grubesich vs. Valley Mills Co., the New York state industrial commission temporarily denied an award, subject to renewal of the application on termination of war conditions. An employee of the mill died of injuries sustained in the course of his employment, but because those who claimed to be his dependent widow and children resided in Austria-Hungary, and by reason of suspension of mail service to that country were unable to establish relationship to decedent, the commission ordered that the matter be held in abeyance until the required proof could be made.

SECTION 572. LIABILITY FOR MEDICAL EXPENSE

The following conclusion reached by the Oklahoma supreme court under the workmen's compensation act of that state is probably in line with what the courts of other states would hold under their workmen's compensation laws (Farley vs. H. T. Milling Co., 239 Pac. 451):

An employer becomes liable for medical fees for an injured employee in one of two ways: first, by contract, either expressed or implied, with the physician; second, by the physician treating the injured employee when called upon under the emergency caused by the employer's failure to provide medical aid. In the latter case, the charges must be approved by the state industrial commission as a part of the injured employee's compensation, before the employer becomes liable for them.

This decision does not run counter to the general rule of law that where an employee sues for damages for an injury not covered by a compensation act, reasonable medical expense is to be taken into account in making an award in his favor.

SECTION 573. VARIOUS ASPECTS

The Kansas supreme court affirmed judgment against the Red Star Mill & Elevator Co., in favor of one McCorkle, under the workmen's compensation act, for injury sustained by plaintiff to his knee in the course of his employment by the company. The points decided by the court were as follows:

Defendant's application for a continuance of the case for such time as would indicate whether plaintiff's injury is temporary or permanent was properly denied, it appearing that more than a year had elapsed between the accident and the trial.

On conflicting evidence as to whether the injury was due to an accident at defendant's mill or to plaintiff's slipping on a street, the jury's finding that it occurred at the mill must be regarded as conclusive.

Under the Kansas compensation act, judgment may be rendered against the employer for a lump sum award, instead of an award of weekly payments subject to modification, redemption or cancellation. (160 Pac. 983.)

* *

The Kansas supreme court sustained an award against the Southwestern Milling Co., and in favor of an injured employee, under the Kansas workmen's compensation act. (155 Pac. 916.)

The court decided that the milling company was not entitled to defeat liability by showing that no formal claim for compensation had been made within three months of the time of the accident, as provided by the law; it being found that the company waived its right to a formal claim through having acted upon an informal demand by offering to make a settlement for the injury.

CHAPTER LXIV

NEGLIGENCE*

SECTION 574. LIABILITY TO VISITORS AND TRESPASSERS

SO far as concerns a mill's liability for injury to a nonemployee while on the premises, the law makes a distinction according to whether the injured person was a trespasser or an invitee. Broadly stated, the only duty which any one owes a trespasser is not to wantonly injure him. A higher duty exists in favor of persons who are expressly or impliedly invited upon mill premises: a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation.

But a visiting customer or other invitee may become a trespasser by departing from the scope of his invitation, as by raising trapdoors or walking in dark or obviously dangerous positions. For consequent injuries a mill could not be held responsible, reasonable care having been exercised to safeguard the visitor in places where he was expressly or impliedly invited to go.

These observations are suggested by the decision of the New Jersey court of errors and appeals in the case of Sefler vs. Vanderbeck & Sons, 96 Atl. 1009, wherein defendant was held liable for death of a customer who fell from a balcony when he placed his hand upon a defective handrail, it appearing that he had gone to the place of the accident at the express invitation of the defendant's representative.

A milling company's obligation to maintain its premises in reasonably safe condition, as to employees and other persons expressly or impliedly invited to come upon such premises, does not extend to uninvited sight-seers, held the Wisconsin supreme court in the case of Klemens vs. Morrow Milling Co., 177 N. W. 903.

Defendant employed a contractor to repair the outside brick wall of its boiler-room at its mill in Milwaukee. The contractor engaged plaintiff as a helper in the work. During a lunch hour the contractor suggested that he and plaintiff go through the mill to see how oatmeal was made by defendant for the government under a war contract, and to get a good view of the city from the top of the six-story building.

In the mill was a belt manlift run by the mill machinery at such rate of speed as to permit one to step off going up on one side, or alight going down the other. The contractor had used this lift before. The two men, without saying anything to any person connected with the mill, proceeded to use the manlift; the contractor stepping on first. The latter alighted at the third floor, because of apparently overloaded condition of the lift, but called to plaintiff to proceed to the top floor, saying that he would follow. Arriving at the top floor, plaintiff saw that he would be carried over the top pulley unless the lift should be stopped. But he did not know that it could be stopped by pulling ropes on each side of the elevator. He was carried over the top, and thrown to the floor at the upper story of the building.

In suing to recover damages, plaintiff depended somewhat upon the Wisconsin statutes which require employers to provide safe places for employees and "frequenters," and which define "frequenters" as persons visiting places of employment under such circumstances as not to be trespassers.

The suit joined Tophooven, the contractor, as co-defendant, but was dismissed as to him, without complaint on plaintiff's part. But plaintiff appealed from judgment directed by the trial judge in the mill's favor. Affirming this judgment, the Wisconsin supreme court laid down the following statements bearing upon a mill's liability for injuries to outsiders:

"The safe place employment statutes quoted above have undoubtedly broadened the field of those to whom there is and was a common-law duty to keep such

*Specific phases of negligence are treated in other chapters of this book relating to the sale of goods, transportation of goods, injuries to employees, etc.

premises as are here involved reasonably safe, so as to now protect and include those upon such premises under the rights belonging to the class described under the somewhat vague and indefinite term of licensees.

"Plaintiff contends that he was at the time of the injury such a licensee, that is, there with the implied consent of the defendant milling company, or that at least the court should not have disposed of such question as a matter of law, as it did, but should have submitted to the jury a question framed so as to require them to determine whether or not, under the facts and circumstances, the plaintiff was frequenter or mere trespasser. It is urged in that behalf that the testimony showed such a known customary use of said premises by other than plaintiff sufficient to support a finding of a jury that the plaintiff was within the class of licensees rather than that of trespassers. . . .

"The elevator had been used by persons other than employees of the company operating the mill, such as those representing insurance companies for the purpose of inspection, those seeking employment in the mill, and those seeking proper or necessary information from employees or foremen on such premises. As against defendant, Tophooven clearly had no authority or power to invite the plaintiff into the mill building or to get upon the elevator. There was no invitation, express or implied, extended to plaintiff by defendant on this occasion or for such purpose. There was nothing about plaintiff's employment as helper to Tophooven in the mason work on the wall of the boiler-room making it necessary or convenient for plaintiff to enter the mill building, or that would require defendant to anticipate his so doing, or to take other steps to guard against plaintiff so doing. He was there solely for his own pleasure, purpose and convenience. He must be deemed, under the facts and circumstances in this case, to have been a trespasser at the time of the injury, and to be doing what he did as an invasion of the owner's rights of possession and privacy on his own premises. Such an invasion of the owner's rights is a trespass, irrespective of what may have been the intentions of him who so invades the premises. The act is none the less a trespass, though done innocently and without any willful intent to harm or violate the owner's rights."

* *

A decision of the Oklahoma supreme court shows that mere existence of a dangerous condition on mill or elevator premises does not create legal liability on the part of the proprietor for injury to an invitee upon the premises, where he has gone beyond the part of the plant to which he was impliedly invited, and where his injury was due to no willfulness on the part of the mill. The decision was handed down in the case of Plowman vs. Chickasha Milling Co., 221 Pac. 476.

Plaintiff's husband died of blood poisoning resulting from laceration of one of his hands when it came in contact with tin cups on a moving endless belt in an elevator leg in a grain elevator operated by defendant milling company. Decedent had gone to the elevator with a load of oats for unloading, and the supreme court decided that judgment in plaintiff's favor must be reversed, because the evidence failed to show actionable negligence on the part of the defendant.

* *

What the Kentucky court of appeals decided in the case of Branham's Administrator vs. Buckley, 166 S. W. 618, concerning liability of millowners for fatal injury to a boy who was warming himself by a grist mill boiler when it exploded, applies to liability to any mill visitor.

The boy had taken a quantity of corn to the mill, and while waiting for it to be ground accepted the miller's invitation to warm himself by the boiler. Affirming a judgment of nonsuit, the court of appeals said:

"The owner or occupant of premises who induces others to come thereon by invitation, express or implied, owes them the duty of using reasonable or ordinary care to keep the premises in safe condition; but he is not an insurer of the safety of such persons. . . . And, where the defendant owes plaintiff no duty other than the exercise of ordinary care to prevent injury, the fact of an explosion of a steam boiler creates no presumption of negligence. . . .

"The jury evidently felt some doubt as to the exact cause of the accident; and, having in mind the fact that there is a general disposition among men to preserve their property, and among the operators of steam boilers to preserve their own lives, and that ordinarily these motives will secure that degree of care which the defendants were charged with under the law, the jury doubtless believed that the injuries to plaintiff's intestate were occasioned, not as plaintiff contends, by

negligence of the defendants, but rather by one of those unfortunate casualties which ordinary care and prudence will not always prevent."

* *

A question whether a milling company was liable for injury to a young child who fell into an unguarded steam pit on the company's premises while playing there was answered in the negative by the Wisconsin supreme court in the case of Lewko vs. Charles Krause Milling Co., 190 N. W. 924.

Suit was brought on the part of the child, but was ordered dismissed on the ground that the complaint failed to state a cause of action. The pit was about three feet in diameter and five or six feet deep. The supreme court said:

"We are again called upon to distinguish between cases where the plaintiff is a trespasser or mere licensee, and where he is an invitee or where he has a right to be, as in a public street or highway. Here the allegations of the complaint, construed most favorably to the plaintiff, . . . make him out at most only a licensee. He was on private property, perhaps with the knowledge of the defendant and perhaps not.

"All the complaint alleges is that children were in the habit of playing on defendant's land to his knowledge, not that he knew plaintiff played on his land, but it can be implied from this that he permitted them to do so. But mere permission or license does not imply invitation. . . . So that at most he was only a licensee on private property. The law is well settled in this state and most of the sister states that a mere licensee on private property takes the premises as he finds them. The owner owes him no duty save to refrain from active negligence rendering the premises dangerous. . . . The same rule applies to trespassers. . . .

"Useful and not grossly negligent conditions and appliances on private property do not render the owner thereof liable to mere licensees or trespassers. To do so they must be of such a character as to constitute active negligence. The pit in question was open, obvious, and useful, and, though dangerous to children, and perhaps to adults also, it cannot be classed as a hidden trap or a concealed death dealing instrumentality."

Mr. Justice Crownhart dissented from the opinion of the supreme court, expressing an opinion that, through being situated in a thickly settled residential district and through attracting children as a playground, the unguarded pit constituted a pitfall.

SECTION 575. LIABILITY AS TO EMPLOYEES OF THIRD PARTIES

Where a contractor is engaged in doing work on mill premises, the mill company is under the same obligation to use reasonable diligence to avoid injuries to the employees of the contractor as respects the company's own employees. So holding, the Massachusetts supreme judicial court sustained an award of damages in favor of an employee of a contractor engaged in wrecking boilers on defendant's mill premises, caused by a chisel falling from a plank overhead, where it had been negligently left by an employee of the defendant under such circumstances that its fall might have been foreseen. (Heuser vs. Tileston & Hollingsworth Co., 119 N. E. 683.)

* *

The Minnesota supreme court sustained the liability of the Superior Terminal Elevator Co. for injury to a grain inspector, while walking along a path between two elevators, caused by employees of the company in prying off a car door which fell upon him. The company unsuccessfully sought to avoid liability on the ground that the injured man was guilty of contributory negligence; the court holding that under the circumstances he was not to be chargeable with knowledge that the car would be opened by prying off the door, instead of sliding it back in the usual manner. (152 N. W. 881.)

* *

The Wisconsin supreme court affirmed judgment in favor of plaintiff in the case of Georgia Casualty Co. vs. American Milling Co., 172 N. W. 148, covering reimbursement against liability under the Wisconsin workmen's compensation act for injury to the employee of a stevedore company while that company and defendant were jointly engaged in unloading a cargo of mill screenings from a vessel into defendant's elevator at Superior.

The employee was assisting other stevedores in bringing the screenings within the range of an elevator leg which had been let down into the hold of the vessel. The elevating operations were under the control of the defendant's employees, and the injured man was hurt through negligence of one of these employees in operating the machinery.

The decision of the Wisconsin court is that liability could not be avoided by

the milling company on the ground that the negligent employee and the injured man were fellow servants, within the rule that an employer is not liable for injuries caused by carelessness of a fellow servant. The court limits this rule to cases where both employees are in the service of a common employer. It is also decided that the case fell within the general legal principle that when it appears in a personal injury action that certain apparatus and its operation were under the control of defendant, and such an accident happened as could not ordinarily happen except by reason of a defect in the machinery or negligent operation of it, the occurrence of the accident itself raises an inference of negligence on the part of the defendant.

* *

The Ismert-Hincke Milling Co., Kansas City, Kansas, and the receiver of the Rock Island Railroad were granted a new trial in an action brought against them jointly by a switchman, who, while in the employ of the railway company and riding on the side of a freightcar, was struck by a post of a mill shed. (217 S. W. 294.)

Although it was found that the trial judge committed errors which nullified a verdict in plaintiff's favor, the Missouri supreme court made this important statement, which may be regarded as stating a well-established rule of law:

"If the milling company negligently maintained the post in question dangerously near the railroad track, it is also liable to plaintiff for the injury inflicted upon him thereby. It is fundamental law that the owner or occupant of land or a building, who directly or by implication invites or induces others to go thereon, or therein, owes to such persons a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils. When it arranged with the defendant receiver to do the switching in and about its mill and elevator, it knew and was bound to anticipate that it was usual and customary for brakemen and switchmen in switching cars to be upon the ladders on the sides of cars that were being moved, and hence it was its duty to not unnecessarily maintain posts or other structures in dangerous proximity to the tracks. . . .

"If it was necessary to 'have maintained the post in question so close to the track that a person could not pass it on the side of a car without being struck, and the danger therefrom was not so open and obvious to a switchman while in the discharge of his duty in the usual and customary way that by the exercise of ordinary care he would have discovered it, as the evidence tends to show, then such danger was a latent or concealed one within the meaning of the rule, and it was the duty of the milling company to have given the plaintiff warning."

The court concluded, from a review of the evidence, that plaintiff failed to make out a case of actionable negligence on the part of the milling company in maintaining a post too near a track entering one of its sheds, but that the jury might find that there was actionable negligence in failing to maintain some sort of warning to apprise plaintiff of the danger. Therefore, it seems that the jury's verdict would have stood against the milling company, excepting for the fact that the supreme court finds that the trial judge erroneously instructed the jury on the law of negligence as applied to the case.

* *

The Sperry Flour Co., Tacoma, secured reversal of a judgment obtained against it by the Alaska Pacific Steamship Co., growing out of an injury sustained by an employee of the latter company while a vessel was being moored at the mill's dock. (182 Pac. 635.)

In front of the mill and on the water front was a dolphin, consisting of a cluster of piles, used in mooring vessels. A plank extended from the shore to this dolphin for use in fastening and unfastening ships' lines. As plaintiff's vessel proceeded to defendant's dock to load flour, one of plaintiff's employees used the plank, which slipped and caused his injury.

The injured man sued both companies jointly, and recovered judgment against the steamship company alone. It thereupon sued the flour company for reimbursement, and recovered judgment. But the supreme court of Washington ordered a new trial, holding that the trial judge incorrectly instructed the jurors as to the law of the case. The following points were decided on the appeal:

A mill, or other owner of premises, is bound to keep its premises in reasonably safe condition for the use of persons who are expressly or impliedly invited to come upon those premises for the purpose of transacting business. This rule extended to the plank maintained by the mill under the circumstances above stated.

The fact that in the employee's suit against both companies the mill was exonerated from liability to him on the ground that the evidence was insufficient to show that the mill furnished the plank, did not preclude the steamship company from enforcing reimbursement from the milling company. The judgment in the first case conclusively establishes that the premises were defective, that the steamship company was liable to its employee, and that the employee was not guilty of contributory negligence.

But if the mill can show that, notwithstanding any negligence on its part contributing to the accident, the injury is also traceable to carelessness on the part of the steamship company, the latter company is not entitled to reimbursement. Hence, the trial judge improperly refused to instruct the jury that if the steamship company knew, or ought to have known, of the unsafe condition of the plank, but nevertheless permitted or directed its employee to use it, that company was guilty of such negligence as precludes it from seeking reimbursement from the mill, although the milling company was primarily negligent.

SECTION 576. AUTOMOBILE ACCIDENTS

In the case of Amley vs. Saginaw Milling Co., 161 N. W. 832, the supreme court of Michigan affirmed judgment for $1,500 against defendant on account of fatal injuries sustained by a pedestrian who was struck by an automobile which was being driven by an employee of the mill in the course of his employment.

The supreme court held that the burden was on plaintiff to show that the accident directly resulted from negligence of the driver, and that the decedent was in the exercise of due care for his own safety, but that the evidence was sufficient to sustain the jury's conclusions that there was negligence of the driver and freedom from contributory negligence on the part of decedent.

SECTION 577. ICE ON MILL PONDS

A milling company is not liable for death of a child through falling into a hole on ice which has formed on the company's mill pond, and on which the child was playing. In reaching this decision, the Minnesota supreme court reversed a judgment which had been rendered against the W. J. Jennison Co., Appleton, Minn., for death of a boy under such circumstances. (150 N. W. 235.)

The court found that this is so, regardless of the fact that dust from the mill may have obscured the hole in the ice. Doubtless plaintiff sought to apply the rule that where one maintains a condition which is attractive to children, he must use a reasonable degree of care to avoid injury to them, but the court justly declined to extend the rule far enough to make the milling company an insurer of the safety of trespassing boys.

SECTION 578. UNINSULATED ELECTRIC WIRES

The Iowa supreme court upheld a judgment in favor of a journeyman painter who was severely injured by electric shock while painting an exterior wall of a flour mill, through coming in contact with exposed wires carrying a high power voltage. Suit was brought against both the mill and the company furnishing the electricity, but proceeded to trial against the latter alone.

It was claimed that one of the partners of the milling firm warned plaintiff against possible danger in working near the wires, suggesting that he leave a space unpainted. The court decided that, although plaintiff was not subject to orders by the firm, which had awarded a painting contract to plaintiff's employer, who had independent control of the work, he was guilty of contributory negligence barring recovery for the accident if he disregarded a warning given him by any one. But the court refused to set aside the jury's verdict, deciding that conflicting testimony made it a jury question whether the accident was directly caused by plaintiff's contributory negligence or not.

The jury awarded $6,000 for the injuries sustained by plaintiff, and the trial judge reduced the award to $4,000. Considering the fact that plaintiff was very severely burned and attacked by lockjaw, and that his injuries were more or less permanent, the supreme court refused to treat the recovery as being excessive. (Harn vs. Cedar Valley Electric Co., 165 N. W. 428.)

SECTION 579. HANDLING RAILWAY CARS

The mere fact that cars spotted by a railway company on one of its sidings for loading by a shipper were in some unexplained manner released and ran downgrade, doing damage to other cars of the company, raises no presumption of negligence on the part of the shipper, so as to make him liable to the railway company for such damages, according to a decision of the Utah supreme court, announced in the case of Denver & Rio Grande Railroad Co. vs. Ashton-Whyte-Skillicorn Co., 162 Pac. 83.

In this case, the railway company un-

successfully sought to have applied the general rule of law that, although negligence may not be susceptible to direct proof in a given instance, it may be inferred when it appears that the agency causing damage was under the control of the defendant and would not have caused the damage complained of if properly handled.

The court refused to apply the principle, because it was shown that, although the defending shipper was in control of the two cars in question to the extent that one of them had already been loaded, and the brakes were in good order, the siding was used by the public generally, and that some other person may have been at fault in the release of the car on the grade.

SECTION 580. MANUFACTURER'S LIABILITY TO ULTIMATE CONSUMER

A manufacturer of food products must exercise the "highest degree of care" in the preparation, handling and packing of them to avoid possible injury to consumers through any unwholesome condition of the goods, held the Iowa supreme court in the case of Davis vs. Van Camp Packing Co., 176 N. W. 383.

* *

Under a decision of the Tennessee supreme court a manufacturer of food products owes a high duty to the public to use care to avoid placing unwholesome goods on the market, but, to entitle an ultimate consumer to recover damages resulting from use of unfit products, there must be a showing of carelessness on the part of the manufacturer or dealer sought to be held responsible. On the other hand, if negligence be established, a manufacturer cannot evade liability on the ground that he sold the particular goods to a middleman and had no contractual relations with the complaining consumer.

The Tennessee court cited cases where manufacturers and dealers had been held responsible for negligence in preparing food, and for furnishing unwholesome meat and other food products.

In the case at bar, plaintiff based his suit on the finding of a decomposed mouse in a bottle of beverage, and recovery was permitted on the theory of negligent use of the bottle by the manufacturer without inspection. The same principle would apply, of course, to the finding of an unwholesome substance in a loaf of bread or a sack of flour. But the Tennessee court emphasized the point that negligence is an indispensable element of liability. (179 S. W. 155.)

* *

The Arkansas supreme court held that there is no such contractual relationship between the manufacturer and a buyer from a retailer, to whom the manufacturer has sold, as will support a theory that the manufacturer impliedly warrants to the ultimate consumer that the food is sound. But it was decided that, where an unwholesome condition was found to have arisen through negligence of the manufacturer, he may be held liable, on the theory of wrongful act distinguishable from breach of contract. (Drury vs. Armour & Co., 216 S. W. 40.)

As supporting this view, the decision cited similar decisions reached by the highest courts of Illinois, Kansas, New Jersey, Michigan, Wisconsin and Massachusetts.

A minority of the Arkansas court dissented from the part of the opinion which held that there was no implied warranty of the wholesomeness of food, so far as relations between manufacturer and the ultimate consumer are concerned. The view adopted by the two dissenting judges was as follows:

"Canned goods and sealed packages prepared by the manufacturer for use of the consumer are in such common and universal use at the present time that we may judicially know that the contents are sealed up, not to be opened until they are used, and they are not then susceptible to any practical test except the one of eating. When the manufacturer puts such goods upon the market for sale and consumption, he in effect represents to each purchaser that the contents of the can or sealed package are sound and fit for food. . . .

"It is obvious that in cases of this kind the retailer is generally free from fault, and sound policy, with due regard to the public good, demands that when an article of food or medicine is prepared by a manufacturer in sealed packages and thrown into the current of trade on the faith of the public that it is what the manufacturer represents it to be, there is an implied warranty that it is sound and fit for the purpose sold, and that this covenant runs with the property through any number of hands, and inures to the benefit of the ultimate consumer."

The importance of the difference in views adopted by the majority and the minority of the Arkansas bench lies in the fact that, if the minority view were adopted, a manufacturer would be held liable for illness resulting from unwhole-

someness of food, regardless of negligence or other fault, whereas the majority view places the manufacturer in the same general light as the motorist, who, although under no contractual obligation to refrain from running a pedestrian down at a street intersection, is legally bound to use a reasonable degree of care to avoid doing so.

* *

The Massachusetts supreme judicial court set aside a verdict in favor of plaintiff in the suit of Tompkins vs. Quaker Oats Co., 131 N. E. 456. Plaintiff sued to recover damages for the death of poultry attributed to negligent mixing of feed bought from a dealer, but manufactured by defendant; it being claimed that the feed was dangerous because excessive quantities of salt were present. The court says:

"It is a long-established general rule that the manufacturer of an article is not liable to those who have no contractual relations with him for injuries resulting from negligence in its manufacture. This has been based on the various grounds of the absence of a legal duty to the plaintiff to use care in making the article, the break in the chain of legal causation, and the multiplicity of suits thought likely to result if the action were allowed. . . . This general rule is subject to certain well-settled qualifications or exceptions. One, which recognizes the liability to third persons on grounds of negligence in the preparation of food for human consumption, is not applicable here, and need not be discussed. . . . Another established exception recognizes the existence of a duty of care in favor of strangers to the contract, where the product is inherently or commonly recognized as dangerous to human life or health; such as poisonous drugs and explosives. . . . And there is a tendency in certain courts to extend this doctrine to cases where an article not inherently dangerous becomes so by reason of negligent preparation. . . .

"In the present case there was no evidence that Schumacher feed, in its ordinary state, was harmful to poultry. The testimony was all to the contrary, including that of the plaintiff, who had used it for two or three years before his loss early in 1918.

"The complaint against the feed . . . is that salt, although commonly used as a desirable ingredient in commercial poultry feeds, was present in too large quantity; that this excess quantity was due to negligence in the process of mixing, and that it was responsible for the death of the poultry."

The supreme judicial court held that even assuming that a manufacturer might be held liable in a case like this—a point not decided—the evidence failed to show negligence.

Plaintiff then fell back on a claim that he was entitled to recover on the theory of defendant's misrepresentation of the feed in circulars, etc., which stated that the feed was "always uniform in quality," "absolutely safe to feed," etc. On this phase of the case, the opinion mentioned that the fact that plaintiff sued on a theory of negligence, and that his declaration did not set forth the essential averments of actionable misrepresentation, would have precluded trial of an issue of misrepresentation had defendant's counsel raised the point; but, treating the issue as in the case, because objection to its consideration had been waived, the court held that verdict in plaintiff's favor should be set aside because of conflicting instructions given by the trial judge to the jurors.

See, also, section 143.

SECTION 581. PRESUMPTION OF NEGLIGENCE

A pedestrian walking along an English street was injured through the falling upon him of a barrel of flour, which escaped through a doorway of defendant's warehouse abutting upon a public sidewalk. He sued for damages, and, being unable to prove the precise cause of the barrel's rolling, it was objected by the defendant that there could be no recovery by plaintiff, under the rule of law, applicable on both sides of the Atlantic, that one who bases a cause of action on negligence has the burden of proving that defendant's carelessness was the proximate cause of the injury complained of.

But the English court held, as would no doubt be held by almost any American tribunal, that the case fell within the legal doctrine of res ipsa loquitur. In other words, the accident spoke for itself, and, as flour barrels are not in the habit of precipitating themselves upon passers-by if they have been properly stationed, the law is no slower than common-sense in inferring that careless handling was the cause of the accident. Therefore, plaintiff made out a case prima facie entitling him to recover by proving that he was injured through the barrel falling upon him as he passed defendant's warehouse door.

But this presumption of negligence is not conclusive. It is open to defendant

to rebut it by proof if he can. For instance, in the English case the defendant might have relieved itself from liability by proving that a sheriff was at the time of the accident levying upon the flour, and that the latter's deputies were the men whose carelessness caused the injury, or by proving any other circumstance showing that no negligent act was committed by defendant or his employees.

But, like John Alden, accidents do not always speak for themselves. The res ipsa loquitur rule requires that there must be proof, not only that the thing causing the injury was under defendant's control, but also that the accident occurred under such circumstances that it could not have been expected in the ordinary course of things had due care been exercised.

SECTION 582. NEGLIGENT WEIGHING BY THIRD PARTY

The decision of the New York court of appeals in the case of Glanzer et al. vs. Shepard et al., 135 N. E. 275, shows that the case involved a much broader and important principle than seems to have been recognized by three lower courts which successively passed on the suit.

Plaintiffs bought 905 bags of beans from Bech, Van Siclen & Co., to be paid for on weight sheets certified by public weighers. Defendants, public weighers, were employed by the seller to do the weighing, being informed that the beans were sold to plaintiffs, and directed to furnish a copy of the weight certificate to plaintiffs. This was done, and plaintiffs settled with the seller on the basis of the weights reported by defendants. Later it was discovered that the beans actually weighed 11,854 lbs less than certified, and plaintiffs sued defendants for reimbursement against the overpayment made to the seller on the faith of defendants' weighing.

The trial judge ruled that plaintiffs were entitled to recover. On appeal the appellate term of the New York supreme court held that, because there was no contract relationship between plaintiffs and defendants, there was no cause of action (182 N. Y. Supp. 178). On further appeal, the appellate division of the supreme court decided that the trial judge was right and the appellate term wrong (186 N. Y. Supp. 88). The case then went to the highest court of the state, the court of appeals, and that tribunal upholds the appellate division. What the court of appeals said shows that a broad principle was involved, and the following opinion handed down in the case takes an important place in the case law of the country on the general subject of liability in commercial transactions where there is no contract relationship:

"We think the law imposes a duty toward buyer as well as seller in the situation here disclosed. The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. Bech, Van Siclen & Co. ordered, but Glanzer Brothers were to use. The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed. We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law. . . .

"There is nothing new here in principle. If there is novelty, it is in the instance only. One who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make the payment. . . . The most common examples of such a duty are cases where action is directed toward the person of another or his property. . . . A like principle applies, however, where action is directed toward the governance of conduct. The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor. There are decisions that a lawyer who supplies a certificate of title to a client is not answerable to a third person whom he did not mean to serve. . . .

"No such immunity, it has been held, protects the searcher of a title who, preparing an abstract at the order of a client, delivers it to another to induce action on the faith of it. . . . Constantly the bounds of duty are enlarged by knowledge of a prospective use. . . . We must view the act in its setting, which will include the implications and

the promptings of usage and fair dealing. The casual response, made in mere friendliness or courtesy, . . . may not stand on the same plane, when we come to consider who is to assume the risk of negligence or error, as the deliberate certificate, indisputably an 'act in the law' . . . intended to sway conduct.

"Here the defendants are held, not merely for careless words, . . . but for the careless performance of a service—the act of weighing—which happens to have found in the words of a certificate its culmination and its summary. . . . The line of separation between these diverse liabilities is difficult to draw. It does not lose, for that reason, its correspondence with realities. Life has relations not capable always of division into inflexible compartments. The molds expand and shrink.

"We state the defendants' obligation, therefore, in terms, not of contract merely, but of duty. Other forms of statement are possible. They involve, at most, a change of emphasis. . . . If we fix our gaze upon that aspect, we shall stress the element of contract, and treat the defendants' promise as embracing the rendition of a service which, though ordered and paid for by one, was either wholly or in part for the benefit of another. . . . We may find analogies again in the decisions which treat the sender of a telegram as the agent of the recipient. . . .

"The other methods of approach arrive at the same goal, though the paths may seem at time to be artificial or circuitous. We have preferred to reach the goal more simply. The defendants, acting, not casually nor as mere servants, but in the pursuit of an independent calling, weighed and certified at the order of one with the very end and aim of shaping the conduct of another. Diligence was owing, not only to him who ordered, but to him also who relied."

CHAPTER LXV

VARIOUS ACTIONABLE WRONGS*

SECTION 583. INTERFERING WITH CONTRACTS

WHERE conscience proves insufficient to deter one from inducing another to break a contract with a third person, it will be worth knowing that the law makes such interference an actionable wrong. What the Alabama supreme court ruled as law in the case of Alcazar Amusement Co. vs. Mudd & Colley Amusement Co., 86 So. 209, would apply to a case where one mill might attempt to induce a valuable employee of another mill to break an unexpired contract of service and go over to the first mill, or to a case where breach of any valid contract for a sale of flour might be induced by a third person:

"A third party who, with knowledge of the existence of a valid contract between others, interferes with its performance or consciously contributes to the impairment of the rights of a party thereto to avail of its obligations (especially wherefrom a selfish advantage or benefit may accrue to such third party), even though by means of a subsequent engagement between such third party and one of the contracting parties with respect to the subject matter of the contract to which such third party is a stranger, commits a tort [wrong] and is liable for the consummated wrong, independent of a right of action against the other party to the contract, if the remedy at law [suit for damages] is adequate and complete, and the threatened or impending commission of such a tort may be enjoined by the party whose enjoyment of existing contractual rights is thus endangered; the application of the doctrine not being restricted to contracts for personal services."

* *

Although it is the policy of the law to foster competition in business enterprises, the courts frequently have occasion to grant redress against wrongful and malicious measures taken to injure the business of a competitor. The Minnesota supreme court has decided that no person has the right maliciously to injure or destroy the business of another by acts which serve no legitimate purpose of his own. It is held that to interfere with a profitable sale made by a competitor, by inducing the purchaser to break the contract, amounts to an actionable wrong. (177 N. W. 133.)

SECTION 584. CONSPIRACIES TO INJURE BUSINESS

A decision of the Kentucky court of appeals draws attention to the well-settled but not generally understood principle of law that, although one, acting alone, may withhold his patronage from another, whether for good cause or maliciously, it is actionable for him to conspire with others to injure the business of another. The decision was handed down in the case of Farmers' Tobacco Warehouse Co. vs. Leech, 188 S. W. 886, in which plaintiff sued for damages, asserting such a conspiracy.

In reversing judgment for plaintiff, the court found that defendant, in ceasing to attend sales conducted by plaintiff, did so because of dislike for plaintiff's floor manager, and not through any desire to injure plaintiff. Defendant's right to agree not to attend plaintiff's sales so long as an offensive manager should be in charge was recognized. On the broader question, the court said:

"Any person or any number of persons has the right at any time, either singly or in concert, to suspend for a time or abandon entirely their business relations with any other person, whether the suspension or abandonment is for good cause or is the result of caprice, prejudice, or malice, unless the suspension or abandonment of such relations is pursuant to a conspiracy entered into for the purpose of injuring or destroying the business of the other party, and it has been injured or destroyed by the acts or conduct of the conspirators, or some of them."

* *

The actionable nature of conspiracies to injure a milling or other business was

*Other actionable wrongs are dealt with in other chapters.

indicated in the decision of the West Virginia supreme court of appeals in the case of Swartz et al. vs. Kay et al., 109 S. E. 822. Plaintiffs owned and operated a flour mill in Jackson County, West Virginia, known as the Mount Alto Mills. Their claim was that defendants maliciously conspired to prevent persons from dealing at their mill, by falsely accusing plaintiffs as being disloyal to the United States in the World War, then in progress.

A jury found in favor of plaintiffs, assessing their damages at $600. Defendants appealed to the supreme court of appeals, which affirmed the judgment, holding that the evidence exonerated plaintiffs on the charges of disloyalty. Taking up the first question involved on the appeal, the higher court said:

"The first error alleged and relied on for reversal is that the court, over defendants' objection, admitted certain evidence characterized as hearsay, and for that reason incompetent. This characterization is applied to two classes of testimony: First, the declarations of some nine former customers, named in the bill of particulars called for by defendants and given in evidence by plaintiffs and others, as to the reasons assigned by them for withdrawing their custom from plaintiffs' mill, to the effect that plaintiffs were pro-German, disloyal to the United States in the war with Germany, and that they were putting poison in their flour and ground up glass in their meal; and that they were not, as they represented themselves to be, engaged in the manufacture of flour and feed for the United States government.

"Second, the declarations of sundry witnesses, merchants in the county and former customers of plaintiffs, as to what customers of theirs gave as reasons for refusing to buy from them flour and feed manufactured by plaintiffs at their said mills, to the effect that one or more of the defendants had told them that plaintiffs were pro-Germans and disloyal citizens of the United States, and were putting poison and broken up glass in their flour and meal, and other false reports derogatory to their character, and that they ought to be shot, etc; and that they would not buy Liberty Bonds or war savings stamps, or contribute to the Red Cross society; and that they had tried to wreck a train.

"An argument made by counsel for defendants applicable to both these classes of testimony is that they amounted only to hearsay, and that the declarations were not made in the presence of defendants, wherefore they are incompetent. One of the principal facts which the plaintiffs were called upon to establish was that the persons named in their bill of particulars actually ceased to trade with them and with the merchants who bought and sold their products, and the reasons they gave for doing so. If they ceased for causes in no way connected with defendants or their false reports about plaintiffs and their business, of course defendants would in no way be responsible for damages for the loss of their trade and business. . . .

"In cases of this kind the rule seems to be that declarations of customers or workmen quitting trade or employment are competent to prove the facts and motive for this conduct, not the prior fact that defendants were responsible for the false reports put in circulation. The fact of defendants' guilt, if true, may be shown by other competent testimony."

The court then proceeded to sum up the evidence, and found that it amply supported the jury's verdict in plaintiffs' favor. On this question the opinion said:

"As to the accusation of pro-Germanism, disloyalty to the government, and failure to buy Liberty Bonds and war savings stamps, and to support the Red Cross society, the fact is that plaintiffs were liberal purchasers of bonds and savings stamps, and did support in the same way the Red Cross, more liberally than most, if not all, their accusers; that they were loyal to the government in the operation of their mill and the distribution of their products, while some of the defendants were disposed to induce plaintiffs to violate the law, and then thereby incurred their displeasure. We cannot go into the details of the evidence, but it satisfies us that the findings of the jury were more than justified, and that a much larger verdict would have been justified by the evidence.

"In a case of this character the gist of the action is the injury done plaintiffs, not the conspiracy, and if defendants or any of them be shown to have done the acts complained of, the verdict and judgment may be against such or all of them as are proved to have done or contributed to the injury; if a conspiracy to do the injury is shown, the effect is to aggravate the damages and to make what was done by one or more of the conspirators the act of all, and to warrant a verdict and judgment against all. . . .

"Because of the fact that it is often difficult to establish a conspiracy by direct evidence, the courts are quite liberal

in the admission of evidence, and will allow the fact of conspiracy to be made out by the declared acts and statements of the individual conspirators; and the fact that several persons have similar or identical grounds of complaint against another, and by their acts and utterances endeavor to injure or destroy the business of another, each being aware of the feelings and doings of the other and approving the result accomplished, often affords evidence of a confederation or common purpose sufficient to sustain the verdict. . . .

"In the first place we find nothing in the evidence warranting the theory of plaintiffs' pro-Germanism or disloyalty. In the second place, their supposed pro-Germanism or disloyalty, if proven, would not have justified the false representations proven, that plaintiffs were engaged in introducing into their flour and meal ground glass and poison. These instructions were binding ones, and would have told the jury to find for defendants the facts assumed therein. Even after defendants were advised by the representative of the United States that their accusations were unfounded, the evidence shows that they did not cease from spreading the false reports.

"The tenth instruction [requested by defendants to be given to the jury] was properly rejected because it was predicated on the theory that customers of plaintiffs may have quit dealing with them without any reason and not by reason of anything said or done by defendants, or either of them, and would have told them, if they so found, they should find for defendants. True, one has the right to withdraw patronage from another's business without any cause, but he has no right to conspire with others to destroy his business, by circulating false reports concerning the same, and thereby to maliciously and wrongfully injure and damage him."

SECTION 585. LIBEL AND SLANDER, IN GENERAL

Then will the summer of the damage-suit lawyer's joy be made gloomy winter, when correspondents learn to write letters only when their ill-will toward persons mentioned therein is below the sizzling point. Thousands upon thousands of court decisions attest the fact that letters are common carriers of defamation. Full many a letter writer has repented haste in committing to writing views concerning some disfavored person.

The main test whether a passage in a letter is libelous is whether it tends maliciously to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. Here are some of the most common imputations which have been made bases of successful libel suits: Implying want of veracity, commission of dishonest or fraudulent acts, unwillingness or refusal to pay just bills, commission of libel or slander, lack of normal mental or intellectual faculties, the doing of rascally or cruel acts, engaging in depraved or immoral practices, betrayal of trust or confidence, and commission of crime.

Any statement that tends to injure another in his social or business relationships should be made with extreme caution.

"The law carefully guards the credit of merchants, traders and business men, and oral or written words imputing to them insolvency, bankruptcy, or want of credit are actionable per se [that is, without proof of actual injury, because the law presumes that injury follows as a natural consequence], the rule applying to any one to whom credit is important in the prosecution of his business. And it is held that where the words are such as to affect a man's credit, then it is neither necessary to aver nor to prove that they were spoken in reference to the particular trade or business which plaintiff was pursuing. . . . The words to be actionable per se must in their common and ordinary meaning necessarily impute insolvency or want of credit. Thus it is not actionable [per se] to say of a merchant that he has been sued, that judgment has been recovered against him, that he has sold or mortgaged his property, or that he has refused to pay a certain promissory note.

"Language which imputes to one fraud or want of integrity in his business is actionable per se; or, as the rule has been otherwise well expressed, any charge of dishonesty against an individual, in connection with his business, whereby his character in such business may be injuriously affected, is actionable. So a charge of adulteration of goods, of selling a substitute for the genuine article, or of selling diseased meats is actionable. A statement merely in disparagement of the property or goods of a merchant or other man of business is not actionable without proof of special damages, although if defendant goes beyond this and his statement touches the character or reputation of plaintiff in his business, the charge is actionable.

"It is actionable to charge a storekeep-

er with using false weights and measures in his business. . . .

"To say of one with reference to his trade or business that he is a rogue, a swindler, a cheat, a villain, a rascal, or a scoundrel is actionable.

"Words whether spoken or written imputing to a person want of knowledge, skill, or capacity to conduct his business are actionable per se." (25 Cyc. 339-344.)

As a general rule civil liability as for libel is avoided by proving the truth of the statement sued on, but in some states defendant must further show that it was made with good motive and for justifiable ends, and this additional proof must ordinarily be made in a criminal prosecution for libel.

Often it has been decided by the courts that a corporation is not liable for damages resulting from the speaking of false, malicious, or defamatory words by one of its agents, even where in uttering such words the speaker was acting for the benefit of the corporation and within the scope of the duties of his agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question.

SECTION 586. DEFAMATION OF COMPETITORS

Although libel or slander usually involves a statement which exposes the aggrieved party to contempt or ridicule, a decision of the New York supreme court for Monroe County shows that any false statement which naturally prejudices a business competitor may be actionable.

In this case—Edwards X-Ray Co. vs. Ritter Dental Mfg. Co., 210 N. Y. Supp. 299—it was decided that it constitutes slander to state falsely that a competitor is going out of business or a certain line of business, and that special damages need not be proved before there may be recovery. Damages will be presumed to ensue. In the course of its opinion, the court said:

"A corporation may criticize the manufactured products of a competitor so long as it does not directly impeach the corporation's 'integrity, knowledge, skill, diligence, or credit,' without being liable for damages, in the absence of proof of special damages. . . . But it cannot falsely assail its business and make untrue statements which would alienate its trade or impair its financial standing and the public confidence in its integrity and stability, without responding to the damages which are presumed in law to follow such action."

SECTION 587. DEFAMING ONE'S CREDIT

In the case of R. J. Todd Co. vs. Bradstreet Co. (148 N. E. 369), decided by the Massachusetts supreme judicial court, plaintiff failed to establish a damage claim on account of a rating given it by defendant. It was alleged that defendant had rated plaintiff as slow in meeting business obligations and as undeserving of credit.

The opinion recognizes that a statement that one is slow in paying his bills and undeserving of credit, if false, is libelous or slanderous. But the court holds that where three grades of credit were given in defendant's rating books, with an explanation that these grades were relative, and based on information in defendant's office, assignment of the third grade to plaintiff could not be interpreted as indicating that plaintiff had poor credit and was not to be trusted. The court observed that "the mere fact of placing against a business concern that grade of credit, even though 'third' instead of 'first,' shows some degree of credit rather than it is undeserving of any credit."

SECTION 588. ACCUSING OF CRIME

An interesting decision handed down by the Texas court of appeals in the case of Koehler vs. Sircovich, 269 S. W. 812, shows legal limits to which an employer may go in accusing an employee of theft, the court recognizing the right of the employer, if he honestly believes that the employee has taken money, to question the latter in regard to the matter and to make to him and all others having any interest in the affair such statements as the employer reasonably may believe to be true. "But this right," adds the court, "cannot be extended into a license publicly and falsely to brand one as a thief, even if the accuser may not be actuated by malice in making the charge. It would seem upon principle and authority that the right to make such false statements, when made in good faith, is so restricted that they may only be made to those directly interested in their subject matter, and to whom the accuser is under a duty to communicate facts which he believes to be true."

SECTION 589. FALSE STATEMENTS IN GOOD FAITH

Notwithstanding falsity of the statement, the writer is not liable if it was made in good faith, without malice, and

under reasonably justifiable circumstances, as where one merchant requests information from another concerning a customer, employee or other third person, or where the letter is written for some legitimate purpose growing out of the interest of the writer or of some common interest of the writer and the addressee. But this qualified privilege cannot be made a cloak for malicious defamation.

* *

Plaintiff, a Maryland grain dealer, shipped corn to a Baltimore customer who later made claim against the delivering railroad on the ground that the corn was in bad condition on its arrival. In the course of investigation of the claim, defendant, agent of the initial carrier at the shipping point, wrote a letter to the auditor of claims for the delivering carrier, in which he stated that he understood the corn "was rotten before it was loaded in car here, as it had been stored away in a tight place without much ventilation and was wet when stored, and when hauled out to car was in a moldy condition; shipper tried to sell it to farmers here at $1 per bu, and could not sell it at any price on account of being so badly damaged," etc.

Claiming that this letter constituted actionable libel, plaintiff sued for damages. He was nonsuited, and appealed to the Maryland court of appeals, which awarded a new trial on the ground that the trial judge misinstructed the jury as to the law of the case. (114 Atl. 734.)

There is a fundamental principle in the law of libel and slander that malice will be presumed from proof that defendant has defamed plaintiff. But as above noted there is an important exception to that rule, and it applies where one makes a false statement, derogatory to another, in good faith and in the exercise of a duty. Such an instance occurs when a mill manager asks a foreman for information concerning the conduct of an employee under the control of the foreman. Statements made in such cases are treated by the law as being made under "qualified privilege." The privilege will not protect against liability for actual malice, but it will protect one who, in good faith and in the course of duty (not necessarily a legal duty), happens to defame another.

Reviewing the evidence, the court of appeals found that it "showed that the corn was not in the condition" that defendant represented it to be in his letter to the auditor of claims; that in relying on a claim that some one had told him that the corn was in bad condition as a basis for the defamation, defendant should have proved who his informant was and produced him as a witness, if possible. It was further found that malice might be inferred from the fact that defendant, in addition to being station agent, was a competitor of plaintiff in grain buying and had tried to buy the corn referred to. Considering all the circumstances, the higher court ruled that the jury should have been left free to find that the letter complained of was not privileged as having been written in good faith. The court of appeals said:

"Under the authorities the case should have been submitted to the jury. While it is a question for the court whether a communication, if made in good faith, without malice, and in the belief that it was true, is privileged, if there be evidence tending to show the lack of good faith and actual malice, the plaintiff has the right to have the jury pass on the facts."

* *

A Minnesota bank to whom request was made for information concerning the integrity, financial responsibility, etc., of a local grain dealer replied that he was "financially weak," and "in the habit of borrowing from farmers whenever he can get it and all he can get," that his credit has been "shut off" at a bank; that he had "little or no exempt property" and was "a kicker and a political crank."

Sustaining verdict for the grain dealer in the sum of $500 on the ground that the report was libelous, the Minnesota supreme court held that a false statement that a business man was "financially weak" was libelous as imputing to him doubtful credit and responsibility; and that it was actionable falsely to accuse him of an improvident habit of borrowing or of having been refused credit.

The court, however, adhered to the well-settled principle that one who was requested to give information as to the responsibility of another was not liable as for libel in making a prejudicial untrue statement, unless the statement was actuated by malice. (Froslee vs. Lund's State Bank of Vining, 155 N. W. 619.)

SECTION 590. PUBLICATION OF LIBEL

Since a libel presupposes at least three different persons, the writer, the person defamed and some third person to whom the defamation was published, it follows that, as a general rule, the mere writing of a letter to the person defamed does not amount to libel. But where the writ-

er has good reason to suppose that the objectionable letter will come under the eye of a third person, e. g., the addressee's clerk, secretary or associate, there is a sufficient publication on the letter coming to the attention of such third person. However, an unauthorized opening of a letter by a third person is not a publication to him for which the writer can be held responsible. It has often perplexed the courts to determine whether the dictation of a letter to the writer's stenographer is a publication within the libel law. The weight of judicial authority seems to be to the effect that it is, especially where the stenographer is charged with transmitting the letter after it has been written and signed. Plainly the reading of the contents of such a letter by the writer to a third person is a publication.

* *

One of the essential elements of libel or slander being the uttering or publishing of defamatory words in the presence of a third person, an interesting question was raised before the Mississippi supreme court as to whether a stenographer's necessary examination of a business letter dictated to her constitutes such "publication" as will support an action for libel at the instance of the addressee of the letter. The court answered the question in the negative, saying:

"It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated. If the stenographer should, in violation of his or her duties, disclose such statement, there might be a liability because of the negligence of the person in employing an improper person as stenographer." (Fischel & Kaufman vs. Cartwright-Caps Co., 74 So. 278.)

SECTION 591. MALICIOUS PROSECUTION

An autocratic station agent overreached himself far enough to subject his railway company to liability in damages for malicious prosecution instituted against a consignee of a carload of grain, according to the Arkansas supreme court's decision in the case of Gage vs. Chicago, Rock Island & Pacific Railway Co., 206 S. W. 141.

Plaintiff was the consignee of an interstate shipment which arrived at its destination at an Arkansas point. He tendered to the station agent a check for the amount of the freight bill, but was told that cash must be paid. Plaintiff said that he would go to the bank and get the money, but that in the meantime he would have his men unload the car, to which the agent made no objection. Accordingly, the seal on the car was broken and the shipment unloaded while plaintiff was cashing a check.

When he returned to the station it was found that a mistake had been made in the freight bill, and that the amount due was $100 more than that stated therein. Plaintiff declined to pay this extra $100, and, his men having unloaded the grain, the station agent swore out a warrant against plaintiff as for violating the federal statute which penalizes wrongful breaking of car seals on interstate shipments. The prosecution was dismissed on plaintiff paying the freight charges in full.

He then brought suit against the railway company, on the ground that he had been maliciously prosecuted, and the Arkansas supreme court has affirmed judgment in his favor, holding that the agent acted without probable cause for instigating plaintiff's arrest and that the transaction was sufficiently related to the scope of his employment to make his employer, the railway company, liable.

SECTION 592. NO RECOVERY AGAINST JOINT WRONGDOER

The rule that where two persons violate a law one cannot make the violation the basis of civil action against the other was applied by the Oklahoma supreme court in a suit brought by a former railway station agent against a milling company (221 Pac. 1029).

The petition, which was held by the court to fail to state a cause of action, averred that the mill's representatives induced plaintiff, as station agent, to issue a bill of lading for a car of corn which had not been loaded as represented, resulting in his being discharged. Because the plaintiff had no right to issue the document without first ascertaining that the car had been loaded and was in the railroad yards, it was held that his discharge must be directly charged to his breach of duty in this regard. The court said:

"The rule is well settled that, if a party suffers injury while violating a public law, the other party being also a transgressor, he cannot recover for the injury if the unlawful act was the cause of the injury."

CHAPTER LXVI

DAMAGES*

SECTION 593. NATURE AND MEASURE OF RECOVERY IN GENERAL

"DAMAGES" comprehend the glue that mends a heart broken through being dropped at the marriage altar, the anæsthetic that makes a man insensible to pain when a wealthy man steals his spouse away, the handkerchief that dries the tears of bereaved relatives when an undertaker boggles funeral arrangements. These examples distinguish cases in which money judgments cannot really remedy wrongs from those in which they can. It is with the latter class that this chapter is to deal, with special reference to controversies arising in the milling industry.

When legal liability for damages is fixed, it still remains to determine the amount that is to be awarded, and thousands of court decisions attest the difficulties judges have met in applying fair and proper measures of recovery. John Smith has been libeled, or his goods have been lost or destroyed through the fault of another, or he has lost the benefits of a contract of sale or of purchase through repudiation of the agreement by the other party, or he has sustained personal injury. How much money is he entitled to? It is this question of measure of damages that is here taken as the specific basis of discussion.

The end usually aimed at by the courts is merely to compensate one person for loss sustained through fault of another. The principal exception to this rule applies when an award is made to cover a wrong willfully, wantonly or maliciously inflicted; then punitive or exemplary damages may be assessed by way of special punishment and of example to others, in case of injury to person or property, and certain other instances.

When breach of a contract, commission of a negligent act or other wrong, resulting in injury, is established, the aggrieved party is entitled to at least nominal damages, without proof as to the actual extent of his loss. But before a substantial sum may be awarded in his favor, usually he must prove some adequate basis for it.

* *

One of the principal limitations on the right to recover damages is that the injury or loss complained against must have a direct and natural consequence of the defendant's wrongful act; there must be causal connection between the wrong and the injury.

For example, the Georgia supreme court decided that a shipper of flour, or other goods, to his own order must, as against a customer on whom draft was drawn with bill of lading attached, bear loss of the shipment, caused by fire while the goods remained undelivered at the destination, although the loss would not have occurred except for the customer's breach of contract in refusing to take up the draft and accept delivery of the goods. (Commander Mills Co. vs. Schafer, 85 S. E. 1036.)

In such case, the natural consequence of the buyer's rejection of delivery was possible loss to the seller in making a resale to some one else at a lower price, and not loss of the goods by fire or theft while remaining in the carrier's hands, which must be charged against the fire or theft cause.

* *

One aggrieved by another's breach of contract must do all that can reasonably be done to minimize the resulting loss. It is the foundation of the rule that the general measure of damages for breach of contract to sell commodities, and especially staple goods like flour, is the excess of the market value of the goods at the agreed time and place for delivery above the contract price; in other words, the increased cost of making a substitute purchase. In nearly every such case the market had advanced over the agreed price, or the buyer would not be complaining.

* *

Broadly stated, damages for libel or slander are to be assessed with regard to

*See the index for a reference to the law of damages as applied to specific wrongs, etc.

injury to reputation, socially or in a business way, business losses, humiliation, etc., plus exemplary damages in the case of malicious defamation.

In personal injury cases, the usual elements of recoverable damage are physical and mental suffering, past, present and future, loss of time, impairment of earning capacity, and expenses, so far as such losses are direct and natural consequences of the injury complained of.

SECTION 594. SPECIAL DAMAGES

Breaking of a shaft in an English mill about 70 years ago gave rise to the since famous case of Hadley et al vs. Baxendale, tried first at Gloucester and then, on appeal in 1854, before the court of exchequer. 23 Law Journal (N.S.) 179.

The decision of the higher court firmly established the propositions of law that damages recoverable for breach of a contract are limited to such as naturally ensued from the breach and were also within the contemplation of both parties when the contract was entered into; and that special damages not mutually contemplated are not recoverable.

Plaintiffs, owners of a steam grist mill, sued defendant, a carrier, for delay in delivering a broken shaft to an engineer as a model for a new one. It was established that there was an unreasonable delay, and the lawsuit turned on the question as to whether profits lost by plaintiffs through their mill remaining idle while awaiting the new shaft were recoverable as an element of damage.

One of the judges said, in the course of the attorneys' arguments: "In a contract to build a mill, the builder knows that a delay on his part will result in the loss of business; but a carrier contracting to convey a shaft or wheel does not estimate in his mind the consequential damages by the loss of trade arising from the loss or damage of the article. Here the nondelivery of a broken shaft occasions delay in making a new shaft, and that causes loss of business."

In the opinion disposing of the appeal, it is said: "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated.

"On the other hand if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

"Had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.

"It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But, as in such cases both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated, as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

"Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiff to the defendant at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?

"Suppose the plaintiff had another shaft in his possession put up or putting up at the time, and that he only wished

to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then also the same results will follow.

"Here it is true that the shaft was actually sent back to serve as a model for a new one, that the want of a new one was the only cause of the stoppage of the mill, that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not in all probability have occurred, and these special circumstances were never communicated by the plaintiff to the defendant.

"It follows, therefore, that the loss of profit here cannot reasonably be considered such a consequence of breach of contract as could have been fairly and reasonably contemplated by both these parties when they made this contract; for such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendant."

* *

The same rule was followed in the decision of the North Carolina supreme court in the case of Sharpe vs. Southern Railway Co., 41 S. E. 799.

Plaintiff sued defendant carrier for negligent delay in delivery of mill machinery repairs. The injury sustained was alleged to have resulted from plaintiff's inability to operate his flouring mill for the want of a cogwheel, and some cogs which he had ordered to be sent to him from a factory in Pennsylvania, and which were negligently delayed in their delivery by the defendant company.

His mill had been in successful operation, but the cogwheel and some cogs broke, and he did not have others to supply their place, and could get such as he needed, only from the factory. By reason of the alleged negligence of defendant the mill was stopped from work a month or more, causing a loss to plaintiff on account of expenses incurred in trying to get his machinery, idleness of his mill, expense of keeping his laborers, etc.

The trial court permitted plaintiff to show what profits were lost while the mill was idle, but the supreme court held this was error, saying:

"Profits become a measure of damages only when they were within the contemplation of the contracting parties and the data of estimation so definite and certain that they can be ascertained reasonably by calculation; in which case the party in fault must have had notice, either of the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance.

"It is not alleged in the complaint, nor shown by the proof, that plaintiff lost any definite and certain profit by the stopping of the mill; nor that the contract was such as to inform defendant that any loss of special profit would ensue to plaintiff by its breach in negligently delaying the shipment and delivery of the machinery, cogwheel and cogs. . . .

"What the profits would have been during that interim would have depended upon the quantity and quality of grain brought to it; regularity with which it was brought; convenience and caprice of the patrons; price of the flour; opportunity of selling and collecting the price for same, and other contingencies, all of which were uncertain, conditional, and indeterminate, and failed to furnish data upon which a reasonably accurate estimate might be made.

"The facts in this case are very similar to those in Foard vs. Railroad Co., 53 N. C. 235, 78 Am. Dec. 277, where a part of the machinery, a steam pipe, was negligently delayed by the railroad company, on account of which the mill was left idle for some length of time. There the court held that the profits which the mill would have made would be too vague, indeterminate and uncertain to be correctly estimated; and held the measure of damages to be the legal interest on the capital invested, expenses incurred in endeavoring to get the delayed machinery, of unemployed employees and such other damages as were the direct and necessary result of defendant's negligence, to which rule we still adhere."

SECTION 595. UNCERTAIN AND CONJECTURAL LOSSES

Awards as for loss of profits sustained through suspension of business caused by another's breach of contract or wrongful act will not be made by the courts where the fact of actual loss or the amount thereof is left to mere guesswork or conjecture, but such loss will be indemnified against when established to reasonable certainty.

This point is illustrated by the decision of the Minnesota supreme court in the case of Cargill, et al., vs. Thompson, 59 N. W. 638, in which it was decided that, on breach of a contract to furnish water power to run a flour mill, loss of profits constituted a proper element of recoverable damage.

Plaintiffs having proved that, during the period while the mill was necessarily shut down for want of the power defendant had failed to furnish, as agreed, sufficient wheat was on hand or could have been obtained to keep the mill running, and having proved the capacity of the mill, and profits obtainable on each barrel, the supreme court said:

"The lessees took the lease for the purpose of engaging in the business of manufacturing flour; the power was leased for that purpose; and both parties knew that if the power were not furnished the business would be suspended or interrupted, and the lessees would consequently be deprived of such profits as might have been made in the business but for the suspension or interruption.

"And the loss of such profits must have been in contemplation of both, as the probable result of a breach of the covenant to furnish the power. To bring the case within the rule, it was not necessary they should have had in mind the amount of profits, or the extent of the loss from the breach. It was enough that they must have contemplated loss of profits as the result of the breach.

"Within the rule stated, the damages sought to be recovered must not be remote, nor speculative, nor contingent, but direct, and shown with certainty to have been caused by the breach. An illustration of too remote damages would have been furnished, had plaintiffs claimed that, in consequence of not receiving the profits on their milling business, they lost profits of other enterprises, which they might have entered on with the profits of their milling business.

"In respect to the profits of the business, their loss might appear to have been due to some other cause than failure to supply water to the mill. But, if not due to any other cause, their loss was sufficiently direct. Although the loss is direct, the amount must not be left to speculation or conjecture, but must be proved with reasonable certainty. Absolute certainty, however, is not required. . . . But, profits lost being allowed as damages, no expenses of keeping and caring for the mill could be allowed, except such as were made necessary by the mill being idle, and as would not have accrued had the mill been running."

* *

In the case of Todd et al. vs. Minneapolis & St. Louis Railway Co., 39 N. W. 318, the same court decided that plaintiffs' proof was insufficient to warrant reimbursement as for loss of profits as millers because of defendant's obstruction of a street crossing leading to plaintiffs' warehouse. It seems that plaintiffs bought wheat there for shipment to their mill at a near-by station, and that part of the milled products were returned to the warehouse for sale, but that wheat used at the mill was also bought at other stations, and that part of the output of the mill did not pass through the warehouse. The supreme court said:

"The profits of the business, then, would depend upon the cost of the wheat, the expense of manufacturing, the quality of the products, and the price obtained therefor. We are of the opinion that the plaintiffs failed to make a case for the allowance of profits. . . . The supplies of grain for their mill were not necessarily or in fact obtained altogether from their warehouse at Albert Lea.

"And no attempt was made to show what, if any, extra expense was actually incurred in supplying the deficiency, if any, arising out of the diminution in the receipts of grain there. And so, also, as to the alleged falling off in the sales of flour and feed at the warehouse, it does not appear that the products were not all actually sold, nor that they were not finally sold at a profit, or what, if any loss was occasioned in the delay or diminution of sales.

"It must also be considered that the wheat market at any particular warehouse must necessarily involve many elements of uncertainty; the delivery of wheat depending upon the price, state of the weather and roads, competition of other dealers, as well as the question of accessibility.

"We think the evidence offered insufficient to establish plaintiffs' loss of profits upon the sales of flour and for the non-

delivery of wheat. . . . The loss of profits was not shown with reasonable certainty."

The decision further held that it was error for the trial judge to permit one of the plaintiffs to testify that the entire loss to their business from the cause complained of was $6,500; the question of amount of loss being one to be ascertained by the jury on definite evidence, and not by mere conclusion of a witness.

SECTION 596. AGREEING ON DAMAGES FOR FUTURE BREACH OF CONTRACT

One of the principal exceptions to the general rule of law that the courts will hold parties to contracts to their voluntarily assumed obligations, in the absence of fraud or mistake, is that an agreement to pay a stated sum as damages for breach of a principal contract will not be enforced when the amount so agreed upon is manifestly in gross excess of the amount of damages actually sustained.

An example of the application of this exceptional rule is afforded by the decision of the Maryland court of appeals in the case of Mount Airy Milling & Grain Co. vs. Runkles, 84 Atl. 533.

Defendant by a written agreement gave one Gorsuch an option to buy his flour mill, elevators, etc., and certain other properties all set out in detail, at a price of $12,500. Gorsuch exercised the option and defendant gave him a certificate to that effect, agreeing to execute a deed for the property when Gorsuch should give collateral to secure the purchase money notes.

In the original agreement there had been no mention of good-will, nor any restriction against defendant's going into the same business again; but without additional consideration, the certificate recited that defendant agreed not to go in the same business for five years, near the same place, under a penalty of $6,250. Within a few months of the expiration of the five years, defendant resumed business at the same place.

In an action by plaintiff, as assignee of Gorsuch, to recover $6,250, as the agreed amount of damages, the Maryland court of appeals decided that plaintiff was limited to the recovery of actual damages, which were also denied because not properly demanded in the suit.

Basing its opinion on the fact that defendant did not break the contract until the five-year period during which he had agreed not to re-engage in the milling and grain business had almost expired, the court of appeals said:

"As just compensation for the injury done is the end which the law aims to reach, the intention of the parties at the time the contract was entered into is often, though not always, given weight; and while the language which they have used in the instrument, if they declare that the damages shall be liquidated, is a circumstance that may have its influence; yet even then explicit words will sometimes be disregarded, and the measure of damages will be restricted to such as the evidence shows have been actually sustained, if the entire agreement, and the peculiar circumstances of the subject-matter of the contract, indicate that the reason and justice of the case require this to be done. . . .

"Where the agreement has been partially performed, it is the policy of the courts to regard the damages as a penalty, and allow the plaintiff to recover only such damages as he has actually sustained. Here the restriction expired Feb. 15, 1911. Runkles [defendant] had a right to prepare for the resumption of business at that date by organizing the corporation as he did, and erecting and equipping his plant.

"The first breach of this contract was in July, 1910, in buying shipping grain, when the contract was nine tenths performed, and there was another breach in December, 1910, in commencing the manufacture of flour when but two months of the five years were unexpired. It would be unconscionable to ask, and unreasonable to declare, these to be liquidated damages in such a case of part performance."

SECTION 597. MARKET REPORTS AS EVIDENCE OF VALUE

The decision of the Nebraska supreme court in Pierce vs. Miller, 187 N. W. 105, recognizes that when an issue is raised in a lawsuit as to what was the market price of a commodity on a certain date, trade journals are admissible in evidence to establish the fact. But it is held that a report published in a country newspaper is not legal evidence, when it appears that it was founded on mere statement by a local elevator operator.

In this case the value of cane seed on a certain day was in controversy, and the court held: "In 22 C. J. 188, sec. 152, it is said: 'The usual records of sales or the conditions of markets, such as newspaper market reports, or prices current, are generally deemed competent evidence of market value, especially when accredited by the party against whom they are offered, provided the quotations are shown to represent transactions actually

consummated or proposed in good faith, and to have been obtained from authoritative or reliable sources in the usual course of business.' . . .

"Clearly the publication in question, measured by the standard to which reference is herein made, was not competent evidence. It was not a trade bulletin, nor was it a periodical accepted by grain dealers generally as a standard for the purpose of fixing the price of grain and of seeds."

SECTION 598. VALUING MILL PROPERTY

Elements properly considered in valuing mill property condemned for public use were dealt with in the case of Banner Milling Co. vs. State, 148 N. E. 668, decided by the New York court of appeals.

The state condemned claimant's mill site in the construction of a canal, and claimant appealed from a decision of the appellate division of the New York supreme court (205 N. Y. Supp. 911), affirming a judgment of the court of claims (191 N. Y. Supp. 143). The appeal involved the sufficiency of an award of damages made in favor of claimant.

The mill insisted that, as its good-will was interrupted and damaged to some extent, it was entitled to compensation therefor. Denying this as a proper element of damage, the court of appeals noted that there is "a marked distinction between the instances where the state appropriates a public service corporation and all of its business and goodwill as a going concern, intending to continue its operations as a public enterprise, . . . and those instances where the state desires the land and not the business. Taking the land may cause the owner inconvenience and loss, by compelling him to remove his business to some other place. Such loss, however, is not recognized as part of the damage or compensation which the state must pay for the land taken."

The court added that this rule specially held good where the good-will consisted of the brand of goods manufactured, or of the personality of the manufacturer, as distinguished from the mere place of doing business.

But, also, noted the opinion, "in establishing the value of the flour mill property appropriated, it was competent to prove all the uses that could be made of the property, the value of the plant as a live, going flour mill, the increased value, if any, which the structure so used had given to the land, and all the valuable appurtenances and availabilities of the property."

It was further observed by the court that the court of claims seemed to have correctly applied the following valuation principles in making its award:

"To estimate the fair market value, the court no doubt should have considered, not only the cost of production [construction of the plant], but also the cost necessarily or reasonably expended in bringing the mill or factory into efficient working condition—what has been called the synchronizing of its parts. Architect's fees in making or revising plans, compensation for engineers to carry out the plans, or to arrange the factory so as to produce appropriate manufacturing results, are all elements which should be considered in estimating the market value. . . . This does not mean, however, that the cost of these various items, considered alone and by themselves, must be allowed for, or that the sum total of all these expenses make up the owner's compensation. The cost of production or reproduction need not of necessity be taken part by part, and the total accepted as the amount of the award. These items, like other items of cost in production or reproduction, are to be considered and weighed with the other evidence of value."

* *

The claim of the James Frazee Milling Co., Baldwinsville, N. Y., against the state of New York for $100,000 damages, demanded on account of interference with the company's private switch connections with a railroad company, in the construction of the new state barge canal, was disallowed by the appellate division of the supreme court of the state. (162 N. Y. Supp. 293.)

In 1886, James Frazee, miller, granted the railroad company the right to construct a spur track across his land to serve his mill exclusively. Later, a similar contract was entered into for a period of five years. In the meantime, Frazee and his successor, claimant company, enjoyed the use of the track in the movement of freight to and from the mill on the north side of the Seneca River to the railroad's main tracks on the south side of the stream, until the connection was bisected by the canal.

The court disallowed the claim because the mill had acquired no permanent right to maintain the track; the first arrangement with the railroad company having been a mere revocable license, and the second having expired.

CHAPTER LXVII

SALES OF MILL PROPERTY*

SECTION 599. PROPERTY COVERED BY DEED

"IN common sense and in legal interpretation a 'mill' does not mean merely the building in which the business is carried on, but includes the site, dam, water privileges, and other things annexed to the freehold, necessary to its beneficial enjoyment, as the machinery used with the mill and necessary thereto." 27 Cyc. 511, 512.

So it has been decided that a contract to sell certain "mill property" covered land on which the mill stood, and all surrounding land necessarily and actually used in connection with the mill.

* *

Perhaps many laymen look upon the familiar deed phrase, "and appurtenances thereunto belonging," as empty legal language. But an appurtenance to mill property may be of no small value. The term generally signifies the right to enjoy some privilege in adjacent land as an incident to ownership of a particular tract, as where mill property enjoys a right of way over adjoining land as its only outlet to a street or highway.

So it was decided by the Iowa supreme court, in the case of Walker vs. Dwelle et al., 175 N. W. 957, that where a mill and dam were conveyed, together with a right to take gravel from other land retained by the grantor for the purpose of repairing the dam, deeds from subsequent and successive owners, covering the mill and dam, carried with it, as an appurtenance, the right to continue to use the gravel pit in question.

Incidentally, however, it was decided that permission to use the gravel pit to obtain materials for "repairing" the dam did not authorize use for the purpose of reconstructing the dam.

* *

In Holley Milling Co. vs. Salt Lake & Jordan Mill & Elevator Co., 197 Pac. 731, it was decided by the Utah supreme court that a deed to one of two milling plants owned by the grantor did not convey trademark rights under the term "appurtenances, rights, and privileges" belonging to the milling property conveyed. This case will be found more fully referred to in the chapter herein on trademarks.

* *

In Alabama Corn Mills Co. vs. Mobile Docks Co., 75 So. 574, the Alabama supreme court decided that a conveyance must be read in its entirety, in interpreting the scope of rights granted; and that a right of way across a tract of land will be enforced, although the deed granting it does not specify a location. Hence it is decided that a conveyance of a strip of land 100 feet wide over a particular tract, "to give track facilities" to a piece of ground, is to be regarded, not as an absolute conveyance of the strip, but merely an interest in the strip for right-of-way purposes, and that a court is empowered to fix a location for the purpose, consistent with the manifest intention of the parties.

SECTION 600. CONDITIONS AS TO USE OF PROPERTY

An authoritative court decision bearing on the effect of provision in a deed for reverting of title to a mill site on cessation of milling was announced by the Illinois supreme court in McElvain vs. Dorris, 131 N. E. 608.

In 1899 a village in Illinois offered a bonus for the establishment of a flour mill there. One Henson accepted the offer and established a mill, which ceased operations in 1905, after which time the building was abandoned for mill purposes.

The deed to the site on which Henson erected a mill, and for which he paid a small consideration, contained this clause: "This tract of land is to be used for mill purposes, and if not used for mill purposes the title reverts back to the former owner."

After milling operations were abandoned and the building had successfully become a warehouse for cement and a

*See, also, the chapter on Mill Equipment as Permanent Fixtures, Chapter LXIX; section 437, on Contracts Not to Re-engage in Business, and section 460, relating to the transfer of trademark rights.

dwellinghouse for Negro families, the heirs of the grantor of the deed sued to recover possession of the property from Henson's successors in ownership. Affirming judgment in favor of plaintiffs, the supreme court said:

"A condition subsequent which destroys an estate is not favored in the law, and such conditions are strictly construed. . . . If from the language employed there is doubt as to what was intended by the condition, the doubt is to be resolved in favor of the grantee, and the condition will never be enlarged by construction. Under that rule it is argued that the words 'mill purposes' are ambiguous and indefinite, and may mean nothing more than the erection of a mill building, and in that view of the condition there has been no breach, because the building still stands on the premises. We cannot agree with the argument. The words employed plainly mean the pursuit, following, prosecution, and carrying on of the business of a mill, and the mere erection of a building that could be used for a mill, or its continuance on the premises, was not a compliance with the condition.

"There was a breach of the condition, and the action of ejectment was equivalent to a re-entry."

* *

The Indiana appellate court filed an opinion in the case of Boonville Milling Co. vs. Roth, 127 N. E. 823, on questions of importance on the subject of mill real estate titles.

The mill sued to forfeit defendants' title to certain real estate forfeited to plaintiff on the ground of breach of the following quoted condition in a deed executed in 1914 by plaintiff to defendants: "As a part of the consideration for the above-described real estate, the grantees agree not to use the above-described property as a flour exchange or for a mill, and this deed shall be null and void if said property is used for a flour exchange or for a mill at any future time."

Defendants denied any breach of the condition, and filed a counter-suit to have the condition declared to be void. Both phases of the litigation were decided adversely to the mill by a trial judge, but the appellate court reversed the decree so far as it declared the condition in the deed to be void.

Holding that there was no violation of the condition, the higher court said: "On the question of the breach of the condition under consideration, we must bear in mind that the court, by its general finding in favor of defendants, has determined that there was no breach, and such determination must stand, if there is any evidence to support the same. It will be observed that the condition provides that the real estate in question should not be used 'as a flour exchange or a mill.' There is no allegation in the complaint, nor was there any evidence on the trial, as to the meaning of the term 'flour exchange,' and we must therefore determine its meaning from the words used, taken in connection with the context of the clause in which they appear."

The appellate court then proceeded to a conclusion which may surprise more than one member of the flour trade, as it did the writer. Instead of resorting to definitions of the word "exchange" as defined in dictionaries as a noun, and as generally understood as being "a place where merchants, brokers, etc., meet to transact business," the court goes into a learned comparison of the term in the deed with the word "exchange" used as a verb. In this way, the Indiana court succeeded in ascribing to the term "flour exchange" a narrower meaning than is probably given to it by any member of any flour exchange. The opinion said:

"The word 'exchange' is synonymous with the word 'barter,' and each means a reciprocal transfer of property for property, as distinguished from a transfer of property for a money consideration, which constitutes a sale. . . . Keeping in mind the meaning of the word 'exchange,' and the distinction between an exchange and a sale, we conclude that the term 'flour exchange,' as used in the clause under consideration, means a place of business at or in which flour is exchanged or bartered for some commodity other than money.

"When we attribute this meaning to such words, it becomes apparent that, while the grantees in the deed are prohibited from using the real estate described therein, under the penalty named in said clause, as a place for conducting a business in which flour is exchanged for wheat, or wheat for flour, there is no prohibition against its use as a place of business for buying or selling either wheat or flour, or both, although such transactions may be with the same individual. Appellant cannot complain that this construction is too narrow, since conditions subsequent in deeds are not favored in law, and are to be strictly construed. . . .

"In determining whether there has been a breach of the condition prohibiting the use of said real estate as a flour

exchange, the court must take into consideration the extent to which such real estate has been used in exchanging flour for some commodity other than money, if at all, for it is obvious that an occasional exchange of that character would not constitute a use of such real estate as a flour exchange, within the evident meaning of such condition. It must assume such proportions as to constitute the conduct of a business in that regard, in order to work a forfeiture of the real estate, as such is the evident intent of the parties, under a fair and reasonable construction of the language used in the condition. An examination of the record, in the light of the construction we have placed on the clause, discloses substantial evidence from which the trial court may have properly concluded that defendants had not breached the condition by using the real estate as a flour exchange."

The court also found that the mill operated by defendants was not a mill. On this point the opinion said: "The undisputed evidence shows that the only mill used on the premises since the execution of the deed was a 10 h-p crusher, used in crushing corn, oats, and wheat for feed. It is evident that the mill, which the parties intend to prohibit by the clause, was a mill for the manufacture of flour, and not a mill for crushing feed."

On the other branch of the case—as to whether defendants were entitled to a decree annulling the condition in the deed—it was first contended by them that there was no consideration for the forbearance on their part to use the property as a flour exchange or mill. They showed that the price paid for the property was agreed upon before any question of limiting the use of the land was mentioned. But the court said:

"It may be, as defendants contend, that $5,700 was the full value of the real estate, still it would not follow that the restrictive condition was without consideration. The fact that they were permitted to purchase the same, even at its full value, affords a legal consideration which is sufficient, since we will not inquire into its adequacy in the absence of a charge of fraud or overreaching. . . . Moreover, it is well settled in this state that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its terms and those in the deed are to be explained and settled by the deed alone, and that while it is always competent to prove by word of mouth the true consideration of a deed, such evidence is not competent to defeat its operation as a valid and effective grant. . . . The same reason would prevent the acceptance of oral evidence to defeat a restrictive condition in a deed.

"The time for defendants to have objected to the clause in question was at the time the bond for deed was tendered, or at all events when the deed itself was tendered, and, having failed to do so, they cannot now be heard to object to the court giving it effect."

The last point decided in the case was of most general importance, involving the question as to whether a sale of real estate under a deed forbidding use of the land for milling purposes was valid.

"Defendants also contend," said the appellate court on this aspect of the suit, "that the clause is unreasonable, and therefore invalid. It bases this contention on the fact that the limitation on the use of the real estate is unlimited as to time. It has been held repeatedly in this state that a contract, reasonably limited as to territory in which a specified business is not to be carried on, is not rendered invalid because the restriction as to time is indefinite."

SECTION 601. REAL ESTATE BROKERS' COMMISSIONS

The case of Clarke vs. People's Roller Mills Co., 268 S. W. 333, passed upon by the Kentucky court of appeals, involved plaintiff's right to commission on a sale of defendant company's plant. The suit was unsuccessfully defended on the ground that plaintiff's relationship to the sale was too remote to entitle him to compensation.

The opinion recognized that, except as otherwise provided by agreement, a broker who brings a seller and buyer together is ordinarily to be deemed the procuring cause of a sale, in such sense as to entitle the broker to a commission, although he does not conduct the negotiations leading up to the sale. It was further held that plaintiff was to be regarded as the procuring cause of the sale where he introduced a prospective purchaser to defendant and that person in turn introduced an associate who induced another person to join with him in buying the property on the prospective purchaser withdrawing.

SECTION 602. SELLER'S RIGHT TO RE-ENGAGE IN BUSINESS

Mere sale of a mill and its good-will does not preclude the seller from subsequently engaging in competition with the

buyer, held the Arkansas supreme court in the case of Rogers vs. Patterson et al., 229 S. W. 711. Plaintiff sold a flour mill at Rogers, Ark., to defendants, and sued to recover a balance due on the purchase price. The defense was that plaintiff had rendered himself liable in damages in excess of the amount sued for, by breaking an agreement not to re-engage in the milling business at Rogers.

To sustain their position, defendants offered testimony tending to show that they were induced to buy the mill through plaintiff's representation that he would not resume business pursuits. About a year after the sale, plaintiff returned to Rogers from a trip to Colorado, and established a new mill.

Holding that defendants failed to make out a valid counterclaim for damages, the court said: "This court has in more than one case upheld contracts in partial restraint of trade; but in doing so we have recognized that the contract is of such character that the rights of the public may be involved, and where the contract results in the creation of a monopoly it is void as contrary to public policy. . . .

"The courts, therefore, require that such contracts be definite and certain as to the extent to which trade or business is restrained, so that it may appear to what extent the rights of the public have been infringed, before lending aid to their enforcement. . . .

"One who sells his business with its good-will must in good faith do nothing which directly tends to deprive his purchaser of the benefits and advantages of the purchase. But it is said in the note to the case of Brown vs. Benzinger . . . that the rule is well settled that the vendor of the good-will of a business may, in the absence of a restrictive agreement, engage in a competing business. . . .

"The reasons generally assigned for the rule are that it is quite usual for one to sell his business, while agreements not to engage in the same business are exceptional, and as such agreements result in at least a partial restraint of trade, they are not to be implied from the mere sale of the business with its good-will or from loose expressions of the seller during the negotiations for the sale indicating a purpose not to re-engage in the business he is selling.

"The rule as stated in 12 R. C. L. 988, is as follows: 'But the more generally accepted doctrine is that, in the absence of an express covenant, there is nothing to prevent him from re-establishing himself in the same business provided he does nothing to injure the good disposition of the public toward the old place of business, or to impair any of the advantages which the purchaser has properly acquired by the purchase of the good-will of the old customers in the same vicinity.' . . .

"Appellee was not asked to agree not to re-enter the milling business in Rogers as a condition upon which the purchase would be made, nor is it contended that he agreed not to go into business again. There is no allegation or proof of fraud. After selling the mill Rogers did go West, as he had said he intended to do, where he remained for about a year. The purchasers saw fit to rely on general expressions by the vendor as to his future intentions, without incorporating those statements into the contract of sale, and they must therefore be held to have taken the chance that the seller might later change his plans, in which event he would not be precluded from re-entering business, as he did not so expressly agree."

* *

Where a partnership conducts a milling or elevator business, one of the members is powerless to convey the good-will of it to a third person, although he may own the premises on which the business is conducted.

This rule of law was recognized by the South Dakota supreme court in the case of Kidder Equity Exchange vs. Norman, 173 N. W. 728, wherein it was shown that Norman & Johnson conducted a grain business at Kidder, S. D., on premises owned by Norman. He sold the elevator property to plaintiff, and agreed that the firm would not re-engage in buying grain in that locality, declaring that the good-will of the business was sold to plaintiff.

The partnership re-engaged in business at Kidder, and plaintiff sued to enjoin a continuance of the competition. Trial of the suit resulted in a judgment in plaintiff's favor, but the supreme court reversed it on appeal, laying down the following propositions of law:

On a valid sale of the good-will of a business enterprise, the seller may bind himself by an agreement not to compete with his successor, but there can be no valid sale of good-will apart from the business.

Mere sale of a building in which a business has been conducted, apart from the business, will not support a purported sale of the good-will attached to the

business, and one partner is not empowered to make a valid conveyance of the firm business or good-will without the joinder of his associate or associates, unless the latter have abandoned their interests or are incapable of acting.

See, also, Chapter L on Contracts Restraining Trade.

CHAPTER LXVIII

LEASES OF REAL ESTATE*

SECTION 603. LIABILITY OF MILL LESSEE

THE New River Milling Co. leased its mill to the Hinton Milling Co. for a term of five years, under an agreement imposing upon the lessor the duty of repairing "any breaks not the result of negligence or unskillful operation." In suit brought by the lessee to recover damages for breach of the provisions of the lease on the lessor's part, the lessor was permitted by the trial judge to set up a counterclaim for damages asserted to have been sustained through injury to its permanent business resulting from the lessee's "unskillful and inferior operation of the mill." The West Virginia supreme court of appeals reversed the judgment which was rendered in favor of the lessor on this counterclaim, for the following reasons, as stated in the opinion of the higher court:

"The plaintiff was in possession of the defendant's mill, under a five-year lease, and as a matter of course was under no obligation to maintain the defendant's trade in the meantime—could not well do so. And the defendant bound itself in said lease not to, at any time during the continuance of the contract, either directly or indirectly, carry on the same trade or business in the city of Hinton or within a distance of 20 miles thereof. The trade during the time belonged to the plaintiff. In addition to this, it does not appear that the defendant had any established trade." (88 S. E. 1079.)

SECTION 604. LANDLORD'S DUTY TO REPAIR

The Adams Grain & Provision Co., as lessee of space in a brick warehouse of the Chesapeake & Ohio Railway Co. at Richmond, Va., for use by the lessee as wholesale dealer in flour, grain, etc., sued the railway company for injury to goods resulting from bursting of a water pipe on the premises.

The trial court at Richmond decided adversely to the claim, but the supreme court of appeals of the state reversed the judgment, holding that although it is a general rule of law that, in the absence of agreement to the contrary, a lessor of premises is under no duty to keep them in repair, the tenant taking them as he finds them, the rule does not necessarily apply when, as in this case, the tenant occupies only a part of a building, and the landlord maintains a water pipe for the benefit of the whole building. In such case, the landlord may be held responsible for loss sustained by the tenant as a consequence of the former's negligence in permitting the pipe to freeze and burst. (88 S. E. 171.)

SECTION 605. WHEN BUILDING IS DESTROYED

The case of Vaughan vs. Mayo Milling Co., 102 S. E. 597, passed upon by the Virginia supreme court of appeals, involved questions concerning the defendant mill's liability for rent and the expense of restoring a leased building on its having collapsed.

There is a common-law rule that where a lease requires the tenant to restore possession to the landlord at the termination of the lease, in good repair, natural wear and tear excepted, it imposes upon the tenant, in the absence of agreement to the contrary, the duty of paying the rent and rebuilding the leased structure on its being destroyed, although without the tenant's fault. This rule, the court held, was not available against defendant milling company, because long ago repealed by a Virginia statute, which provides that a tenant shall not be liable for rent or the cost of restoring premises in such cases, unless the destruction of or injury to the building was due to fault or negligence of the tenant, or unless there is a special agreement imposing such liability, but judgment was awarded against the defendant on the theory that collapse of the particular building was due to overloading.

The court held, incidentally, that where a tenant becomes liable for restoration of a leased building, by reason of injury to it through his fault, the damages are to be assessed with reference to the cost of replacing upon the land a building of equal size, character, and construction,

*See, also, the Chapter (LXIX) on Mill Equipment as Permanent Fixtures.

deducting therefrom a proper amount to cover depreciation of the destroyed building and any amount which the owner of the premises has received or should receive from a sale of the material salvaged from the building, after allowing the cost of salvage.

* *

According to the holding of the South Dakota supreme court in the case of Carlon Elevator Co. vs. Klahn, 177 N. W. 760, the law on the right of a tenant of leased premises destroyed by fire differs in that state from the rule in force in some of the other states. It was decided that if a tenant pays a year's rent in advance, he would be entitled to a refund on the premises being burned, unless his lease otherwise provided.

"In some jurisdictions," said the South Dakota court, "there seems to be a common law rule to the effect that, where there is a covenant on the part of the lessee to pay rent for a specified term, and the leased premises are destroyed by fire, the tenant is not relieved from the payment of rent unless he has protected himself by a covenant in the lease. . . . This rule, however, is not in effect in this state, having been changed by statute."

SECTION 606. TERMINATION OF TENANCY

The suit of Lewis vs. Welch Wholesale Flour & Feed Co., 111 S. E. 158, reviewed by the West Virginia supreme court of appeals, involved plaintiff's right to oust defendant from leased premises. It appeared that defendant had occupied the premises as tenant, and refused to vacate on a lease being executed by the landlord to the plaintiff. The court held that, in the absence of any showing on defendant's part of a lease for a definite period, it must be assumed that it was merely a tenant for an indefinite term, terminable by the landlord on reasonable notice. It was also decided that execution of a lease for a stated term to plaintiff revoked defendant's tenancy, and that either the landlord or the plaintiff could maintain legal proceedings to recover possession of the premises.

SECTION 607. SITES ON RAILWAY RIGHT OF WAYS

Operators of mills and elevators on premises leased from railroad companies will be interested in the decision of the North Dakota supreme court in the case of Gladstone Equity Exchange vs. Hines, 182 N. W. 763.

Plaintiff operated an elevator on the Northern Pacific Railway Co.'s right of way under a lease containing the following quoted clause and further provisions limiting the railroad company's liability for any loss that might result to the elevator company through fire, etc:

"It is understood by both parties hereto that the leased premises are in dangerous proximity to the tracks of the railway company, and that persons and property on the leased premises will be in danger of injury or destruction by fire or other causes incident to the operation of a railway, and the lessee accepts this lease subject to such dangers."

The elevator was destroyed through fire communicated to it by negligent operation of a stove in a cook car forming one of a string of cars temporarily spotted near the elevator for the purpose of housing a bridge repairing crew. Defendant, as director general of railroads under government control, denied liability, asserting that the loss was covered by the exemption of liability provided in the lease. But the supreme court took a different view and, holding the defendant liable, remarked:

"The language of the provisions relied upon has already been quoted. It appears from the first sentence in each provision that the parties had in mind the fact that railroad trains would pass near the property of the elevator company, on the main line and on the side track and spur; that there was danger of injury from sparks and fire that might be scattered from engines or cars utilized in the operation of the railroad, as well as danger of injury from misplaced switches, etc. There is no contention that the loss involved here was occasioned 'by fire or sparks from locomotive engines or other causes incident to or arising from the movement of locomotive, trains or cars,' or 'misplaced switches.' The question therefore resolves to this:

"'Was the cause of the loss in this case one incident to or arising from the operation of a railway, as that term was understood and intended by the parties to the contracts?'

"We think this question must be answered in the negative. The burning of weeds and dead grass along the right of way, as well as of old rotted ties, is a matter of frequent occurrence in the operation of a railway, yet it would hardly be contended that the contracting parties here contemplated that the railroad company might with immunity place piles of weeds or old ties in close proximity to the elevator of the plaintiff company, set fire to them, and thereby cause the destruction of the elevator. Neither do we believe that they contem-

plated that crews engaged by the railroad company to repair bridges or perform other necessary work on the road should, for the purpose of cooking their food, kindle fire, either on the ground or in the cook cars, in such close proximity to the elevator of the plaintiff company as to cause the same to be set on fire. It is our opinion that when the parties contracted with respect to injuries arising from or incident to the operaton of the railway, they had in mind such injuries as it might reasonably be anticipated might occur from the carrying on of its traffic, i.e., from the operation of a railway at that place. And we do not believe that the act which it is alleged, and which the jury found, caused the fire in this case, was one covered by the exemption provisions."

CHAPTER LXIX

MILL EQUIPMENT AS PERMANENT FIXTURES

SECTION 608. RIGHTS OF TENANTS AND MORTGAGEES

OF the few cases to be found in the law reports concerning the status of mill machinery, etc., after installation on real estate, as to retaining its character as personalty or becoming a part of the estate, the decision of the Pennsylvania supreme court in the case of Albert vs. Ulrich et al., 180 Pa. 283, is one of the most interesting.

In that case it appeared that plaintiff's wife acquired mill property which he operated for her. A few years later they joined in executing a mortgage on the property. Still later, plaintiff at his own expense installed a steam power plant to furnish power when sufficient waterpower was not available. The engine and boiler were placed on a brick foundation in a frame structure attached to the mill building proper, which was of brick. Shafting and belts passed through a window and a wall of the mill.

On foreclosure of the mortgage, controversy arose as to whether plaintiff was entitled to assert ownership of the engine and boiler as constituting removable trade fixtures. The supreme court affirmed a decision of a lower court, holding that the engine and boiler were properly sold under the mortgage as constituting part of the real estate. Part of the trial judge's opinion read as follows:

"The right of a tenant for years to remove what are called 'trade fixtures' during his term, although affixed to the freehold, has been generally recognized both in this country and in England. In all the recent cases, however, the true criterion has been held to be the intention on the part of the tenant to remove the fixtures during his term, at the time he placed them upon the property. The manner of their annexation is no longer the test. . . . Yet if fixtures, which the tenant might remove during his term, be suffered to remain after its expiration, they become inseparable from the freehold, and an action will not lie by the tenant to recover damages for their conversion. While they remain attached, they are part of the realty. . . .

"The plaintiff in this case is clearly in no better position than a tenant who has erected trade fixtures upon a leased property, and at the expiration of his term has left them in the landlord's possession. Indeed, we are of opinion that he would have had no right to remove the boiler and engine even prior to the sale. While the business was being run by him for the wife, and in her name, he attached to the freehold certain articles which forthwith became part of the milling plant. If they had been put there by a tenant during his term, a lack of intention to convert into realty would have been presumed in his favor; . . . yet no such presumption can properly arise in behalf of a husband who voluntarily places fixtures on his wife's land which he is managing as her agent.

"In the absence of any evidence to the contrary, we may conclude that he intended to make the articles a permanent improvement to the premises. In this respect he comes within the operation of the general principle that where one fixes his own chattels on the land of another, such act is in legal effect a gift of them to the owner of the soil. We are of opinion, therefore, first, that as against the mortgagee, plaintiff did not have the right at any time to remove the fixtures in controversy; and, second, that if such right had existed in him, his failure to take them away, prior to the sheriff's conveyance, left him powerless thereafter either to remove them or to recover damages from the purchasers for their conversion."

Affirming these conclusions on appeal, the supreme court declared that "according to the undisputed evidence the articles in question never were trade fixtures, and the plaintiff had no right to remove them either before or after the sheriff's sale under the mortgage."

* *

Defendant in the case of Bromich vs. Burkholder, 158 Pac. 63, held a mortgage on mill property. The mortgagor bought

a tubular boiler from plaintiff for use in operating the mill, replacing an old one. The new boiler was sold under a contract reserving title in plaintiff until payment of the price, which has not been paid. Defendant foreclosed the mortgage and became owner of the premises. Plaintiff then sued to recover possession of the boiler under the reserved title, but defendant resisted the suit, claiming that when the boiler was installed it became a part of the land, and, as a fixture of the real estate, subject to defendant's mortgage.

Under these circumstances, the Kansas supreme court ruled that plaintiff was entitled to possession of the boiler, it appearing that it could be removed without substantial injury to the real estate.

The court held that the intention of the parties to a contract for installation of machinery upon real estate was one of the strongest elements in determining whether the machinery had become legally a part of the land; and that where they agreed that it should remain personal property, and be subjected to removal under the seller's reservation of title, it was not necessary to give a mortgagee of the land notice of the terms of such contract, in order to forestall any claim by him that the machinery had become a permanent fixture of the real estate.

* *

The United States circuit court of appeals, eighth circuit, in reviewing the suit of Williamson vs. City of Clay Center, Kansas, 237 Fed. 329, held that a mortgagee of a waterpower mill was not entitled to hold dynamos subject to the mortgage, as fixtures of the mill real estate, it appearing that the dynamos were appurtenant to an electric lighting plant operated as an enterprise independent of the mill, and that the mortgagee knew that the dynamos had for years been treated as chattels, by the giving of various mortgages covering the light plant.

The dynamos were fastened to the mill timbers and were operated by the same power that ran the mill, and, although the holder of the real estate mortgage covering the mill did not claim that the dynamos were expressly included in the property described in his mortgage, he did claim that a provision of the mortgage including the "appurtenances" of the mill sufficiently embraced them. In overruling this claim, the court said:

"It is unnecessary to discuss at length the various tests for determining when personal property becomes fixtures and passed under a mortgage covering the realty. The all-important question is to determine the intention of the parties. . . . In the instant case that portion of the electric light property which was placed upon the mill real estate was in no sense accessory to the milling plant. It did not assist in the operation of the milling plant, nor was it placed there for the benefit of the milling plant."

SECTION 609. RIGHTS OF PURCHASERS OF REAL ESTATE

In a case before the North Carolina supreme court there was a controversy as to whether a deed and a mortgage covering mill property included the machinery therein. In deciding that the machinery was conveyed, the court said:

"It was placed in the usual way in such plants, and in the language of one of the witnesses it was 'screwed down and fastened good,' and, under our decisions, was conveyed by the written deeds offered in evidence." (83 S. E. 551.)

* *

Engines were sold to a mill and elevator company under a written contract which provided that title should remain in the seller until payment of the purchase price. The price not being paid, the seller brought suit to replevy the engines. A third person claimed to have acquired title to them in purchasing the real estate on which they had been installed, under foreclosure of a mechanic's lien against the real estate. In affirming judgment in favor of plaintiff and holding that the engines did not pass under sale of the real estate on foreclosure of the mechanic's lien, the Kansas supreme court said:

"The engines were not made a part of the real estate by merely depositing them in the building. To change their character as personalty, it was necessary that they should be set up and permanently attached. The contract reserving to the machine company title to the engines had no validity as against any one acquiring a claim upon them before it was filed of record. But no claim to them was asserted except by virtue of proceedings which affected only real estate, and irrespective of the contract they were personal property until they were set up and bolted to the floor.

"Before this time the contract had been made of record, and, being thereby validated, it prevented their becoming a part of the realty so as to be subject to any

then existing lien. . . . A valid agreement between the owner of personal property, who is guilty of no misconduct or concealment, and the owner of real estate to which it is annexed, that its character as personalty shall not thereby be affected, binds not only these parties, but all other persons, unless an exception be made in favor of purchasers for a valuable consideration without notice." (St. Mary's Machine Co. vs. Iola Mill & Elevator Co., 155 Pac. 1077.)

CHAPTER LXX

MILLS AS NUISANCES

SECTION 610. GENERAL OBSERVATIONS

INCREASING congestion in cities makes of proportionately increasing importance the legal principles affecting the right of owners of property near mills to legal redress on account of annoyance or injury resulting from the milling operations. But since flour mills, unlike garages, undertaking establishments and many other business places, are usually found only in districts given over mainly to railroad yards and manufacturing districts, it is not strange that the reports of courts of last resort disclose but few appellate court decisions involving the status of a mill as a nuisance.

The milling business being lawful, the courts have decided that it is not inherently a nuisance. To constitute it a nuisance it must appear that it unreasonably invades a given locality in which the occupants in general are entitled to freedom from such inconvenience or annoyance as necessarily results from the conduct of the mill in a proper manner, or it must appear that the mill, being in a proper location, unnecessarily is operated in such manner as to cause annoyance or injury to others.

So long as a mill is isolated from dwelling houses, and especially where it is situated in an industrial district, it seems clear that it must be so negligently or improperly conducted as to thereby create injury to others before it can be denominated such a nuisance as to justify an award of damages or a decree of injunction against the operator. Disturbing noises, flying dust or chaff, dense smoke, etc., are some of the things which have been held to constitute industrial plants nuisances, where complaining property owners have been found to be aggrieved.

* *

An instructive decision is to be found in the early case of Cooper vs. Randall et al., 53 Ill. 24, decided by the Illinois supreme court. Plaintiff sued for damages claimed to have resulted from defendants' erection of a flouring mill upon an adjacent lot, and the consequent casting of large quantities of chaff, dust, smut and dirt upon plaintiff's near-by house. A jury returned a verdict in favor of defendants, and plaintiff appealed. Reversing this judgment and ordering a new trial, the supreme court said:

"The counsel for the respective parties in this case do not widely differ in their view of the law. . . . Counsel for appellant insist the case has been defended on the theory that, as the erection of a flouring mill is lawful in itself, if the defendants, in the erection of their mill, have used all known means to prevent the escape of chaff, dust, dirt and smut, they are not liable for injuries resulting therefrom to adjacent property. The counsel for defendants expressly repudiate this theory, which, it is hardly necessary to say, would be wholly untenable, and admit the defendants are liable if, in erecting and operating their mill, they have materially and substantially injured, or lessened in rental value, the property of plaintiff.

"The difference comes down to this, that plaintiff's counsel insist the defendants are liable if they have injured the plaintiff's property in any degree, while the defendants' counsel insist they are liable only for material and substantial injuries. Practically, the difference is of little moment, as a jury would never give damages where the injury was so slight as to be merely fanciful, and incapable of a reasonable measurement in dollars and cents.

"As an abstract question, however, there can be no doubt that, where there is a right of action at all in cases of this character, it exists as well for a slight as for a great injury. It would be very illogical to say that the right of action depends on the degree of the injury, holding that one may causelessly harm his neighbor a little, but shall not harm him very much. Still, as was said by Vice Chancellor Bruce, in Walter vs. Selfe, 4 Eng. L. and Eq. Rep. 22, the injury must be something more than a

fanciful inconvenience, a question of mere delicacy or fastidiousness arising from elegant and dainty habits of life; it must be a clear and plain interference with ordinary comforts or enjoyments. . . .

"If, however, a business is established which sends into a neighboring house smoke and vapor, or offensive odors, or dust and dirt, to a degree which renders it uncomfortable as a habitation, the proprietor has a right of action, and would be entitled to damages in proportion to the degree of the injury.

"The instruction given [by the trial judge to the jury] for the defendants in this case, that the plaintiff could not recover unless he had proven 'a material injury,' might, unaccompanied by explanation, mislead a jury. If understood by them as meaning that the plaintiff must show a real and not imaginary or fanciful interference with the reasonable enjoyment of his property, it would not be liable to objection. If construed as stating that they must find against the plaintiff unless he had proven a great injury to his property, as distinct from a slight one, or because the occupation of his house had only been rendered slightly uncomfortable, it would be obviously incorrect.

"If, for example, the smoke from an adjacent mill were to fill a man's house only one day in the year, but during that day rendered it an uncomfortable abode for himself and family, although the injury, in view of the shortness of its duration, would be slight, it would nevertheless be a palpable injury, for which the law should furnish a remedy.

"We do not decide, however, whether the use of this term, unexplained, is so objectionable as to be, of itself, a sufficient ground for reversing the judgment. It must be reversed on other grounds, and as this point has been discussed by counsel we have said thus much, in order that the court, on another trial, may explain the law with more precision.

"So, too, of the first instruction given by the court on its own motion, the latter part of which reads as follows: 'No action can be maintained for the reasonable use of a flouring mill, or for carrying on any other legitimate business in a convenient and proper place, even though some one may suffer inconvenience thereby. Where a lawful trade is established and carried on, in a suitable and proper place for such business, the law imposes upon the proprietors reasonable diligence in the manner of carrying on such trade or business, to prevent injury to the rights of others. You should determine in your minds whether defendants' mill was erected and operated in a suitable and convenient place for business of that nature, and if you consider the mill was erected in an improper locality, was the manner of conducting the business of the mill such as to make the enjoyment of life and property uncomfortable?'

"This instruction is not as clear as could be desired, but in view of the evidence we fear it may have misled the jury. We understand it to assume, if a lawful business is established and carried on in a place suitable to the business itself, the proprietors of such business are not responsible in damages, even though their business works injury to others, if they use reasonable diligence in conducting it. If this is the meaning of the instruction, it can only be attributed to the fact that it was prepared in the hurry of a trial, as the other instructions given by the court announce a different principle, and it is not claimed by counsel for appellees that such a construction would be the law. Perhaps we misapprehend the instruction, but it should be modified on another trial.

"We must reverse this judgment independently of objections to the instructions, because of the admission of illegal evidence. The defendants were allowed to prove, against plaintiff's objections, that another house in the same neighborhood, owned and rented by the plaintiff, was a disreputable house. This was precisely one of those pieces of evidence which could be used with great effect before a jury in a case of this character, and which was clearly inadmissible because wholly foreign to the issue. The issue was whether the mill was an injury to this property, and no light could be shed upon that question by evidence in regard to the occupancy of another house in the neighborhood.

"A good deal of evidence was also admitted, against the objections of plaintiff, for the purpose of showing that the machinery of the mill was excellent, and that the business was properly managed. If the plaintiff had claimed vindictive damages, on the ground of gross carelessness or wanton injury, this evidence would have been proper. But his evidence indicated no such claim, and we do not understand this testimony to have been offered by the defendants for the purpose of meeting such a claim, but to

show they were not liable to damages at all.

"The plaintiff did not base his claim on bad management by the defendants, or the use of imperfect machinery, but on the naked fact that the mill, by the chaff, dust, dirt and smut thrown out, had injured his property, by interfering with its comfortable occupancy. If such was the fact, he was entitled to damages, without reference to the degree of care used in running the mill, or the character of the machinery.

"The court, on another trial, should admit this evidence only with the explanation that it was admitted for that purpose, and should not admit it at all if vindictive damages are disclaimed. This evidence raised a false issue, upon which, in connection with the instructions above considered, we are inclined to think the jury found their verdict. The judgment is reversed and the cause remanded."

* *

The Kansas City court of appeals affirmed judgment for plaintiff in the case of Stremph vs. Loethen, 203 S. W. 238, for damages claimed to have been caused through defendant maintaining a steam exhaust pipe connected with a mill power plant in such position that steam and moisture were carried into plaintiff's near-by house.

The principal defense interposed in the suit was that the mill had been operated for several years and that plaintiff bought the house with full knowledge of the surrounding conditions, but it was found that plaintiff did not know of the injury and annoyance caused by the steam exhaust until she moved into the house.

The court of appeals held that action would lie for damages caused in this way, excepting where the right to discharge steam to the injury of near-by property owners or residents had been acquired by grant or long continued exercise. And in order that a millowner might claim right to continue a practice of this kind because of a grant presumed to have been made merely because the practice had been long continued, it was decided that "there must be a continued and uninterrupted possession and use for the period required by law [10 years in Missouri], and this must be adverse to the rights of others, and must have been continued in substantially the same way and with equally injurious results for the entire period."

SECTION 611. INJUNCTION AS LEGAL REMEDY

In the case of Green et al. vs. Lake, 54 Miss. 540, the most important phase dealt with by the Mississippi supreme court concerned the right to have a mill abated as a nuisance, as distinguished from a mere recovery of damages.

Plaintiffs alleged that defendant's mill produced annoying noise and filled them with apprehension of danger from fire, thereby depriving them of the comfortable enjoyment of their respective near-by homes. Affirming a decree of the trial court dismissing the suit, the supreme court said, among other things:

"The gravamen of the bill is that the corn and flouring mill of the defendant Lake is a nuisance to the complainants and other citizens of the immediate neighborhood. . . .

"Perhaps the most delicate jurisdiction ever exercised by a court of chancery is to restrain, by injunction, the use of property by the owner, on the allegation that such use will be annoying, or injurious to the property of another. . . . Certain uses of property in a crowded city the law would characterize as nuisances per se [inherently], and would abate; such as bone boiling, horse boiling establishments, swine yards, slaughter houses, and the like, which emit poisonous effluvia, tainting the atmosphere with offensive odors and the seeds of disease. Other uses of property may become nuisances, though the use itself is lawful. A corn and flouring mill is not per se a nuisance in a city, nor is a blacksmith shop, nor a foundry, nor a steam engine, which emits smoke, makes noise, and is liable to set buildings on fire. These and such employments are the necessities of modern society. . . .

"The complainants allege that Lake, the defendant, about five years before they filed their bill, erected the mill, and has been running it ever since, except at short intervals, but do not allege that they or either of them warned him when he commenced building that his mill would be dangerous or injurious to them and their property, nor that they have ever applied to him to use any appliance on the chimney to prevent the escape of sparks, or suggested any precaution by which the danger from fire would be diminished. Since no complaint was made for the first five years that Lake held the property as lessee, it would be a very serious matter to him, when he had made further investments, and become the absolute owner, to be,

without warning, arrested in the further prosecution of his business.

"The complainants prefer to live in a city from motives which induce others to do the same thing in numbers sufficient to constitute a city. Such a community has its advantages and its inconveniences. Of the latter are dust, smoke, noise and increased risk of conflagration. . . . Surely it would not be pretended that a flouring and corn mill is per se a nuisance. But the complainants allege this one to be a nuisance, because of the circumstances detailed.

"To abate a public nuisance, the public authority must move. A private action, either at law or in equity, will not lie, unless the plaintiff has sustained some special damage. . . .

"But do the complainants bring their case within the settled rules of a court of chancery? If they intend by the allegations recited that the establishment of Lake is a public nuisance, they have no right of suit at law for damages, or equity for perpetual injunction, unless they sustain peculiar and special injuries of the character just considered. But if they mean no more than to affirm that the use of the property is a private nuisance as to themselves specially, then the principle is the same.

"Irreparable injury lies at the foundation of relief in equity, which must be so great as to be incapable of compensation in damages. . . . Equity will not relieve if the injury be doubtful, eventual or contingent. . . . Nor ought so peremptory an interdict to be laid on the defendant's use of his property, if the evils which are said to exist may be obviated by proper precautions.

"If the chimneys should be elevated so high as to discharge the smoke in the upper air, that annoyance to the complainants would be obviated. So a spark arrester might be placed in the chimney to prevent from that source the danger of firing the complainants' houses. So, if the boiler and furnace are not sufficiently guarded, proper structures might be put around them, to guard against the escape of fire. The noise complained of is not specifically analyzed in the bill. Whether it proceeds from the puffing of the engine or the rumbling of the machinery is not stated. Whether it is more than is usual to such mills is not alleged.

"A perpetual injunction against the lawful use of property in a city ought not to be decreed if the owner can apply to his steam power and machinery such alterations and appliances as will relieve them from the special and unusual annoyances complained of in this case. A chancellor ought to be well satisfied that the grievance is serious and well founded, and that there is no remedy short of the cessation of such before he will abate it as a nuisance by injunction. . . .

"If the grievances can be removed by the aid of science and skill, a court of equity will go no further than to require those things to be done. The legislature and the local municipal authorities have ample power to regulate the business of the city so as to produce as little inconvenience and annoyance to the different classes of its population as possible. Noisome and offensive trades may be assigned certain limits.

"It does not appear that the authorities of Aberdeen have declared that Lake's mill was improperly located, or that such establishments should not be carried on in the neighborhood where his is located. The merchant, mechanic, manufacturer, butcher, laborer and professional man, as well as those of wealth and leisure, constitute the city. They all have rights, and they ought to be so accommodated that each may enjoy his property and pursue his calling under the regulations prescribed by the authorities, without inflicting unnecessary and reasonably avoidable injury on others or their property.

"If there should be such accumulation of filth about the mill as is apprehended, the remedy is easy and plain, when that evil comes."

* *

Recognizing that a mill is not inherently a nuisance, the Georgia supreme court refused to enjoin construction of a grist mill and dam (Gray et al. vs. Chason, 123 S. E. 290).

Plaintiffs, residents near an old mill site, unsuccessfully sued to restrain defendant from reconstructing a dam to operate a proposed grist mill. Plaintiffs averred that before the old dam had broken, several years previously, persons dwelling near by had been subjected to mosquitoes, malaria, and chills and fever; that in the meantime they had been free therefrom; but that upon reflooding of the bed of the millpond, sap fermentation of existing scrub pine trees would bring back the unhealthful conditions. The court remarked:

"Without a full recital of the contents of the petition, it is sufficient to say that it is ample in its statements of probable injuries likely to result to the petition-

ers, and it is likewise alleged that petitioners have no adequate remedy at law. However, it is to be noted that it is not alleged . . . that the damages are irreparable, nor is there any allegation that the defendant is insolvent. . . .

"The construction and building of a grist mill is a legitimate business, and is not a nuisance per se. The court properly refused to enjoin the construction and building of the mill and the erection of the milldam until it was conducted in such a manner [as] to work hurt, inconvenience, or damage to another."

The court intimated that plaintiffs were confined to a claim for such damages as they might prove to result as a consequence of the maintenance of the dam.

* *

Another decision of the Georgia supreme court is a precedent for saying that, where a mill's steam power plant is needlessly operated in such manner as to cause dense, black smoke to be emitted from the stack to the injury of owners or occupants of near-by property, a court will grant an injunction against continuation of the practice.

In the course of its opinion, the court made the following quotation from the report of a Pennsylvania court's decision in a suit to restrain the owners of a flouring mill from using soft coal to run their steam engine:

"No occupation is more legitimate and no erection more careful than that of a flouring mill. There can be no denial of the owner's right to build one and to run it by steam. So of any other manufacturing establishment. They may not be agreeable to his next neighbor. He is not bound to consult the taste, pleasure, or preference of others; but he is bound to respect his neighbor's rights. . . . While mills and manufactories are legal and necessary, it is neither legal nor necessary that they be so located as to interfere with the rights of others in the enjoyment of their possessions. When, therefore, they create noises that prevent sleep, or taint the atmosphere with vapors prejudicial to health or nauseous to the smell, or fill it with a smudge that depreciates its use for every purpose, they trench on the rights of persons affected thereby. Just here is where the line must be drawn. At this point they become nuisances."

In the Georgia case, the court held that the evidence was sufficient to warrant a jury in finding that defendant, a laundry company, created a nuisance in a business district by needlessly using soft coal, where it was feasible to use coke. Speaking of smoke nuisances generally, the court said:

"Theoretically, every person has the natural right to have the air diffused over his premises in its natural state, free from all artificial impurities. . . . If this rule were literally applied, its application would seriously disturb business, commerce, and society itself. Hence, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and nature of the community. . . . The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the right (and such it must be conceded) must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. . . . The right to use one's property as he pleases implies a like right in every other person, and is qualified by the doctrine that the use in the first instance must be a reasonable one." (100 S. E. 207.)

* *

SECTION 612. ZONING ORDINANCES

A decision of the Minnesota supreme court clinches the rule of law in Minnesota that certain business and industrial establishments, including mills, may be prevented by cities from taking root in districts primarily devoted to residences. The court said, in the case of City of St. Paul vs. Kessler et al., 178 N. W. 171:

"That the city has ample power to regulate, restrict or prohibit trades or occupations that are likely to develop into nuisances or are generally considered such when carried on in certain localities, cannot well be questioned. . . .

"In State ex rel, vs. Houghton, 142 Minn. 28, an ordinance excluding a cereal mill from what had been declared to be a residence district was sustained as being a proper exercise of the police power for the general welfare."

In the last mentioned case the court denied the right of a grain company to establish a cereal mill within a certain district of Minneapolis. The pertinent facts were that the city had, by ordinance, designated that district as being residential in character, forbidding the erection or operation of industrial plants within it. After the ordinance was adopted, the grain company bought a tract bordering upon the right-of-way of the Chicago, Milwaukee & St. Paul Railway Co., within the district, and ap-

plied for a municipal permit to build a cereal mill 34 by 38 feet and 40 feet high to the eaves, to be equipped with modern machinery and a dust collection system. The permit was refused on the sole ground that the location was within a residential district.

The grain company sued to compel issuance of the permit, asserting, first, that the district was not, in fact, residential in character; and, second, that the mill as proposed to be built and operated would not constitute a menace to the health, safety, comfort and general welfare of the surrounding property owners, and that the ordinance was not, as applied to the grain company and its proposed building, a reasonable exercise of the city's police power.

Disposing of the case, the supreme court said:

"The defense is that the area is a residential district in which mills are not permitted, and that the proposed mill, if erected and operated, will give off various foul and unwholesome odors and dusts, will be noisy and a menace to the health, comfort and welfare of the people.

"This ordinance was considered and discussed in . . . cases . . . holding . . . that the legislative power may impose any reasonable restrictions and may make any reasonable regulations, in respect to the use which the owner may make of his property, which tend to promote the general well-being or secure to others that use and enjoyment of their own property to which they are lawfully entitled; but when the legislative power attempts to forbid the owner from making a use of his property which is not harmful to the public and does not interfere with the rightful use and enjoyment of their own property by others, it invades property rights secured to the owner by both the state and federal constitutions. We adhere to the rule.

"The area is practically level, sparsely settled and largely covered with brush and trees. The right-of-way of the named railway company extends from the southeast to the northwest across the district, upon which there is a main and several side or storage tracks. The lots along the right-of-way are well adapted for industrial purposes, but we see no reason why the area in general might not be suitable for residential purposes and it has been so designated by the proper tribunal. The issues were fully litigated before the trial court and determined adversely to the contentions of the relator. There was evidence to support the findings, and we see no reason for this court to interfere therewith.

"The area having been legally established as a residential district, and the relator thereafter claiming the right to erect and operate a factory therein, the burden is upon him to show that the proposed industry would not impair the value of the property within the district or seriously interfere with its proper enjoyment as residential property."

CHAPTER LXXI

DAMS AND RIPARIAN RIGHTS

SECTION 613. RIPARIAN RIGHTS IN GENERAL

THE Russell-Miller Milling Co. secured several noteworthy rulings by the North Dakota supreme court limiting the objections that validly may be made by owners of land along a stream used by a mill. The rulings were announced in a suit brought by one McDonough, in which he complained against uses made by the milling company of waters of the Heart River at Dickinson, N. D. (165 N. W. 504.)

Plaintiff owned land bordering the stream, and used the tract for pasturing cattle and raising vegetables, and harvested ice from the river. The mill was situated upstream, and its drainage led into the stream more than a mile above plaintiff's land. It was asserted in the suit that this drainage, consisting of water utilized in washing wheat at the mill and the discharge of water used for sanitary purposes, rendered the flow of the river unfit for human or animal drink, and rendered ice, forming below, unwholesome and unsalable.

A trial resulted in the allowance of nominal damages, $100, to plaintiff, who, complaining that it was an insufficient award, appealed to the supreme court, where the judgment was affirmed. The higher court declared that the rights of the parties must be determined in the light of the following stated general principles:

"The owner of land traversed by a natural stream may use the water therein so long as it remains on his land, but he may not prevent the natural flow of the stream or pollute it. . . . The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is a natural right inseparably annexed to the soil itself, which arises immediately with every new division or severance of ownership. . . .

"The right of a riparian owner to have a natural stream continue to flow through or by his premises is necessarily subject to the right of each riparian proprietor to make a reasonable use thereof. . . . In every case the test 'of the rightfulness of the use which one owner is attempting to make of the stream is whether or not such use is reasonable, under all the circumstances of the case.'

"It cannot be contended that every use of a stream which either decreases the amount or purity of its waters is unreasonable. If this was true, the right of riparian owners to use the waters of the stream could largely be a right without value or benefit. For clearly many, if not most, of the uses to which streams are ordinarily put tend to decrease, in some degree at least, either the quality or quantity of the flow. . . .

"Upon the question of reasonableness of the use by the upper proprietor, the character and extent of his business, as well as the use to which the lower proprietor is putting the water, may be taken into consideration. A riparian owner has a right to make a reasonable use of a stream for the operation of a mill or factory, and may even cast sewage or waste material therein, if he does not thereby cause material injury to public or private rights. . . . Manifestly, running streams cannot be used for commercial, manufacturing, or agricultural purposes and retain their pristine clearness and purity. . . .

"A riparian owner whose rights have been invaded is entitled to apply to and receive from the courts such relief as the facts in the particular case show him to be entitled to. He may maintain an action for damages against the wrongdoer for the detriment sustained. And in certain cases, where the legal remedies are inadequate, he may also be awarded injunctive relief."

Reviewing the evidence adduced at the trial, the supreme court held that plaintiff failed to sustain the burden imposed upon him to establish his claim that the stream and ice forming over it was polluted by the mill's operations, that being refuted by the testimony of expert chemists; and finds that any valid ground for objection concerning the discharge of sewage at the mill would be avoided in the future by the mill's intended use of

septic tanks. Concluding, the court said:

"In this opinion we have adopted the theory on which the case has been argued, but we deem it proper to say that we are by no means satisfied that a riparian owner of land situated within the limits of a city at a point with respect to residences and manufacturing establishments therein, such as the evidence shows plaintiff's premises to be situated, can legally claim that the cutting of ice thereupon is a reasonable use of the waters in the stream."

* *

Several important legal phases concerning the rights of water power mills were considered by the Virginia supreme court of appeals in the case of Hoge et al. vs. Kirk et al., 97 S. E. 116. The suit involved the right of defendants, as owners of a mill and appurtenant water power rights, to temporarily stop discharge of water along a tailrace while making necessary repairs to the mill, by discharging such water by overflow into a waste-race above the mill.

The main point decided in the case was that the fact that defendants and their predecessors had for about 70 years openly used the tailrace and the waste-race in the operation of the mill under apparent claim of right to do so, and without opposition of landowners affected thereby, created a prescriptive right in the defendants to continue the use; and it was decided that one taking title to lands through which the races extend was and is bound to take notice of the mill's vested rights to such continued use.

Another point laid down in the case was that, although one owning land along a natural water course has a natural right to use of the water for domestic use on his property, this right does not extend to such artificial channels as are formed by tailraces. One owning land bordering such a race owned and maintained by another has no rights in the water thereof except as he may acquire them by special grant or prescriptive use.

Hence, in this case, persons through whose lands the tailrace extends are not entitled to complain of any disadvantage resulting to them through a withholding of water from that channel while the defendants repair their mill, having acquired no legal interest in the flowage in the tailrace.

* *

Some of the legal rights of a mill in a navigable stream on which its premises border were defined by the Michigan supreme court in the case of McMorran Milling Co., Port Huron, Mich., vs. C. H. Little Co., 167 N. W. 990.

Plaintiff owned lands bordering upon the St. Clair River, and granted defendant, a dealer in sand and gravel, the right for 10 years to remove such material from the submerged lands appurtenant to the mill, at a stipulated annual rental. The contract was carried out for some time, but the federal government interfered on the ground that the dredging operations interfered with navigation. Thereupon the defendant refused to make further payment, and the mill sued to recover on the contract. The trial court in Detroit directed verdict in plaintiff's favor, but the supreme court reversed the decision, holding as follows:

An owner of land bordering upon a navigable stream has title to the submerged lands to the center of the river, but this title is subordinate to the right of the United States to control the stream for the purposes of navigation, and is subordinate to the right of the public to use it for commerce.

Hence, when defendant was compelled to cease removing sand and gravel from the river that company was ousted by paramount authority, and was not bound to continue making the quarterly payments called for by its contract with the plaintiff, although bound to pay the agreed rental up to the time of such ouster.

* *

The case of James Frazee Milling Co. vs. State, 204 N. Y. Supp. 645, before the New York court of claims, dealt with claimant's rights on account of construction of the Barge Canal at Baldwinsville; claimant having owned a mill on a site extending between the canal and the Seneca River. Among other points, the court of claims ruled as follows:

That navigation of a river may be impeded by rapids and obstructions does not deprive the stream of classification as being navigable if it is usable as a public highway. To be navigable, it is not essential that the stream be deep enough to admit passage of boats or other craft at all of its parts, nor need the navigation be open at all seasons of the year or at all stages of water.

Legislative consent is essential to the establishment of dams and canals along navigable streams.

The legislature may grant the soil of or confer an exclusive privilege in navigable waters held by it for the people,

or authorize a use inconsistent with the public right, or interfere with the rights of navigation, so far as the public is concerned, when acting in the public interest, subject to the superior control of Congress.

"The right of the plaintiff to have the water flow past and away from its premises and the tailrace of its mill without an artificial obstruction, which there increases the natural height of the water to an interference with the water wheels or tailrace, is an inseparable part of plaintiff's land, and an artificial obstruction which destroyed, in whole or in part, the waterpower, is a taking of a part of the land [for which compensation must be made by the state]. By the same rule, the artificial obstruction of the natural flow of the river, which at times hinders the escape of the water from the water wheels (although it does not destroy the waterpower) and causes inconvenience and diminution of power, is an infraction of the right of the plaintiff. The state is therefore liable in compensatory damages.

"The fact that the land bordered upon the canal created no right to the plaintiff, as a riparian owner, to the use of the water of the canal as power."

* *

The Ephraim (Utah) Milling & Elevator Co. secured affirmance by the supreme court of the state of a judgment for $500 against the town, on account of injury done to the company's flour, grain and mill machinery through obstruction of a stream. (161 Pac. 1124.)

To better secure an adequate water supply, the city of Ephraim constructed a divider in a creek to divert surplus flow of the stream in times of high water, but it appears that the work resulted in obstruction of the natural flow of the channel and in accumulation of rock and other substances which clogged the stream, thereby casting overflow back upon plaintiff's mill.

Under these circumstances, the supreme court declared that the city became liable for all damages traceable by the company to such obstruction of the flow of the creek.

SECTION 614. RIGHTS AS TO DAMS, IN GENERAL

In the case of Duncan vs. New England Power Co., 113 N. E. 78, the Massachusetts supreme judicial court held that the provisions of the commonwealth statutes authorizing erection and operation of "water mills" on non-navigable streams, and dams to create waterpower, were not limited to mills for grinding grain or manufacturing fabrics, etc., but extended to plants erected to generate electricity for general power and lighting purposes. This decision was based on a finding that "by the practice of a hundred years a water mill . . . includes mills for the manufacture of goods and the rolling of iron as well as for grinding corn."

The court, however, cited a decision of the Missouri supreme court, based on differently worded statutes, holding that the word "mill" must be given its primary meaning as "an engine or machine for grinding or comminuting any substance, as grain, by rubbing it or crushing it between two hard, indented surfaces."

* *

Plaintiff's right to enjoin defendant from maintaining a dam at such height as to back water up at plaintiff's dam and mill and thus infringe upon his right to the fall of the water was recognized by the Iowa supreme court in the case of Harp vs. Iowa Falls Electric Co., 191 N. W. 520. Responding to a claim made on defendant's part that plaintiff could install new and more efficient wheels and machinery, and produce the maximum output of the machinery then installed, and that he was not entitled to a greater head of water at his dam than sufficient to operate his mill with the more efficient machinery, the court said:

"The trial court held, and properly so, we think, that this is no defense. It may be true that plaintiff's mill and machinery is old, but it appears that plaintiff was engaged in the flour and feed business, and was manufacturing such flour and feed, and had in good faith utilized the waterpower in grinding products which he sold in his business in the town. The power and the mill and its equipment were sufficient for his purposes, and could be used by him profitably. In addition to that he owned the land, and the nature of the stream at that point was such as to make his right of fall of intrinsic value."

* *

Where a flour mill is operated by waterpower, the right of the owner of the mill to use the waters of the stream for that purpose is subordinate to the right of a boom company to accumulate and detain water by means of flooding dams for such time and in such quantities as is reasonably necessary to permit the driving of logs with reasonable efficiency and dispatch; and, therefore, the mill

owner has no legal remedy against interruption of the operation of the mill pending such detention of water.

In announcing this rule in the case of Johnson vs. Wild Rice Boom Co., 143 N. W. 111, the Minnesota supreme court reversed a judgment for $2,000 which had been awarded plaintiff because of interference with operation of his mill at Ada, Minn.

The theory upon which priority is given boom companies is that use of a stream for transportation by the public must take precedence over use of the waters for private purposes. The court, however, expressly held that there was liability for damages unnecessarily or negligently inflicted upon a mill owner.

* *

That a company has a power dam, and some distance upstream another dam used as a reservoir to keep an adequate supply of water on hand, was held by the Maine supreme judicial court, in the case of Portland Sebago Ice Co. vs. Phinney, 103 Atl. 150, to give the company no standing to complain of defendant's construction of a dam about 3,000 feet above the company's lower dam and some 1,200 feet below its reservoir dam, in the absence of any showing of unreasonable impairment of the company's use of the stream.

SECTION 615. FLOODING UPPER LANDS

About the time that George Washington confessed to chopping the cherry tree, when his father caught him in the act, or, to be a bit more exact chronologically, in 1745, the colonial legislature of Virginia enacted that "any person or persons *willing* to build a watermill, on some convenient run," might condemn the right to construct a dam, as against persons to be affected thereby. The law further provided that "if any person shall thereafter presume to build any mill with such leave first had, he or she shall be liable to the action of the party grieved, for his or her damages."

In an interesting lawsuit reviewed by the Virginia supreme court of appeals —Hayden vs. Norfolk & Western Railway Co., 93 S. E. 77—the court applied this legislation, and determined the rights of the parties under rights granted by a county court to Peter Randolph, in 1798, "with a dam to stagnate" water in a creek; defendant railway company having succeeded to the rights of the former owners of the dam.

Plaintiff sued to enjoin defendant from any longer maintaining the dam, but the court held that right to maintain the suit was barred by the statute of limitations, notwithstanding certain interruptions in the use of the dam. It was decided that, under the Virginia laws, right to relief against maintenance of a permanent dam "outlaws" five years after original erection of the structure.

* *

In the case of Smith vs. Collins, 251 S. W. 979, it was decided by the Kentucky court of appeals that any right to damages for flowage of land, caused by the construction of a permanent dam across a stream, vested in the owner of the land at the time the dam was erected, and that a subsequent owner did not have any valid claim.

It was further decided that right to maintain such structures will be presumed to have been properly acquired where they have been maintained for many years, and where public records in which the right might be shown have been destroyed.

* *

In a Kansas case the supreme court of that state decided:

One who builds and maintains a dam may acquire flowage rights by long-continued use, and if the dam has been maintained for more than 15 years a grant or consent by the owners of the upstream lands will be presumed and gives the owner of the dam a right to its continued maintenance to the extent to which the right has been enjoyed for such period of time.

The fact that a city which has bought a small tract of land on a stream is undertaking to supply the inhabitants of the city with water gives it no special rights to the water of the stream as against a lower millowner who has acquired a prescriptive right to unobstructed flowage. The city merely acquires the rights of ordinary landowners along a stream; that is, the right to make reasonable use for individual domestic and agricultural purposes; but it does not acquire the right to divert water for sale to consumers without making full compensation to other riparian owners who are thereby deprived of water rights. The opinion, however, recognizes the right of a city to condemn such flowage rights as were acquired by plaintiff in this case, on making full compensation therefor. (149 Pac. 693.)

* *

The height at which a milldam might be reconstructed after having been washed out was involved in a decision announced by the supreme court of

South Dakota in the case of Johnson vs. Centerville Milling Co., 156 N. W. 82.

It appears that defendant acquired the right a long time ago to construct and maintain a dam in the Vermilion River at a height of 10 feet, but that the structure was washed out in a flood. When reconstruction was attempted, plaintiff, an owner of land along the stream and above the dam, brought suit to restrain erection at a greater height than 10 feet, claiming that his lands had been overflowed through defendant's previous use of flashboards on the dam whereby the dam's height was increased over 10 feet.

Trial of the action resulted in a judgment in favor of the milling company, but the supreme court reversed the judgment and remanded the case for further findings of fact.

The decision of the higher court was to the effect that an owner of land flooded by a dam maintained at an unauthorized height is entitled to enjoin its reconstruction at that height and to recover damages for accrued injury to his property. It was also held that, under the South Dakota law, a milling company can acquire no right to flood land through the maintenance of a dam until the right has been regularly condemned and the awarded damages have been paid.

* *

Suits were brought against the C. Hoffman & Son Milling Co., a railway company and others for damages claimed by plaintiffs to have been sustained to their lands through flooding caused by the milling company maintaining a dam in the Smoky Hill River in Kansas and the railway company maintaining a bridge which contributed to the overflow. Before final determination of the suits, the plaintiffs made settlement with the railway company, dismissing their actions as to that company, but expressly reserving the right to proceed against the mill and other defendants. A trial resulted in the judge holding that no cause of action was shown against the mill, and the plaintiffs appealed.

On the appeal it was asserted that the act of the plaintiffs in dismissing the suits as to one of the alleged joint wrongdoers released the others, but the Kansas supreme court has ruled against this contention, holding that, as each defendant might have been sued separately, the fact that they were sued jointly did not prevent the plaintiffs from dismissing as to one defendant under reservation of claim against the others.

The judgment in the mill's favor was reversed and a new trial ordered, on the ground that the jury should have been permitted to pass upon the question whether the dam had caused injury to plaintiffs' property. If such damage was inflicted, the court holds that liability for it could not be avoided by the mill on the ground that the dam was installed and maintained under statutory authority. (165 Pac. 276.)

SECTION 616. DIVERTING STREAM'S FLOW

In the case of McKee vs. Nebraska Gas & Electric Co., 193 N. W. 106, the Nebraska supreme court decided the following points of law concerning riparian rights:

Where the owner of a milldam willfully diverts the water of a natural stream into a millrace cut through his own land and thereafter turns it back into the natural channel at right angles, so that the water is carried by its own momentum across the natural channel onto the land of the opposite riparian owner, he is liable for the damages resulting therefrom.

A riparian owner, who by his willful act diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages, irrespective of any question of negligence or malice. It is sufficient in such case if plaintiff prove that the act was wrongfully done and that he was damaged thereby.

The fact that defendant may in good faith have believed that it was necessary for the preservation of its own property to cut a dike and change the course of a natural stream is no defense to an action for damages where the effect of its act was to injure the lands of plaintiff, a lower riparian owner.

* *

"Can any one divert the water above our dam to our detriment?" asked a Michigan milling company. "The dam backs water up about a mile, and has been built 60 or more years. We own the flowage rights on all the land that we flow, and own the banks of the river about one half mile on each side; beyond that the banks are steep, probably 25 to 30 ft high, going almost directly down to the water.

"A small farmer beyond where we own the banks is putting in an irrigation plant. At present he does not purpose to irrigate enough to cut any particular figure, but others might take it up and influence our waterpower in the future."

Even a casual glance through the law reports shows that under such circumstances there is no right to divert water above the dam to the detriment of the mill.

Says a standard legal authority: "The owner of a dam and pond, in the absence of rights vested in others by grant or prescription [that is, by deed, contract or long-continued use] is entitled to the exclusive use of the water stored or the power thereby created." 40 Cyc. 671.

This protects the waterpower miller against diversion of water impounded by him. The statement is even broad enough to entitle him to prevent diversion of the impounded water without regard to detriment to him. But we do not believe that the statement can be relied upon to prevent use by an upper owner of land of water for irrigation purposes, to the extent that such use would be reasonable if no dam were maintained and to the extent that no detriment results to the mill.

The law seems to make a distinction between the miller's rights in water impounded and that which would flow in natural course except for the maintenance of the dam. Such a distinction is manifestly reasonable, since an upper owner has natural rights to use of water in the course of flowage which do not apply to water conserved by a dam maintained by a lower owner.

The authority above cited lays down these further rules touching the relative rights of owners of land along a stream:

"The use of water for irrigation must be reasonable, having regard to the size and capacity of the stream, climatic and other conditions, and the needs of other proprietors on the stream." 40 Cyc. 813.

"A diversion by a riparian owner of the waters of the stream, beyond what may be necessary for his proper riparian uses, to the injury of owners below him, is an invasion of their riparian rights for which he will be answerable in an action at law. . . . While a diversion which does not inflict injury on others is permissible, a diversion which materially curtails the rights of lower owners is unreasonable and unlawful, and under no circumstances can an excessive or wasteful diversion be sanctioned." 40 Cyc. 604, 605.

See, also, the first section of this chapter.

SECTION 617. USE OF WATER FOR MUNICIPAL PURPOSES

The Kansas supreme court denied the right of Charles M. Wallace, the owner of a mill and milldam on the Walnut River at Winfield, Kansas, to recover from the city on account of water taken from his millpond in the operation of a municipal waterworks system. This action was brought to recover $49,500 as the value of water taken, and the decision is not inconsistent with the right of a milldam owner to recover for injury to his power rights, which recovery was permitted in an earlier case between the same parties. Referring to that case, the court said:

"It was determined that the plaintiff had acquired waterpower rights in the river, and that the taking of water at the lower intake was a material interference with the plaintiff's rights, by not only diminishing the quantity, but depriving him of the use of the water to which he was entitled under rights previously acquired. For this interference and deprivation he is entitled to reasonable damages to the extent of the injury sustained by him. However, he had no title to the water in the river, no right to sell it, nor to recover the sale price of water taken from the river." (159 Pac. 11.)

* *

The right of an owner of a mill run by waterpower to recover damages for diminution in the power, caused by a water company's subsequent appropriation of waters from springs which feed the stream, was recognized in an opinion handed down by the Pennsylvania superior court.

The judges who heard the case, however, decided that it was open to the water company, for the purpose of reducing the damages, to show that the mill property, being out of repair, could not utilize all the water at hand. (56 Pa. Super. 536.)

SECTION 618. RIGHTS OF WAY FOR RACEWAYS

Various aspects of title to rights of way across land for purposes connected with the development of waterpower were considered by the Oregon supreme court in the case of Patterson vs. Chambers Power Co., 159 Pac. 568. Among the more important points decided were these:

One who buys land is presumed to know of the existence of a granted right of way across the land for use as a mill raceway, if it exists under a recorded conveyance, although the raceway may not yet have been constructed.

Whether the owner of the right of way is entitled to enlarge the raceway to meet increasing requirements depends up-

on the language of the conveyance under which the right is reserved. Unless provision for enlargement of the right of way clearly appears, the first location of the raceway limits the right.

The raceway right of way in this case was not extinguished by a sale of part of the tract of land to which the right was appurtenant.

SECTION 619. RIGHT TO HARVEST ICE ON MILLPOND

According to a decision of the New York court of appeals it appears that the mere fact that a particular miller who derives the power for his mill from a dam is entitled to maintain the millpond gives him no right to harvest ice forming on the pond, if the underlying soil belongs to another landowner.

Following decisions reached by the highest courts of several other states, the court holds that the owner of land flooded by a millpond has the exclusive right to the ice, and to gather and sell it for his own benefit, provided that he does not thereby impair to a substantial extent the flow of the water for mill purposes. Similar decisions have been handed down by the highest courts of Maine, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Nebraska. (Valentino vs. Schantz, 109 N. E. 866.)

SECTION 620. CONFLICTS WITH IRRIGATION RIGHTS

The Fort Collins (Colo.) Milling & Elevator Co. succeeded in establishing before the Colorado supreme court legal rights pertaining to use of waters of the Cache la Poudre River for milling purposes. (156 Pac. 140.) An irrigation company applied for permission to change its point for diversion of water, and the district court granted the application over the milling company's protest, but the latter company's appeal to the supreme court resulted in reversal of the decision. The higher court declared the following propositions:

A senior appropriator of waters of a stream acquires no right to use for other purposes than that for which the appropriation was made, to the prejudice of junior appropriators. Nor may he waste water to the injury of others, although acting within the maximum quantity of water decreed to him for proper use.

Nor will a court permit a senior appropriator to change the point of diversion of water used by him to the disadvantage of junior appropriators who would thereby be deprived of benefits of return by seepage or otherwise of part of the water taken by the senior appropriator, such benefits accruing to them under the established point of diversion.

The same company previously won a suit before the same court involving priority of right to take water from a stream for power purposes as against the irrigation company which brought the action. (152 Pac. 1160.)

The court held that a stockholder of a company as distinguished from the corporation itself, is not entitled to maintain suit to enjoin invasion of claimed rights of the company; and that the Colorado law, which provides that, until a decree adjudicating priorities shall have been obtained, no claim of priority shall be recognized by the water commissioner in times of scarcity, does not preclude the commissioner from recognizing a prior vested right to an appropriation for power purposes, which had existed for more than 10 years before the law took effect. This latter holding is based upon the theory that the law merely recognizes irrigation rights, and that under it there is no provision for adjudication of power priorities.

* *

Plaintiff's flouring mill did not lose water rights to defendant by the latter's use of surplus water leaving plaintiff's ditch and by defendant's occasional obstruction of the ditch under temporary license from the mill, held the Oregon supreme court in the case of North Powder Milling & Mercantile Co. vs. Pacific Fruit Express Co., 198 Pac. 893.

The court also held that injunction was a proper remedy to prevent threatened continuation of interference with the mill's water appliances; it not being restricted to an action to recover damages.

* *

The Oregon supreme court was called upon to adjudicate some interesting phases of the right of a milling company to use waters of a stream for the development of power. In a suit brought by the Joseph (Oregon) Milling Co., the court held that, as between conflicting claims of right to appropriate the waters of a stream for power and irrigation purposes respectively, water lost by leakage in ditches and flumes should be considered, where reasonable care is used to avoid unnecessary loss; and that mere non-use of all the water a milling company is entitled to take under prior appropriation does not constitute an abandonment of the right afterwards to use the full amount, unless the non-use con-

tinues for an unreasonable length of time. (144 Pac. 465.)

But in a case to which the North Powder Milling & Mercantile Co. was a party, the Oregon court decided that where a milling company has acquired the right to use waters of a stream for power purposes, but does not need them during certain months, and never uses them during those months, it cannot grant the right of use for irrigation to a third person, as the rights of an appropriator of waters are limited to his own use. (144 Pac. 485.)

See, also, section 616 on Diverting Stream's Flow.

SECTION 621. FISHING PRIVILEGES

"The owner of land adjoining a nonnavigable stream is the owner of the soil to the center of the thread of the stream, and of the fishing rights to the center of the thread on his side of the stream. If one proprietor owns the land on both sides of the stream, he has the exclusive right of fishing therein.

"The right of fishing is not severed from the ownership of the fee by grant which does not by its terms either expressly convey the right, or necessarily include it, as, for instance, an unrestricted grant of all water rights or privileges.

"The grant by the owner of the fee of 'mill privileges' carries the right to the reasonable use of land and water necessary to the operation of a mill, but does not grant any fishing privileges." (Thompson vs. Tennyson, 148 Ga. 701, 98 S. E. 353.)

SECTION 622. DAMAGES FOR DESTROYING WATERPOWER

Occasionally a millowner has a claim for damages based on destruction of waterpower in the course of some public or quasipublic improvement, and the question arises, What is the measure of recoverable damage?

Broadly stated, the governing rule is as follows: "The measure of damages for taking or diminishing a waterpower is the difference between the market value of the property before the power is affected and afterward." 15 Cyc. 708.

The rule applies to all sorts of public improvements, railroad projects, and other works under which a mill's waterpower is destroyed, whether the injury consists in diverting so much water that the waterwheel will not turn, or in destroying the head at the dam.

Under the Federal Constitution, the owner of waterpower cannot be deprived of his rights in it without just compensation.

The general rule above stated, that the measure of damages is the difference between the market value of the property before the power is affected and afterward, was applied by the Pennsylvania supreme court in the case of Wagner vs. Purity Water Co., 88 Atl. 484. It was held that, on defendant establishing waterworks which interfered with plaintiff's waterpower, the latter's damages must be computed on this basis, without regard to special damages.

But in the case of Little vs. Stanback, 63 N. C. 285, the North Carolina supreme court decided that plaintiff was entitled to nominal damages for the ponding back of water upon his waterwheel, although he suffered no substantial injury.

Damages are to be assessed with reference to the injury done, rather than with regard to the value of the use to which the condemning corporation or political subdivision intends to put the premises. For instance, in the matter of Daly, 72 N. Y. App. Div. Rep. 394, it was decided by the New York supreme court that in a proceeding to condemn waterpower rights, the damages must be ascertained on the basis of the value of those rights, without regard to the value of the water storage to be established by a condemning municipality.

* *

In the case of Tyler et al. vs. Hot Springs Railroad Co., 36 Ark. 205, it was decided by the Arkansas supreme court that where a railroad was so constructed as to obstruct a millrace, and destroy the use of a mill on it, the measure of damages was the difference between the value of the millsite and machinery before the obstruction and after it. The court said:

"The business of plaintiffs was a valuable property, which made the value of the millsite; gave, indeed, to the land all the value it had. . . . Upon the building of the road, when it was found to render the millsite useless, it was nevertheless the duty of plaintiffs to take reasonable care of the machinery and make the best of its remaining value. But it is not true that the value of the machinery cannot be estimated at all as part of the damages. The true question is, How much less valuable was the millsite, and the machinery, than it would have been if there had been no interference with the waterpower?"

It follows from this reasoning of the

court that machinery of a mill rendered useless in that plant by destruction of waterpower is not necessarily to be treated as a total loss. The fair market value of the machinery, as it stands on the premises and as it may be sold for removal by some buyer who may be able to use it, after it has become useless on those premises, must be taken into consideration as an element of value preserved to the owner of the waterpower, notwithstanding destruction of such power.

* *

Ordinarily, question will arise as to how far the fact that the millowner can substitute steam or some other kind of power for the lost waterpower enters into a just computation of damages.

The law on this phase of the subject was also treated in the New Jersey case of Butler Rubber Co. vs. Newark, 40 Atl. 224, wherein it was decided that in assessing damages against defendant city for condemnation of waterpower rights, the cost of installing and maintaining a steam plant with which to run machinery formerly operated by waterpower was properly considered as a means of arriving at the difference in market value of the property caused by destruction of the waterpower rights.

On the trial of the New Jersey case the presiding judge instructed the jury as follows, and the supreme court approved this statement of legal principles:

"The foundation on which your verdict is to be constructed is the market value of this property before this water was diverted, the market value that would, in the judgment of the jury, under the evidence, have been realized by a sale of this property if the owner had put it in the market, desiring to sell it, and effected a sale to a purchaser willing to buy. . . . When you have ascertained that . . . you commence the construction of a verdict on the principle I have already stated, the comparaison of market values before and after. The sum arrived at cannot be more than the market value of the premises, and if part only is taken it will be less, if that which is left possesses any market value. . . .

"There is evidence that the stream in its natural state is subject to fluctuations occasioned by high water and drouth, and also subject to interference because of ice, and there is no evidence that the water supply was adequate to drive both or either of these wheels throughout the year. . . .

"When you have ascertained the extent and the value of the plaintiff's waterpower before the diversion, then you advance another step, and that is to ascertain the extent to which the plaintiff's property was affected by the diversion of this water; in other words, the nature and extent of the injury done, and the character and value of what was left. . . . When you ascertain how much the legal right of the city to the use and appropriation of this water, in its exercise, would affect the power that is left, then decide for yourselves the value of the remaining power, bearing in mind that the city takes only water rights, and leaves everything else in the possession and enjoyment of the owner. And when you have done that, subtract that from the market value of the property before it was interfered with, and you have got your verdict. . . . The legal proposition (the difference in market values) cannot be set aside; but how that legal proposition is to be ascertained, by what methods and by what evidence, depends on the situation of the particular case."

The evidence in this case showed that, before the waterpower rights were interfered with, the owner had installed auxiliary steampower—a 500 h-p engine. The city claimed that if this engine were compounded enough power might be obtained to drive all the owner's machinery. Another method suggested was the installation of a separate plant to supply additional power. On this phase of the case, it was held by the supreme court that the trial judge properly instructed the jury:

"That method of readjustment is for your consideration. If you find, as the result of the evidence, that this is the proper way for readjusting this establishment, with a view of restoring what has been lost by the diversion of the water, then the cost of that method of reconstruction will furnish you with the means of deciding, on the legal rule, the difference in market value. . . . Which method, gentlemen, would a judicious owner adopt to meet the diminution of his power by reason of the diversion of the quantity of water taken by the city under these proceedings? Would he make a connection with the engine that is there, or would he install a new plant for the purpose of driving the machinery on that line of shafting?

"When you determine that, then the cost (and when I speak of cost I don't confine it wholly to first cost, as you will see presently) of furnishing that supply will be used, not for the purpose of figuring out a verdict, but as a means of deciding on just compensation—bearing

in mind that while the plaintiffs are entitled to compensation which would restore what they have lost, they are not entitled to have their property improved beyond its original value by means of a proceeding of this character. . . . The plaintiffs are entitled to just compensation. And I use that word 'just' in a double sense—in the first place, just, in the sense of fairness; and in the next place, just, in the sense of limitation—just compensation. In the second place, they are not entitled to have their property made more valuable in the market than it was before the condemnation was made. . . .

"As I understand the evidence, and I believe that is the case, the compounding of an engine doesn't increase its efficiency; it simply saves fuel. If that method of reconstructing these premises meets the approbation of the jury, make compensation on the basis of such a readjustment."

Approving the instructions last quoted, the supreme court said:

"The plaintiffs were the owners of the 500 h-p engine provided by them for present as well as for future use in their works. When these condemnation proceedings were had, they had their waterpower, and they had also, in addition to the power derived from the stream, the . . . engine. Both these sources of power the plaintiffs owned, with the right to use both in the present or in the future, as circumstances might require. If that engine be utilized in driving machinery which was made destitute of power by the diversion of this stream, to that extent the capacity of the plaintiffs' plant, made up of the 500 h-p engine and the waterpower as it was originally, would be impaired."

* *

Another case in point is that of Lakeside Mfg. Co. vs. Worcester, 72 N. E. 81, decided by the Massachusetts supreme judicial court. It was there decided that on an issue as to the value of waterpower rights condemned, the trial judge properly refused to instruct the jury that if the substitution of steam power for waterpower was an economical and proper mode of repairing the damage . . . due to the taking of the water, and if the use of the mill privilege for manufacturing purposes, with steam power substituted for the waterpower taken, would, after the taking, have been a reasonable and proper mode of using the property to obtain the best financial results, then the measure of the millowner's damages, due solely to the taking of the waterpower, was "the cost of producing annually a full equivalent therefor by the substitution of steam power."

The supreme court held that the jury might consider this matter, but that "we should be slow to say as a matter of law that the measure of damages was the cost that might result from a certain reasonable and economical mode of repairing the damage, to the exclusion of every other reasonable and proper mode, the financial result of which might not be precisely the same."

We refer any specially interested reader to the full report of the Massachusetts case for a detailed consideration of various matters related to the question how the fact that other power may be substituted for destroyed waterpower affects the measure of damages.

* *

In assessing damages for interference with, or destruction of, waterpower rights, question is apt to rise under particular circumstances whether the owner is entitled to have those rights valued with regard to possible power uses to which they have not been actually put. For example, suppose that a millowner has never utilized half the power available at his dam, because his mill has not required it, but that there is a reasonable prospect that at some future time he might need it on an enlargement of his mill, or on the organization of a light and power company. May these prospective uses be taken into consideration? It seems that the trend of judicial decision clearly calls for an affirmative answer to this question.

In an opinion supporting this view (Rankin vs. Harrisonburg, 104 Va. 524, 52 S. E. 555) the Virginia supreme court of appeals said:

"Water privileges and waterpower can now be put to uses not dreamed of in the past. By the generation of electricity, power can be transmitted to a distance, no absolute limit to which has yet been fixed, and thus become subservient to all the uses to which, in the marvelous growth of modern industry, force in its varied manifestations of heat, light and motion is applied. Waterpower, therefore, so far from being less valuable than heretofore, acquires an additional value as the possibilities of the generation and transmission of force by means of electricity are from day to day disclosed, and the courts should be careful not to introduce or to sanction refinements by which the value of those rights to ripa-

rian owners may be diminished or impaired."

And, in the case of Swain vs. Pemigewasset Power Co., 85 Atl. 288, the New Hampshire supreme court decided that, on the assessment of damages for flowage of land, a riparian owner may recover compensation for the impairment of undeveloped and unutilized waterpower located upon his land. The court said:

"The principal value of the plaintiff's real estate might consist in its natural availability for the development of waterpower. To deprive her without her consent of this element of the value of her land, whether rightfully or wrongfully under the law, would be to deprive her pro tanto of her land; for the ownership of land in fee simple without the right to enjoy its use is a palpable contradiction of terms. . . .

"It is urged in argument in behalf of the defendant that it would be difficult to assess the plaintiff's damages, that they are, from the nature of the case, problematical and visionary, and that their assessment would for that reason be impracticable. But without attempting to point out what evidence would be and what evidence would not be competent and admissible upon that question, we can discover no such inherent difficulty in reaching a conclusion upon it that the amount of her damages could not be reasonably determined by the tribunal charged with that duty. The practical question would be, How much less was her land worth after the flowage than before?"

The last two decisions seem to be at variance with an earlier one of the Maine supreme judicial court (Worcester vs. Great Falls Mfg. Co., 41 Me. 159), in which it was held that, in a suit to recover damages for overflowing land, the plaintiff owner was not entitled to an award based on possible value of his property as a waterpower site, where it did not appear that he ever intended to devote the property to that use. This case was decided many years ago, and I doubt very much that it would be followed were the same question to be submitted to the Maine court again.

* *

One point in connection with this subject well worth remembering is that there is a general principle of law under which, on the assessment of damages for a permanent injury, such as is involved in destruction of a waterpower right, all damages, past, present and future, must be covered. The final award will be conclusive, and the owner will not be permitted to make claim for additional damages arising out of the injury complained of, although he may discover that he sustained some element of damage not considered when the award was made.

* *

See, also, section 598 on Valuing Mill Property in the chapter on Damages.

SECTION 623. PARTIES TO SUITS CONCERNING WATER RIGHTS

The Addison Flouring Mill Co., of Addison, Mich., succeeded before the Michigan supreme court in securing the dismissal of a suit whereby owners of summer cottages fronting upon a lake, from the outlet of which the company derived waterpower, sought to compel the company to maintain an artificial low-water mark.

The ground on which the court dismissed the suit was that it appeared that farmers owning land along the shores of the same lake, and interested in seasonal lowering of the waters for agricultural purposes, had not been made parties to the suit. These farmers, being so interested, must be joined as parties litigant before any court order affecting their rights could be made.

For similar reasons, the supreme court held, however, that the trial court improperly adjudged that the milling company had acquired the right by adverse use to raise the waters of the lake to a certain fixed point. "We reach this conclusion," said the supreme court, "not because defendant [the milling company] may not be entitled to such a prescriptive right, but because the question whether it was so entitled was not properly an issue in the case, and the rights of the interested persons not parties to the record should not be foreclosed by such a decree." (159 N. W. 391.)

* *

In the case of State vs. Kansas Flour Mills Co., 164 Pac. 1170, the Kansas supreme court issued a writ of mandamus requiring reduction in the height of a dam maintained across the Smoky Hill River at Enterprise, Kansas.

The original dam was constructed in 1869 at a height of seven feet, under authority specially granted by the Kansas legislature. A year later the height was increased two feet, as permitted by a supplemental statute. The dam was erected by Christian Hoffman, but he

had transferred all his interest in it to the defendant company.

Claiming that the dam had been reconstructed in such manner as to greatly increase the height above nine feet, the attorney general of the state brought suit in the supreme court to obtain an order compelling a reduction.

The right of the state to institute the suit, as distinguished from owners of private property injuriously affected by the condition complained against, was questioned, but the court found that there was sufficient public interest to justify the suit, especially since it appeared that public highways were obstructed by the backwater impounded by the dam.

On the other hand, the state argued that the mill company was not entitled to maintain any dam under the authority conferred upon Hoffman, on a theory that the franchise confers special corporate privileges in violation of a state constitutional provision. This point was ruled out on the ground that the privilege was granted by the state to an individual, and that the fact that he transferred his rights to a corporation did not render continued maintenance of a nine-foot dam unlawful.

CHAPTER LXXII

FIRE INSURANCE

SECTION 624. DUTY TO EFFECT INSURANCE

A CANADIAN judge handed down a decision which suggests that any one who undertakes to manage property for another may incur heavy responsibility in failing to effect such insurance as reasonable prudence may be held to require. The decision held executors liable for loss resulting from failure to renew a fire policy covering a building later destroyed. It appeared that the executors knew when the old policy would expire, that they had ample funds with which to secure renewal of the insurance, and that they kept their own buildings insured. The decision is that of one of the lower courts of Ontario, and is therefore subject to reversal on appeal to a higher tribunal.

We do not find that the precise question has been previously passed upon by a court of authority. There are numerous decisions on the general proposition that an executor or administrator is liable for loss resulting from mismanagement of the estate in his charge, and there are decisions to the effect that he is liable for loss of estate property by fire attributable to failure to exercise such precautions to avoid loss as would be taken by a person of ordinary prudence respecting his own property. The only decision coming to my attention concerning the liability of directors of corporations under this head is an old decision of the New Hampshire supreme court (Charlestown Boot & Shoe Co. vs. Dunsmore, 60 N. H. 85), holding that directors are not legally bound to keep corporate property insured, nor liable in damages to the company where the uninsured property burns, in the absence of special circumstances.

All sorts of representatives—agents, executors, directors, etc.—are governed by the abstract rule of liability for losses to their principals resulting from failure to use such care as an ordinarily prudent person would use in his own business. That in the past it may have been held that ordinary prudence did not require one to effect or renew insurance for his principal, in the absence of express instructions or other requirement, cannot be too confidently relied upon as reflecting what a judge or jury might decide at the present time or in the future. An officer or board intrusted with the management of a mill, or other property, is treading on dangerous ground if it appears customary to insure property of that class and there is omission to carry insurance.

* *

In Broussard vs. South Texas Rice Co., 131 S. W. 412, the Texas supreme court decided that a rice milling company which, during a course of long dealing with a customer, had charged two cents per sack on all rice delivered to the company for milling to cover insurance, without any understanding as to the amount of insurance to be carried, was presumed to have undertaken to insure the rice for its full value, and was liable to a customer to that amount for its loss by fire, though the insurance effected was only for such part of the value as could be insured for a premium on the basis of two cents per sack.

The court said: "To insure goods properly, means to insure the entire thing and to its full value." Since the customer in this case was found to have been induced to believe that insurance would be effected to the full value of the rice, the court said that it was immaterial that mills in the particular locality may not have customarily insured their customers' property at full value.

SECTION 625. PROPERTY COVERED BY POLICY

Insurance of a "mill house" against fire has been construed as protecting the mill property and the machinery, as well as the building.

Whether the term "flouring-mill" should be interpreted as including a corn meal mill and a firekiln for drying corn was a question which perplexed the Ohio supreme court in an early case. (5 Ohio St. 450.) An insurance policy covered flour, grain and cooperage, contained in a "flouring-mill," but provided that there should be no use of the build-

ing in carrying on hazardous operations, such as a gristmill or mechanical operations requiring heat. While a kiln-drying corn meal mill was in operation on the premises, a fire destroyed the contents of the mill, but the insurance company denied liability, under the proviso of the policy above mentioned. In granting a new trial after a verdict adverse to the insurer, on the ground that the jury was not permitted to pass upon the question whether the corn meal mill was a usual or appropriate part of a "flouring-mill," the supreme court said:

"Some of the difficulty in this case appears to have arisen from confusion as to the distinction between the terms 'flouring-mill' and 'gristmill.' At this late day there should be no uncertainty as to the distinctive signification of these words of common use. Flour is the product of grain, both ground and bolted; while meal is the pulverized grain, ground but unbolted. The making of flour, therefore, consists in both grinding the grain and bolting the meal; while the making of meal consists in the simple process of grinding. The . . . gristmill, therefore, is an essential part of all flouring-mills, while the bolting apparatus is not an indispensable part of a gristmill. But it will not be controverted that the bolting apparatus is an ordinary appendage or usual incident to gristmills. But whether it is a part of the known or usual business of a mill denominated a flouring-mill, to manufacture meal without bolting it, or, in other words, to do the business of the grinding of grain without flouring it, is one of the questions of fact presented in this case. And in case it be found that the business of making meal or unbolted flour is a usual part of the business of a flouring-mill it still remains to be found whether a fire-kiln for drying corn in the manufacture of corn meal is an ordinary or usual part of a flouring-mill. For if it be so, the underwriter, in taking the contract of insurance, takes the risk; but if it be not, he cannot be burdened with a risk, which could not be fairly presumed to have been in the contemplation of the parties at the time."

SECTION 626. INSURABLE INTEREST

An Oklahoma concern requested information as to what the courts have decided as to the validity of insurance taken out by warehousemen on grain stored by them for the account of others.

What is said below in answer to this query will be found to apply to flour, as well as grain, in the custody of one other than the owner, as, for example, a commission merchant or a warehouseman. The decisions show that the custodian of goods belonging to another has an insurable interest in them, but that care should always be taken to see a policy shows the nature of the interest assured.

One of the latest opinions on the subject was announced by the Arizona supreme court in the case of Webster Bros. Milling Co. vs. Bingham, 125 Pac. 709. In this case Bingham brought suit against the milling company for the price of wheat destroyed at the mill, he claiming that the wheat had been sold to the company, and the company asserting that it was merely held for Bingham as the owner. As supporting his claim, Bingham attempted to show that the mill carried insurance on the grain, but the Supreme Court said:

"The fact that the appellant [the mill] was carrying insurance on the grain in its mill is not necessarily evidence of ownership. Warehousemen and bailees [a legal term denoting one who holds goods belonging to another] have a right to insure bailments [the goods so held] for their protection against loss that might occur through the negligence or carelessness of their servants or agents or themselves. . . . In a suit of this kind, brought and prosecuted upon a contract of sale, it is not competent as evidence of a sale to show that the defendant had insured the grain when the defendant denies the sale and alleges a contract of bailment, for, as above stated, he has a right to insure the bailed property."

Another instructive decision is to be found in the case of Baxter vs. Hartford, 12 Fed. 481, cited by the Arizona court. There plaintiffs sued on a fire policy covering grain, seeds and sacks, their own, or held by them in trust or on commission, or sold but not delivered, contained in an elevator; the elevator and its contents having been destroyed by fire. The insurance company sought to evade liability as to a certain quantity of wheat which had been held by plaintiffs for depositors under a clause reading, "Fire at owner's risk," the insurer asserting that the plaintiffs were not authorized to effect insurance on such wheat. But the court said:

"The contract between the plaintiffs and the depositors was, not that the latter should on demand receive the identical wheat stored in the elevator, but that the plaintiffs should deliver wheat equal in amount and grade to that deposited,

or account for its value. Being authorized to sell the wheat on their own account as fast as it was deposited in the elevator, I think the plaintiffs had such an interest in it as authorized them to insure it for its full value. They were under no obligation to return the identical wheat stored in their elevator, and no one expected them to do so. . . .

"But, on the theory that the title to the wheat . . . remained in the depositors, and that they took the risk of loss by fire, under their contract with the plaintiffs, still the latter was liable for its value if fire should result from carelessness on the part of their employees, and they had a right to protect themselves from this liability by insuring the wheat for its full value; and, further, if this wheat remained the property of the depositors, there was nothing in their contract with the plaintiffs which prohibited them, as bailees, from insuring it for its full value."

For additional authorities supporting the general proposition that a bailee may insure both his own interest and that of his customer in goods see the cases of Murdock vs. Franklin Insurance Co., 10 S. E. 777, and American Cereal Co. vs. Western Assurance Co., 148 Fed. 77.

But it is a general legal principle that a policy will be invalidated if the insured party's interest in the property be other than that of absolute ownership and that interest be not designated in the policy, where, as is generally the case, the contract contains a provision to that effect. Hence, great caution should be exercised to avoid running afoul such a clause.

There is, however, an interesting authority which qualifies this statement, in the decision of the Texas supreme court in the case of Wagner & Chabot vs. Westchester Fire Insurance Co., 50 S. W. 569. Plaintiff sold goods upon commission and applied for insurance thereon for the benefit of the owners, whose title they verbally disclosed to the insurance company's agent. The agent issued a policy insuring the goods as plaintiff's own, and containing provisions to the effect that the insurance should be void if the interest of the insured should not be truly stated, or should be other than unconditional and sole ownership; that any other interest must be described therein; and that no officer or agent could waive such conditions except by a writing attached to the policy.

Under these circumstances, the court decided that the agent, by issuing the policy in such form, with notice of the true ownership, waived the conditions relating thereto, and that recovery could be had on the policy. The court declared that, by receiving the premium with knowledge of the true state of the title to the property, the insurance company was estopped from asserting that it made and delivered what it knew at the time to be an invalid policy.

Having seen that it is the right of a warehouseman to effect insurance for a customer's account, it should be interesting to note that the courts have decided that it is his duty to do so, when there is a contract or general custom obligating him to insure.

In the case of Southern Cold Storage & Produce Co. vs. A. F. Dechman & Co., 73 S. W. 545, it was decided by the Texas court of civil appeals that where a warehouseman insures, in his own name, property belonging to a depositor, although without the latter's knowledge, the depositor, by adopting the insurance, even after a loss, is entitled to the benefit; and that adoption is not necessary where the insurance is effected in conformity to a trade custom. The same opinion holds that where a warehouseman, complying with such custom, insures both his own and his customers' goods, sufficient to cover all goods destroyed, but unjustifiably settles with the insurance company for less, he is liable to the customers for consequent loss.

SECTION 627. MISSTATEMENTS IN APPLICATIONS

The importance of making full statements in applications for fire insurance concerning all matters affecting the risk of insuring a flour mill is illustrated by the decision of the Pennsylvania supreme court in the case of Corbin et al. vs. Millers' Mutual Fire Insurance Co. of Harrisburg, 102 Atl. 425, in which case the plaintiffs were denied the right to recover on a fire loss.

Defendant's secretary visited plaintiffs' mill and noted that, in addition to water power normally used, a gasoline engine was used as auxiliary power. Three months later the plaintiffs forwarded an application for a policy, designating the power used as "water," and omitting to answer a printed question that called for a description of any equipment used for gasoline power.

The rate for the amount of insurance contracted for was nearly $100 more for insurance on the basis of gasoline power than on the basis of water power only. Plaintiffs remitted to cover the lower

rate, after the defendant drew attention to the difference, and after defendant's secretary had referred to having seen the gasoline engine in operation a few months before. The engine was used after the policy issued, and the night of the fire.

In a suit on the policy the trial judge awarded recovery in favor of the mill, but the judgment was reversed on an appeal taken by the insurance company, the higher court holding that the statements in the application for the insurance amounted to a warranty that the insurance hazard would not be increased through the operation of a gasoline engine, and that, notwithstanding the defendant's secretary's previous knowledge concerning the engine, defendant was entitled to assume, under the circumstances stated, that its use had been discontinued.

SECTION 628. FORFEITURE PROVISIONS IN GENERAL

The Missouri supreme court announced a decision which encourages one to read his fire insurance policies over if he has not already done so. Every business man knows that the ordinary fire policy does not impose absolute liability on the insurer—that his contract is full of fine print conditions which overflow into attached slips, but many a miller, to his sorrow, has deferred a reading of his contract of insurance until after a fire, only to find that the insurer has been exempted from liability through failure of the policy holder to comply with some condition affecting the risk.

In the case before the Missouri court it appeared that a policy covered a Kansas mill, and that it contained a clause forbidding the mill's remaining idle more than 60 days. After the policy had issued, the insurance company agreed, by indorsement attached to the policy, that "in consideration of the full compliance by the assured with the watchman warranty attached to this policy, permission is hereby granted to the insured to remain inoperative until next harvest if necessary."

The "watchman warranty" required a watchman to be employed and to perform specified duties, and required watch clock records to be forwarded to an insurance bureau. While the mill was idle, and while there was no compliance with the last-mentioned requirements of the policy, the mill was accidentally destroyed by fire.

The insured owner of the mill sued to recover on the policy, relying upon a claim that the insurance company had waived compliance with the above-mentioned conditions of the policy imposed against him, but both the trial court and the supreme court found that there was no waiver, and exonerated the insurance company from liability. (Frick vs. Millers' National Insurance Co., 184 S. W. 1161.)

But that the courts will not place unduly strict interpretation on fire policy provisions in favor of insurance companies where liability for a loss is involved is shown by the decision of the Idaho supreme court in the case of Sweaney & Smith Co. et al., vs. St. Paul Fire & Marine Insurance Co. et al., 206 Pac. 178.

The named plaintiff owned a flour mill in Idaho, and its co-plaintiff held a mortgage on the same. Defendants had issued fire policies covering the property destroyed. An adjuster offered to settle on a basis of one half of the face of the policies, claiming that the insurance had been invalidated by noncompliance with a clause attached to the policies, reading as follows:

"It being warranted by the assured that whenever the mill . . . is idle or not in operation . . . competent watchmen shall be employed and due diligence used to keep a continuous watch, both day and night, in and immediately about said parts of the mill. If the above mill is idle or not in operation for more than 60 days, this policy shall be void."

The president of the mill was in charge of a store about 600 or 700 feet distant from the mill, and, on the quoted clause being attached to the policies, employed an extra man at the store so that he could devote time to watching the mill during the day. Smith, the president, could observe the mill from the store, and visited it five or six times daily. A night watchman was employed, and was on duty when the fire broke out. The only explanation offered as to the cause of the fire was that a locomotive had passed and repassed the mill just before the fire was discovered.

At the trial, plaintiffs offered proof of a conversation with the insurance company's representative, in which the latter was told before the fire what was being done toward maintaining watch over the premises, and that he had said that there was sufficient compliance with the policy clause. The proof was received by the trial judge over objection that it violated a further clause in the policy, to the effect that no representative of the company had power to waive

compliance with the conditions of the policy. Disposing of this point and other questions presented on the appeal, in addition to certain points relating to appellate practice, the Idaho supreme court said:

"The testimony complained of was not offered for the purpose of varying the terms of the policy, nor does it tend to have that effect, but rather to show what should be regarded as a compliance with the terms of the watchman clause, and that the system adopted by respondents constituted the employment of competent watchmen and the use of due diligence to keep a continuous watch, both day and night, in and immediately about said parts of the mill.

"There is no claim here that the agent waived any conditions of the policy, but only that he construed certain words contained in it in a certain way, and it is obvious that the provision that no agent should have authority to waive any provision or condition of the policy is not involved in the determination of this case. . . .

"It has been almost universally held that insurance policies will be strictly construed against the insurer, and liberally construed in favor of the insured. . . .

"The use of the word 'warranted' in the watchman clause adds nothing to the force of the stipulation. The expression of the word 'warranty' does not necessarily constitute a warranty, and it must be used in its ordinary signification. Port Blakely Mill Co. vs. Springfield Fire & Marine Ins. Co., 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863. Furthermore, it will be observed that the rider upon which the watchman clause appears also provides that, 'if the above mill is idle or not in operation for more than 60 days, this policy shall be void.' It is not provided that the policy shall be void if competent watchmen are not employed and due diligence used to keep a continuous watch, both day and night, and, under the rule of 'Expressio unius est exclusio alterius,' the policy could not be held void for failure to comply strictly with this latter provision. If such had been the intention, appropriate words would have been used to that effect. . . .

"Forfeitures are not favored by the law, . . . and a clause in an insurance policy being susceptible of more than one construction, the one most favorable to the insured will be adopted. . . . Contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation. . . .

"Conceding, however, for the purposes of this case that the watchman clause here involved is a warranty and not a representation, nevertheless a breach of its provisions would not avoid the policy nor prevent a recovery upon the policy, in the absence of a showing that such breach was a contributing cause of the loss.

"The evidence in this case shows a substantial compliance with the provisions of the watchman clause, and this is all that the law requires. The tendency of the more recent cases is to require that the watchman clause in a fire insurance policy shall be substantially rather than strictly complied with."

* *

In the early case of Washington Mutual Insurance Co. vs. Merchants' & Manufacturers' Insurance Co., 5 Ohio State Reports, 450, the Ohio supreme court recognized the point that the question whether a corn meal mill, operated in connection with a fire kiln for drying corn or meal, was an appropriate part of a steam flouring mill, as affecting the validity of a fire policy which relieved the insurance company from liability in case a plant insured as a steam flouring mill should be used for distinct and hazardous operations requiring fire heat, was properly determined by trade usage.

SECTION 629. CHANGE IN PROPERTY OWNERSHIP

Legal principles applying to the insurance of flour and feed while in the channels of commerce were involved in two appellate court decisions handed down. In these cases one of the points involved was as to whether the policyholder was at the time of fire loss the owner of the flour in one case, and of the hay in the other.

In the first case—Durham vs. Stuyvesant Insurance Co., 182 N. Y. Supp. 887—it was decided that plaintiff owned certain flour, although he did not, on its arrival, pay draft against bill of lading, as required by the terms of sale, where the seller accepted a 30-day draft. It appears that plaintiff bought flour from Youngblood, Inc., which company procured the flour to be shipped to plaintiff; the terms of sale being that plaintiff was to pay for the flour on its arrival by a sight draft against the bill of lading.

When the flour arrived, plaintiff was not able to pay for the same, but wrote

Youngblood, requesting that the flour be placed in a certain warehouse for his account and at his expense, and payment would be made in a few days. In conformity with this request, Youngblood delivered the bill of lading to the warehouseman, who obtained the flour, and a few days thereafter plaintiff delivered to Youngblood his trade acceptance, dated May 23, 1919, payable 30 days thereafter. The flour seems to have been destroyed while it still remained in storage and before the trade acceptance fell due. The policy carried by plaintiff was a floating one, covering goods owned by him, wheresoever located. On these facts the court said:

"While under the original contract plaintiff was not entitled to possession of the flour until the payment of the sight draft, it is clear that the contract was mutually modified, so that the seller, Youngblood, accepted payment by a 30-day draft, and title thereupon vested in the plaintiff, although claim might be urged that it had vested earlier."

In the other case referred to—Hubbard vs. Home Insurance Co. of New York, 222 S. W. 886—it was held that, under a contract for a sale of hay f.o.b. cars at a place of storage, the buyer to furnish cars, loss of the hay before any part of the hay to be delivered had been set apart in the warehouse was covered by a policy carried by the seller, although the buyer had made a partial payment on the price.

"It is clear," remarks the court, "that the title to the hay had not passed. The portion sold had not been separated or identified in any way, and it was a sale for cash, and the full purchase price had not been paid. All the authorities are to this effect."

The court holds that the mere fact that the buyer would have a valid claim against the seller to secure return of the amount paid on the price did not give him such interest in the property as to affect the seller's insurable interest.

* *

The Virginia supreme court of appeals affirmed judgment in favor of W. H. Aston and against the Aetna Insurance Co. on a policy covering loss of flour mill property by fire. (96 S. E. 772.)

The insurance company failed in an attempt to have the policy declared void on the ground that, between the time that the policy issued and the burning of the mill, there had been such change in the ownership and possession of the property, without the consent of the company, as invalidated the insurance. The court laid down the following rules of law applicable to cases of this kind:

A condition in a policy against assignment of the insurance before loss and without the consent of the insurer does not render the policy void on mere making of an unexecuted agreement to assign.

After loss has occurred under an insurance contract, the insured person may make a valid assignment of his right to recover on the policy, regardless of consent on the part of the insurance company.

A condition against change of ownership and possession of insured property, without the insurer's consent, is limited to a change in the title to the property, as distinguished from a mere change in occupancy. The change of possession which will invalidate the insurance, unless consented to by the insurer, is a transfer of the right of possession as an incident to title.

An agreement for an exchange of insured property for other property, which contract was legally unenforceable because the other party's wife had not signed it, did not constitute such change in ownership before loss as invalidated the insurance, although such other party was in possession and had paid one fifth of the consideration; title not having passed to him. A mere contract to convey property does not invalidate a policy condition against a transfer of ownership without the insurance company's consent.

* *

The Minnesota supreme court affirmed judgment in favor of the Dodge Elevator Co. against the Hartford Fire Insurance Co. on a fire policy covering a carload of wheat destroyed after having been loaded for shipment. (165 N. W. 487.)

The policy insured plaintiff against loss or damage by fire on grain, etc., "their own or held by them in trust or on commission, or sold but not removed, or held in storage; if in case of loss the assured is liable therefor; while contained in the elevators . . . or while in cars on tracks within 100 feet thereof." There was also the customary policy provision making the insurance void if any change should take place in the "interest, title, or possession of the subject of insurance."

The wheat destroyed had been loaded in a car which was standing within 25 feet of the elevator when the fire occurred. In the meantime, the railway company had issued a bill of lading

showing the elevator company to be both consignor and consignee.

In a suit brought on the policy, the insurance company claimed that the delivery of the grain to the railway company changed the status of the wheat so that it was no longer covered by the policy, but both the trial court and the supreme court decided that the insurance remained effective while the shipment remained within 100 feet of the elevator. It was also claimed by the insurer that there was a change in "possession," within the second-mentioned clause of the policy, but the supreme court said:

"The owner had as much interest as ever to be protected by insurance. It was clearly contemplated that the grain would be loaded into cars and shipped, and as clearly provided that the insurance covered grain so loaded, as long as the cars remained within the specified distance of the elevator."

* *

Although it is advisable to notify a fire insurance company of any change in the ownership of the insured property, it is interesting to note that in the case of Fort Worth Grain & Elevator Co. vs. Germania Fire Insurance Co., 271 S. W. 256, it was decided by the Texas court of civil appeals that transfer by one member of a firm to another of his interest in partnership property was not such change in title and possession of the property as invalidated the policy, under the standard insurance clause requiring notice of change in title and possession.

However, it was decided that failure of insured to keep inventories and books in an iron safe, as required by a policy, vitiates the insurance, unless excused by particular circumstances.

Another point declared by the court is that a fire insurance company will not be permitted to deny the authority of an adjuster to act for it, where the company has availed itself of his services in attempting to adjust a loss.

SECTION 630. CLAUSES REQUIRING INVENTORIES

For want of proper inventory taken when fire insurance was effected on a stock of grain, etc., the Texas supreme court decided, in the case of Walker vs. Hartford Fire Insurance Co., 210 S. W. 682, that the policies were void, and that, on loss occurring, the insured merchant was not entitled to recover more than the amount of premiums paid.

Policies held by plaintiff on his stock contained the common provision that a complete itemized inventory of stock on hand should be taken annually, and that one would be taken within 30 days from the date of the policy, unless taken within 12 months prior thereto.

Loss occurring a few months after the policies were issued, plaintiff relied on the following statement contained on the flyleaf of a ledger as constituting a sufficient inventory: "238 100-lb sax bran. 1445 160-lb sax W. oats. 194 160-lb sax R. oats. 2693 empty oat sax. 18681 empty corn sacks. 124 lbs twine. No corn. No wheat. No chops."

Holding that the policies were invalidated for want of compliance with the requirement for an inventory, the court makes the following observations, which will interest millers as well as grain dealers:

"Neither the value nor the grade of the commodities is given. The evidence shows that plaintiff handled both red and white oats; that oats were sold in different grades, as follows: No. 1, No. 2, No. 3, No. 4, no grade, and rejected grade; that the price of each grade differs. What constitutes a substantial compliance with the inventory clause of a fire insurance policy has been the subject of frequent adjudication, calling forth various definitions of 'inventory.'

"But we believe that whatever view may be taken of the question, and conceding that only a substantial compliance with the policy is required under our decisions, the inventory should present an itemized list of the commodities on hand at the time the invoice is taken, from which the value of the stock can reasonably be ascertained. It is no doubt true that as to a stock consisting of staple articles, such as oats, wheat, corn, and bran, the market value of which can be determined from day to day and which from day to day varies upon the market, the grade and quantity of these commodities would furnish all the data necessary to determine the value at a given date.

"However that may be, in the present instance there is nothing from which the grade can be determined. The quantity only is given. And in the absence of both value and grade, we believe there is not even a substantial compliance with the requirement as to inventory."

SECTION 631. VALIDITY OF CO-INSURANCE CLAUSE

One point raised in the New York case of Durham vs. Stuyvesant Insurance Co., 182 N. Y. Supp. 887, related

to the validity of co-insurance clauses in New York policies. The court held that such clause was unauthorized by and inconsistent with the New York statutory form of policy. The opinion declared on this point:

"The policy, without said clause, provides for payment of a loss in the ratio that the face amount of all insurance bears to the amount of the loss, irrespective of the value of the property; on the other hand, when a co-insurance clause is read into the policy, the company's liability is determined by the ratio which the face amount of the total insurance carried bears to the value of the property. In other words, generally stated, in the absence of a co-insurance clause, the insured collects his whole loss if that does not exceed his insurance, and his whole insurance if that does not exceed his loss. With a co-insurance clause present, the foregoing rule of recovery is modified, and the recovery reduced, if the insurance and the loss, or both, are below the percentage of value."

SECTION 632. WHO IS ENTITLED TO INSURANCE PROCEEDS?

Under a fire insurance policy covering the contents of a mill, including grain and products belonging to customers, when loss occurs and the miller makes proof of loss of property belonging to a customer, he becomes estopped to deny liability to the customer for the just portion of the proceeds of the insurance applicable to the customer's loss. Nor will the miller be permitted to assert, under such circumstances, that his tenant, and not he, was the custodian of the property lost.

In deciding these points the Kansas City court of appeals applied the legal doctrine of estoppel, under which a person who receives money as a representative of another will be precluded from denying that representative capacity actually existed, to the prejudice of such other person. (Penney & Penney Feed Co. vs. Kramer, 182 S. W. 755.)

In passing, it is to be noted that a miller who receives grain to be ground for a customer is not liable for loss of the grain or its product, unless he has expressly agreed to insure it, or unless the loss is attributable to negligence on his part or on the part of his employees. That is, apart from any contractual obligation to carry insurance, the miller is not an insurer of the safety of his customer's property except as against negligence of the mill.

SECTION 633. LIABILITY FOR DELAYING ADJUSTMENT

That one guilty of breaking a contract is not to be held responsible for damages which were not within the contemplation of the parties when the contract was entered into is an old and well-established legal principle. It was invoked in an interesting case before the Minnesota supreme court, wherein it was decided that even if, as alleged, defendant insurance company did unreasonably delay adjusting a retail grocer's loss under a fire policy covering his stock of goods, thereby preventing him from resuming business, paying his debts, etc., he could not recover damages on that account. (Independent Grocery Co. vs. Sun Insurance Co., 178 N. W. 582.) The court says:

"The general rule of damages for the breach of contract obligations is well settled law in this state. It limits the rights of the complaining party to compensation for such loss as results naturally and proximately from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into. . . .

"The facts presented do not bring the case within the rule. Neither the loss of trade nor the inability of plaintiffs to pay their creditors, or even that they were likely to have creditors in the event of a destruction of the insured property by fire, or the loss of the good-will of the business, flowed naturally or proximately from the delay of defendants in adjusting and paying the loss; nor can it be said that the financial condition and business situation of plaintiffs as pictured by the complaint was within the contemplation of the parties when the contract was entered into. Those facts, therefore, furnish no basis for the recovery of damages, for as to the breach of contract, whether malicious or not, plaintiffs' recovery, within the rule stated, must be limited to the amount of the legal liability under the policy, with interest."

SECTION 634. WAIVER OF CONDITIONS

Imputing to fire insurance companies knowledge concerning insurance risks acquired by the insurers' agents, and holding that misdescriptions in policies made by such agents, without misrepresentation on the part of the insured, do not invalidate the insurance, the Iowa supreme court ruled as law in the case of Dodge vs. Grain Shippers' Mutual Fire Insurance Association, 157 N. W.

955, that where an insurance company is advised through its agent that an insured building is not being operated, and is vacant at the time the policy is issued, the insurance is not vitiated by a clause in the policy to the effect that the insurance shall be void if the building be vacant; and that the insurance company cannot avoid liability because of the insuring agent's misdescription of the property or of the insured person's interest therein.

CHAPTER LXXIII

TAXATION

SECTION 635. TAXATION OF FOREIGN CORPORATIONS

THAT a corporation organized under the laws of a particular state has no tangible property in that state, such property and the company's papers and business being situated in another state, does not preclude the first state from taxing it. This point, decided by the highest court of the land in the case of Cream of Wheat Co. vs. Grand Forks County, 40 Sup. Ct. Rep. 558, proceeds upon the principle that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty."

So the United States Supreme Court holds that the law of North Dakota, imposing a tax on the value of outstanding shares of a company incorporated under the laws of that state, in excess of the value of real and personal property and certain indebtedness, is constitutional, regardless of the fact that such company's business and property may be established in another state. And it is decided that it makes no difference in this result whether the tax be regarded as a property tax or a franchise tax.

See, also, the next section and sections 394, 395.

SECTION 636. TAXATION OF INTERSTATE AND FOREIGN BUSINESS

Although mill products be shipped from one state to another, and the selling mill be a nonresident corporation, the company is nevertheless subject to municipal license tax on business done in the state to which the goods have been shipped, where, pursuant to the contract of sale, it employs salesmen to render service to the buyer in making resales. The decision of the Alabama court of appeals in the case of Hoover Suction Sweeper Co. vs. City of Birmingham, 100 So. 83, supports this statement, although other commodities were involved. That the court had in mind the flour trade, as well as other trades, is indicated by a reference made to the decision of the United States Supreme Court in the Northwestern Consolidated Milling Co. Case, 38 Sup. Ct. 297.

* *

The case of Cheney Brothers Co. vs. Commonwealth of Massachusetts, 38 Sup. Ct. 295, passed upon by the United States Supreme Court, involved a massed attack by several nonresident corporations against excise taxes levied by the commonwealth upon business done by the companies in the state. The attack rested upon a claim that the business taxed constituted interstate commerce, within the clause of the Federal Constitution that gives Congress exclusive control over such commerce.

In the case of one of the companies, this contention was sustained, it appearing that the only business done by the corporation in Massachusetts consisted in maintaining a local selling office where samples were kept and through which orders were taken for approval at the home office of the company.

But as to the other petitioners, including the Northwestern Consolidated Milling Co., the suit was determined in favor of the commonwealth. The court said concerning the milling company:

"It has an office in Massachusetts, where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business—inducing the local merchant to buy a particular class of goods from another—and may be taxed by the state, regardless of the motive with which it is conducted."

* *

"The city of St. Louis imposes upon its merchants and manufacturers a tax of $1 on each $1,000 of gross sales," wrote a flour merchant of that city. "The point has been made by some of us that sales made for export could not be in-

cluded in computing the amount to be levied for a license tax, on a theory that export sales are not taxable by any state or municipality. Please cite us any decisions that sustain our contention."

It seems that the decisions bearing on the subject are directly adverse to the contention. Speaking of this ordinance in the case of American Mfg. Co. vs. City of St. Louis, 192 S. W. 402, the supreme court of Missouri said:

"The city has, by ordinance, forbidden them [manufacturers] to pursue their business within the city without procuring a license, and has prescribed the additional tax they shall pay for that purpose which is graduated to accord with the amount of business they shall carry to the point of realizing the profit or liquidating the loss by the sale of the product of their work. . . . That his [the manufacturer's] right to pursue his business is the one thing he receives as compensation for the tax is evident, and that the method of fixing its amount by the amount that he receives from the licensed activity is a just and equitable one is not disputed. . . .

"Any other interpretation of the ordinance under which the business is licensed would not only do violence to its terms, but would ascribe to the legislative department of the city the absurd intention to give every person and corporation, that might desire to avail themselves of it, the unlimited right to pursue the business of manufacturing in the city without license or the payment of any tax upon the privilege, provided they would store their product outside the city limits, and sell it through nonresident agencies, to customers in other states. . . .

"We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured, the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated by their sale by the manufacturer; that their removal from the city of St. Louis and storage elsewhere, whether within or without the state, worked no change in this obligation; that their sale by the respondent wherever they may have been stored at the time, whether it was done through its home office in New York or the office of its factory in St. Louis, should have been reported in its return to the license collector of the city of St. Louis and the amount included in fixing the amount payable on account of its license tax."

The ordinance, or at least a similar one, was under consideration by the same court in an earlier case between the same parties (142 S. W. 297). There it was contended that levy of a manufacturer's license tax upon goods sold from plaintiff's factory in St. Louis to persons residing outside of the state was invalid, as violating the clause of the federal constitution which gives Congress exclusive power to regulate commerce with foreign nations and among the several states. Overruling the contention, the supreme court of Missouri said:

"The evident purpose of that provision of the Federal Constitution . . . is to prevent any state from discriminating against the products of another state; and it was not intended to prohibit a state in which goods are grown or manufactured from placing such reasonable burdens of taxation upon same as are necessary for the support and maintenance of such state.

"Clearly no state can legally discriminate in favor of its own products against the products of another state, and a direct or indirect levy by one state of an import tax or embargo upon goods lawfully shipped across its borders from a sister state would be wholly illegal.

"In our opinion, it was not the intention of the framers of our Federal Constitution to compel or encourage a state to discriminate against its own citizens in favor of those of another state; and this would be the effect of adopting plaintiff's views. It is not denied that defendant has a right to levy a tax on the sales made by plaintiff from its factory in this state to citizens of this state, and this tax, of course, increases the price of said goods so sold to citizens of Missouri; thus it necessarily follows that, if plaintiff be permitted to sell its goods to citizens of other states without paying such license tax, plaintiff will thereby become enabled to sell its goods outside of the state cheaper than they are furnished to citizens of this state, where its factory and property receive the protection of our laws.

"If the state of Illinois levies, or permits its municipalities to levy, a tax upon the sales made from factories located within its borders, it would only be necessary, under the construction of the interstate commerce law sought by plaintiff, for it to establish a factory in East St. Louis and supply its Missouri customers from such factory, and supply its

Illinois patrons from its Missouri factory; and by that method escape taxes upon its sales in both states. We cannot give our assent to a doctrine so unreasonable and unjust, and we therefore hold the trial court properly denied a recovery upon taxes paid on goods shipped from plaintiff's St. Louis factory to citizens of other states."

Similar conclusions have been reached by the courts of other states under kindred tax measures. For example, in the case of Southern Operating Co. vs. City of Chattanooga, 159 S. W. 1091, the Tennessee supreme court decided that an occupation tax could be levied upon one selling goods, although all of his purchases and sales were made outside the state. And in the same state it has been ruled that goods were taxable there, even though imported for the purpose of distribution beyond the borders of the state.

What the courts have decided concerning a tax on local manufacture of goods partly or wholly designed for shipment to other states appears to be equally decisive of the validity of the tax, although part of the goods may be intended for export. It is true that there is an independent prohibition in the Federal Constitution of taxation by states of exports, but it is settled by judicial decision that it does not forbid "a tax on foreign bills of exchange, or on money or property invested in the importing or exporting business, nor a corporate franchise tax, nor a license tax on the privilege of doing business within the state." (12 Corpus Juris, 115.)

* *

The United States district court for the southern district of New York denied the right of an exporter of goods to recover a portion of corporate income tax paid, covering foreign business. In this case it was claimed that the portion of the tax in question was unconstitutional as, in effect, imposing a tax on exports, in violation of the Federal Constitution. But Judge Hough said:

"Obviously, general taxation on production may discourage exports, yet that gives no relief as to articles intended for foreign parts. By the same reasoning, profits or income from exports should be taxable, because subsequent to the act of export. Income or profit presupposes a successfully completed transport. It is no part of the act of exportation, though it may be said to be a result thereof. Similarly, the fact that taxation of the fruits of exportation may discourage business quite as much as anticipatory taxation on the goods transported is immaterial." (Wm. E. Peck & Co. vs. Lowe, 234 Fed. 125; affirmed, 247 U. S. 165.)

* *

A wholesale dealer who resides in one town and takes orders from residents of other places in the same state for quantities of flour to be shipped from a point in another state, on acceptance of such orders by the miller or jobbers, is engaged in interstate commerce in such a sense as not to be subject to a state license tax on the business so done, according to an opinion handed down by the Maine supreme judicial court in the case of State vs. Littlefield, 91 Atl. 945.

The court finds that this rule is not affected by the fact that the dealer sought to be taxed receives, at one point, the goods shipped on several orders, and reships them to their respective final destinations.

* *

A decision of importance to every flour broker was handed down by the supreme court of Missouri in a case wherein it is held that, since it is beyond the power of a state to levy a tax on interstate commerce, control of which is exclusively vested in Congress, a valid license tax may not be assessed against a resident merchandise broker whose business consists in securing orders for a nonresident concern, such orders being sent to another state for acceptance or rejection, and the goods being shipped from outside of the state in which the orders are taken. (Kansas City vs. McDonald, 175 S. W. 917.)

See, also, the preceding section.

SECTION 637. PROPERTY TAXABLE

Flour was shipped from the Northwest to New York on through bills of lading, but was unloaded and held at a pier in Jersey City for the purpose of repacking and blending. While so held it was assessed by the New Jersey authorities for taxation. The owners litigated the right of taxation, but the supreme court of the state upholds the assessment, saying:

"If the goods are actually in the course of a continuous journey, they are not subject to taxation. The difficulty is to decide what breaks the continuity of the journey. In this case it was broken by repacking and blending the flour upon the pier. Whether mere repacking would suffice may perhaps be arguable, although the packages that go on to the destination are not the same packages that are landed on the pier; but surely the flour

after blending is a different commodity. It is blended for the very purpose of making something different, a quality that is or is supposed to be more salable. The process of blending is no doubt different from the process of grinding grain into flour, but in each case a different commodity is produced." (McCutchen vs. Board of Equalization of Taxes, 96 Atl. 292.)

* *

In Peacock Mill Co. vs. Honeycutt, 55 Wash. 18, the mill sued to restrain collection of a tax levied on wheat as belonging to it on the legal date for assessment to the owner. Because it appeared that title to the wheat had not passed from the seller to the mill on that date, the Washington supreme court decided that the assessment was improperly made against the mill.

But it was held that, since the mill company's representative had listed the wheat as belonging to the company, there could be no relief against the tax; a mistake in interpretation of the law by the mill company as to whether the wheat was its property or not could not relieve it from the consequences of the mistake.

* *

In Oriental Trading Co. vs. Houser, 151 Pac. 242, the Washington supreme court decided that a seller is not entitled to reimbursement from the buyer for taxes assessed on the property in his hands as of the first day of a month on which taxes become a lien, where the contract of sale called for delivery not later than the preceding day.

* *

The Albers Bros. Milling Co. defeated a suit brought by the city of Oakland, Cal., to recover taxes claimed to be due under the following stated circumstances:

The city leased water-front lands to the milling company, the latter constructing a dock and a warehouse, which the contract recited should become and remain the property of the municipality. The company became entitled to be repaid for its outlay through a system of warehouse and dockage charges.

Claiming that the improvements belonged to the milling company in such sense as to be taxable, officials of the city attempted to collect taxes. But the district court of appeals of the state affirmed a judgment of the superior court in Oakland, finding that the property belonged to the city and that, as municipal property, it was exempt from taxation. (184 Pac. 868.)

SECTION 638. PLACE FOR ASSESSING PERSONALTY

The office of the Arkadelphia Milling Co., being situated within the city limits of Arkadelphia, Ark., but its manufacturing plant and considerable of its personal property being situated outside those limits, a controversy arose as to whether the personal property was assessable for taxation in the city or in the adjoining school district in which the personalty actually was. Reviewing the question, the Arkansas supreme court has determined that the personal property is taxable in the city, as being constructively at the company's domicile. (191 S. W. 410.)

SECTION 639. ENFORCEMENT OF LICENSE TAXES

Interpreting the then existing concentrated commercial feedingstuffs act of Iowa, the supreme court of that state decided in State ex rel. Cosson vs. Shores-Mueller Co., 166 N. W. 62, that suit did not lie to recover unpaid license taxes provided for by the law.

It was attempted to collect $500 from defendant, claimed to be due the state for five years during which defendant manufactured and sold feedingstuffs covered by the act, but without paying the prescribed annual fee of $100. Reversing a decision of a lower court, the supreme court decided that under a statute imposing license fees there is no right on the part of the state to maintain a civil action to recover payment, except as that remedy is expressly prescribed by the statute; the only recourse is a prosecution to punish for the offense of transacting the particular business covered by the law without a license. The Iowa feedingstuffs act was found to be no exception to this general rule.

CHAPTER LXXIV

GENERAL ASPECTS OF LETTERS

SECTION 640. AS LEGAL DOCUMENTS

WHEN reflection brings to view the fact that a single letter may carry in its language consequences ranging from a binding business contract to a suit for breach of a marriage promise or imprisonment, one commences to realize the value of caution against dispatching a too hastily composed missive and against destroying correspondence received.

A letter in form may be a will, contract or other legal document in substance, or it may be mere evidence concerning the existence of some fact to become pertinent in an unborn controversy. The manifest intent of the writer will usually prove to be the determining factor as to the legal effect to be given to his letter.

The instances in which wills have been executed in the form of letters have been justly rare, for they naturally tend to litigation, but it is interesting to note that in numerous instances the courts have upheld, as valid wills, letters which plainly indicated an intent of the writers that they should govern the disposition of their property after death. In some jurisdictions, however, absence of attesting witnesses' signatures would be fatal.

By far the most important class of letters in the business world are those containing offers and acceptances of offers to enter into contracts, such as are flowing through the mails at every tick of the clock. This class is elsewhere discussed in this book under the head of sales contracts.

SECTION 641. INTERPRETATION OF LETTERS

When rights are sought to be enforced by the addressee of a letter under it, the principal test by which the extent of the obligations created by it is to be determined is the intention of the writer as expressed in the language of the letter, giving to that language commonly understood meaning. Any secret intention entertained by the writer will not be permitted to diminish the force of the words he has actually used. But manifest errors in the use of words will be disregarded to give effect to a plain intention otherwise apparent from the letter as a whole or the surrounding circumstances. And when a particular letter constitutes only one link in a chain of correspondence making up a single contract, all the letters must be considered together for the purpose of arriving at the writer's intention.

When ambiguity appears in a letter the rights of the parties must be determined by construing the words most liberally in favor of the addressee, when the uncertainty of meaning cannot be dissolved by a consideration of all the negotiations, since the courts hold that the disadvantages flowing from faulty wording of a contract should fall on the person choosing the particular language employed.

When a letter is written to serve as a contract or as one of several letters going to make up a single contract, it should be remembered that the wording will become to a very great extent obligatory upon the writer, for the missive then falls within the general rule of law that the contents of a written agreement cannot be contradicted or altered by proof of previous or concurrent verbal understandings at variance with the writing. In this respect, the letter differs in legal effect from a communication relating to some business transaction but not constituting part of the contract involved, as in the case of letters written in the course of adjusting controversies. When a letter is relied upon merely as tending to prove some fact, it is not so conclusive against the writer as to prevent his contradicting the statements in it. But where the letter is a part of the contract involved it ordinarily binds him, except as he may be able to show that, through mutual mistake or fraud of the other party, it fails to state the true agreement.

The reason of the rule that precludes contradiction by one of his own signed obligation is that written instruments would be of little value if their provi-

sions could be varied by oral evidence, and that temptations to the commission of perjury would be increased. Speaking of this rule, which is technically known as the parol evidence rule, it has been authoritatively said:

"The parol evidence rule may protect letters from variation or contradiction where they are of a contractual nature, containing promises, propositions, undertakings, representations, and the like, especially where it is intended that the receiver shall act upon the faith of the contents of the letter; but letters forming no part of a contract and not contractual in their nature are not protected." 17 Cyc. 625.

SECTION 642. LETTERS AS EVIDENCE

Apart from character as a contract, or as some other independent document on which suit is grounded, statements contained in letters may be used as evidence on some disputed fact pertinent in a suit. But the use of letters as evidence is subject to important qualifications. For instance, a party to litigation is not entitled to show that he has made some self-serving declaration in a letter written by himself, unless he can go further by showing that his adversary expressly or impliedly admitted the truth of the declaration in a replying letter or by other conduct reasonably showing acquiescence. On the other hand, a letter proved to have been sent by one party, or under authority from him, is competent evidence of all pertinent admissions made in it against his own interest.

When the contents of a particular letter are in issue, the original letter is the best evidence, and a court will not entertain extrinsic proof as to the contents until nonproduction of the original is accounted for. If it has been lost, its loss must be shown. If it is in the possession of the adversary, notice must ordinarily be given him to produce it. In the absence of ability to produce the original, copies may be offered in evidence on proof of their correctness; and, in the absence of copies, the contents may be established by the testimony of witnesses knowing the facts.

SECTION 643. PROVING RECEIPT OF LETTER

There is a rebuttable presumption that a properly addressed, stamped and mailed letter was received by the addressee in due course of mail delivery. This presumption is almost conclusive when it is established with reasonable certainty that, in addition to being so dispatched, the envelope of the letter bore the address for return in case of nondelivery. On an issue whether a letter was actually received the addressee's positive denial of receipt will not prevent a judge or jury from giving effect to the above mentioned presumption, if the surrounding circumstances support it.

A decision handed down by the Georgia court of appeals is in line with what other courts have held on the subject of presumed receipt of mail. The decision is to the effect that when it is material to prove that a given letter was received by the addressee, it will be presumed to have been received when it is shown that the letter, properly addressed and stamped, was mailed by depositing it in a United States post office or a mail box, or by intrusting it to the custody of a United States mail collector. But this legal presumption is not conclusive, and loses its force when the addressee expressly denies having received the letter.

The court holds that the mere fact that a return address was printed on the outside of the envelope, and that the letter was never returned to that address, will not outweigh the addressee's positive denial of receipt. A further point appearing in the decision is that testimony of an agent of a corporation, in entire charge of its correspondence, that the letter was not received by his corporation, is sufficient to establish that fact in the absence of proof to the contrary. (89 S. E. 490. See, also, 96 S. E. 578.)

SECTION 644. RIGHTS OF THE WRITER

One is apt to suppose that the addressee of a letter acquires as complete control over its disposition as if it were one of his yuletide neckties. This is not true. The necktie legally may be sold or given away or exposed to public gaze. Not so with a letter, unless the writer has expressly or impliedly authorized its disclosure or transfer. A legal authority has found that the body of judicial decisions warrants the statement of the following rules of law:

"The recipient has a qualified property in the paper on which the letter is written. He may keep it or destroy it, and he can recover possession of it when lost, even from the writer, but he cannot publish it or communicate it to others without the consent of the writer. A newspaper, however, is entitled to publish letters sent to it impliedly for publication, and the property in business letters written by an employee to his employer belongs to the latter as well as letters by

a public officer to his government. It has been held that the recipient of a letter may publish it against the will of the writer where it is necessary to protect his rights or to defend his character against the writer, but the doctrine has been severely criticized in this country and it is doubtful if it would now be followed; but these considerations do not apply to, or prevent, the production of letters in court as evidence. The property in letters passes to the personal representative of the receiver, but they are not assets in his hands. The personal representative of the writer may prevent publication." 25 Cyc. 1493, 1494.

"The right of the writer of a letter to restrain its publication rests on his right of property in the ideas expressed. It is not necessary that letters should have any literary quality or originality of ideas. Familiar and business letters are as much property as more finished compositions intended for the press." 25 Cyc. 1492.

Applying the general rule that the recipient of a letter is prima facie entitled to its possession, a New York court held in an early decision that the city of New York was entitled to recover a letter, which had been written by George Washington to the authorities of the municipality, as against one who bought the communication at an executor's sale, there being nothing to show that the executor's decedent came into possession of the letter under authority from the city.

There are several legal remedies against wrongful disclosure of the contents of a letter: If the disclosure has not been consummated, but is threatened, it may be enjoined. If the disclosure is complete, it seems that the aggrieved person may maintain an action for damages actually sustained; and, if the act of disclosing was malicious and resulted in manifest injury, there is judicial authority for saying that an additional award may be made in favor of the complaining party by way of punitive damages.

SECTION 645. LETTERS AS VEHICLES OF CRIME

An examination of the United States Criminal Code shows that drastic penalties are imposed against about every conceivable act connected with the mails so wrongful in itself that any person committing it should know that he is a malefactor in some degree. For instance, one runs the risk of a $2,000 fine or five years' imprisonment in tampering with a letter while it is in the custody of Uncle Sam for delivery to its address. An overly curious or a malicious postmaster or postal employee runs substantially the same risk in wrongfully detaining, delaying or opening a piece of mail.

As is commonly understood, the mailing of a letter containing obscene matter is one of the gravest offenses against the postal service. A closely related crime consists in writing on the outside of an envelope or wrapper or on a postal card sent through the mails "any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another." But it has been held by the courts that a mere demand for payment of a just debt, written on a postal card, is not unlawful, although accompanied by a statement that suit will be brought unless the bill be paid.

One of the most popular means of breaking into the federal prisons is afforded by the statutes which broadly denounce the sending of letters through the mails with intent to defraud or to further some such unlawful enterprise as a lottery. The statement of any false fact in a letter which tends and is intended to induce the addressee to part with money or thing of value is covered by the law. It has been judicially determined to be an offense for one to order goods through the mails with a fixed intention at the time of not paying for them.

To cover cases not falling squarely within the jurisdiction of the United States, most of the states have adopted laws making it a felony to write and part with a letter threatening to accuse one of a crime, or to do injury to person or property, or to publish or connive at publishing a libel, or to expose one to disgrace; and making it forgery for one to alter or counterfeit a letter which imposes an obligation on another or injures another in any substantial way. It is usually a misdemeanor under the state laws willfully and unauthorizedly to open or read a sealed letter addressed to some other person.

See, also, section 506.

CHAPTER LXXV

MISCELLANEOUS MATTERS

SECTION 646. INTERPRETATION OF CONTRACTS

THE Arizona supreme court lately recognized a rule of law that has been applied by courts in other states, in holding that "if in a contract there appear a printed and a typewritten clause which are irreconcilable the one with the other, the typewritten clause will prevail." (Babbitt Brothers Trading Co. vs. Marley, 238 Pac. 392.)

SECTION 647. SIGNING CONTRACTS

The old misconception to the effect that a signature, to be legally binding, must be written in ink, has become generally obsolete, even among laymen, for it is now well settled that even a mark is sufficient as a signature if it is shown that it was affixed to a paper with intent that it should serve as such. So, milling corporations, no doubt, frequently use printed forms of contract with the company's name printed as a signature. But a decision handed down by a federal court sitting in Washington draws attention to the fact that a printed signature will not serve as a valid signing unless there is something to show that it was expressly adopted as such for the purposes of the specific transaction.

Under the various statutes requiring certain kinds of contracts to be reduced to writing, the printed name of a company should be followed by the "per" signature of the representative of the company who is authorized to bind it.

SECTION 648. ASPECTS OF COMPROMISES

That one may be held liable in damages for breach of a compromise agreement is shown by the decision of the South Carolina supreme court in the recent case of Wilkins et al. vs. Howe Grain & Mercantile Co., 96 S. E. 678.

Plaintiffs, having a claim against defendant, a Texas corporation, attached a car of grain owned by the latter and found in South Carolina. This claim was compromised on an agreement that defendant would deposit $112.50 to the plaintiffs' credit in a Texas bank. The deposit was made, and the attachment was released, but thereupon defendant instituted suit in Texas against plaintiffs, and garnished the funds in the Texas bank. Holding that plaintiffs were entitled to recover damages for this violation of the compromise agreement, the South Carolina court says:

"The question is whether the conduct of the defendant, in preventing the payment of said sum to the plaintiffs, was a breach of contract for which it was liable in damages. The defendant did not comply with all the conditions imposed upon it, when it deposited the money in the Texas bank. The law imposed upon it the additional obligation of acting in good faith, and it failed to comply with this duty when it undertook to use such methods as would enable it to evade performance of its contract, by preventing the money from being paid to the plaintiffs. . . .

"Furthermore, the only reasonable inference from the defendant's answer is that the proceedings instituted by the defendant in the Texas court were to recover an amount alleged to be due by the plaintiffs, which was included in the compromise, and therefore could not be made the basis of another action."

* *

An offer to compromise a difference is not admissible in evidence in an action between the parties concerning that difference; but, if the offer to compromise contains an admission of fact, that may be properly introduced in evidence. (Kansas supreme court, Kaull vs. Blacker, 193 Pac. 182.)

SECTION 649. CONSTRUCTION CONTRACTS

There is an important legal principle, applicable to contracts for the installation of mill and elevator plants, that a contractor is not entitled to recover compensation for his work unless he shows that he has substantially complied with the terms of his contract, and this rule was given application by the New York court of appeals in the case of Steel Storage & Elevator Construction Co. vs.

Stock et al., 121 N. E. 786. In a lower court, plaintiff was awarded judgment for the value of work and materials furnished in the construction of a grain elevator for defendants at Hillsdale, Mich. But the court of appeals reversed the judgment and ordered a new trial, on the ground that the trial judge erred in failing to instruct the jury that there could be no recovery if the specifications of the contract called for an elevator with an hourly capacity of 4,000 bus of grain and the plant as installed could not handle more than 3,300 bus, as the evidence tended to show.

The opinion follows the well-established rule of law that slight omissions and deviations in the performance of a contract will not prevent the contractor from recovering the agreed compensation, or reasonable compensation where the amount is not stipulated, with such deductions as may be fair to enable the owner to have the work completed in strict accordance with the contract.

But the decision adheres to the equally well-settled rule that one is entitled to substantially what he has bargained for, and is not bound to accept and pay for something falling materially short of this. Rapid performance in the operation of a grain handling plant is held by the court to be a material element of a contract for its construction.

SECTION 650. MILL OPERATION CONTRACT

In the case of Holding vs. Kessinger, 191 S. W. 1077, reviewed by the Springfield, Mo., court of appeals, it appeared that defendant agreed to furnish a mill, and all money required for running it, and stipulated that he and defendant should each draw a stated amount monthly from the gross income of the mill for living expenses; and that any surplus profits should be divided two thirds to defendant and one third to plaintiff.

The agreement was in writing, and recited that it should continue in force until July 1, 1916, more than one year from the date of the contract. It further stated that, in case the mill should be sold before expiration of the contract, defendant would pay plaintiff $200. Before July 1, 1916, plaintiff quit work. The mill was soon afterwards sold, and plaintiff sued to recover the $200.

Affirming judgment in defendant's favor, one of the judges of the court of appeals held that the contract was void for want of mutuality because it bound plaintiff to do nothing, and the remaining two judges held that, regardless of this point, there was no right to recover, because defendant abandoned the contract before the mill was sold.

SECTION 651. VALIDITY OF MILLING CHARGES

Where a rice growers' association contracted with a mill to pay $1 bu, together with the byproducts, for milling, and that appeared to be the customary charge among mills, an owner of rice who failed to obtain a special agreement for a lower charge was bound to pay the regular charge, although depreciation in the value of rice made it a heavy one, was held by the Arkansas supreme court in the case of Brown vs. Joy Rice Milling Co., 268 S. W. 1.

SECTION 652. MILLS AS PUBLIC UTILITIES

Millers who dispose of surplus electricity or other power to private consumers will be interested in the holding of the Missouri supreme court in the case of State ex rel. M. O. Danciger & Co. vs. Public Service Commission of Missouri, 205 S. W. 42. The main point involved in this case was whether a manufacturer who disposed of surplus electric energy constituted himself a "public utility" in such sense as to require him to serve the public without discrimination and as to render him subject to control by the defendant commission, the same as companies engaged primarily in furnishing electricity to the public for power and lighting purposes.

The brewery corporation at whose plant surplus electricity was generated was not chartered to engage in the business of supplying electricity to others, and no franchise was obtained from the town of Weston where the plant was situated. But the president was permitted to dispose of this surplus on his own account, and he supplied various consumers, they taking the energy at the plant and furnishing their own transmission lines. Electricity was also furnished to 30 or 32 street lamps for the town, which paid nothing for this current, excepting $19.50 a month for five or six lights.

One Roach, conceiving that the situation disclosed the existence of a public utility in this collateral enterprise, instituted proceedings to compel furnishing of service to him, but lost his suit. After referring to the circumstances above noted, and the further fact that expensive additions to the power plant would be required to make any considerable extension of service, the supreme court said:

"In the light of these considerations, does the business of respondent consti-

tute him a public utility, within the meaning of the public service commission act? We are of the opinion that it does not; for, as forecast above, state regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to a public use.

"If the requirement that the private property shall be devoted to a public use, before it can be regulated and before inquisitional authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation."

* *

There is a rule of law that property already devoted to use by one public utility may not be condemned for use by another. But the rule does not prevent a water company from condemning the lands or waterpower rights of a grist mill, held the New Jersey supreme court in the case of Bogert vs. Hackensack Water Co., 127 Atl. 261. Overruling a claim that a grist mill, milldam, and millpond were not subject to condemnation, the court said:

"The argument is based upon the idea that a grist mill is devoted to the public use. But the prosecutors nowhere point out or show that there is a legal obligation upon the mill to grind all the grain brought to it. It can select its customers. The operation of the mill is purely voluntary. It is a private use."

SECTION 653. DUTY TO ADJOINING PROPERTY OWNERS

The obligation of a milling company, in constructing an elevator, or other building, to avoid interference with the soil of adjoining property was involved in a case before the Illinois appellate court. (183 Ill. App. 458.)

An owner of land, on which a building was standing, conveyed a strip of the land to a milling company for the erection of an elevator without any special reservation in the deed. On account of a defect in the foundation of the new structure, the soil of, and the building on, the grantor's land was disturbed, and he sued to recover damages.

The court decided that there was no implied warranty on the part of the milling company that it would support the soil of the land retained by the grantor, but held that the company was liable for injury to that land, if it was caused by adoption of a defective foundation plan.

The court, however, recognized the principle that the milling company would not be liable for the damage if it was done by the contractor in a negligent manner when performing his contract to construct the elevator, as distinguished from an inherently defective plan of construction adopted by the company.

SECTION 654. OBSTRUCTION OF MILL APPROACHES

Millers operating plants so situated that access to and from them depends upon railroad crossings will be interested in McMorran Milling Co. vs. Pere Marquette Railway Co., 178 N. W. 274.

The milling company owned a tract of land in Port Huron, Mich., bounded by navigable rivers and defendant railway company's yards. The mill and elevator once situated on the site were burned, and it seems that the company discontinued use of the property for manufacturing purposes. Right to access to the tract by street crossings was reserved by a deed executed in 1885, when the mill was in operation, but the crossings were gradually obstructed by defendant railway company until direct access was shut off in 1918, when the milling company brought suit to enjoin continued closing of the crossings.

Disposing of the case on appeal, the Michigan supreme court held that the evidence failed to disclose an abandonment of the milling company's right to have the crossings kept open as provided in the deed referred to. But it was decided that, since the traffic requirements of the defendant were such as to make keeping the crossings open a matter of damage to the railway company in gross disproportion to any benefit to the mill, an injunction would not be granted; the milling company being required to content itself with an award of damages to cover all past and future loss resulting from closing the crossings. This decision rests, however, not altogether upon the fact of disproportion of damages; it is intimated that injunction might have been granted had the milling company not delayed in bringing an injunction suit, instead of merely entering protests as the crossings were gradually closed.

When a mill or elevator and its customers have for many years enjoyed access to and from the premises over private property under such circumstances as to indicate that the owner of the land over which the way exists has dedicated

it to such use, the owner of the mill or elevator is entitled to maintain suit to enjoin obstruction of the way, according to the decision of the Illinois supreme court in the case of Law vs. Neola Elevator Co., 117 N. E. 435.

Plaintiff acquired an elevator at Savanna, Ill., it having been operated before the Civil War. For more than 50 years access to the elevator has been open across a lot intervening between it and an established street, the street and the way across the lot forming a cul-de-sac at the elevator. Defendant, owner of the intervening lot and of another elevator, was threatening to build a grain bin on the lot in such manner that the old approach to the plaintiff's elevator would be obstructed, when plaintiff brought suit to enjoin closing of the way.

Affirming a decree granting an injunction, the supreme court holds that, where a roadway across private property has been used by the public for many years, it will be inferred that the owner of the property intended to permanently dedicate it to public use, in the absence of a showing that the use has been permissive only. And where there has been uninterrupted use of a way for a long time, the burden is on the owner of the property which it crosses to show that the use was under some license or indulgence inconsistent with the claim of right by the public.

It is further held that, in determining whether there has been a "public" use of the road, it is sufficient to find that the way has been open to all having occasion to use it, although limited to persons having dealings with the elevator or other place of business at the end of the road.

SECTION 655. ROADWAY ACROSS MILL PREMISES

That a millowner may preclude himself from obstructing a way across his premises by permitting its use as a public highway for a long time, although there may have been no express dedication of the strip of land to that purpose, is shown by the decision of the Michigan supreme court in the case of Berkey & Gay Furniture Co. vs. Valley City Milling Co., 160 N. W. 648, in which judgment in plaintiff's favor was affirmed.

It seems that the mill property was bounded on the south by a street and on the east by a canal, and that plaintiff owned premises adjoining on the north. A way along the west side of the canal afforded several manufacturers access to the street mentioned. This way passed over the mill property. Apparently these conditions had existed for many years, although the mill had never formally granted any right of way over its land. While the mill was constructing a garage that would obstruct more than one half the way across the mill premises, plaintiff brought suit to establish its right to continue to use the way and to enjoin its obstruction.

The suit was decided in plaintiff's favor on the ground that permissive use of the way for 40 or 50 years had ripened into a legal right which cannot be cut off without the consent of the owners of the property for which the way affords an outlet.

SECTION 656. MUNICIPAL POWERS OVER HIGHWAYS

The right of a municipality to compel one who maintains a millrace in a public highway to provide a substantial covering over the same, in the interest of the public safety, was upheld by the Oregon supreme court in the case of Town of Gaston vs. Thompson, 174 Pac. 717.

Defendant's predecessor, a milling corporation, constructed a millrace which occupied a portion of a county road longitudinally. Afterwards the plaintiff town was incorporated, and the portion of road involved became one of the streets of the municipality. No official permission had ever been obtained for the maintenance of the millrace in the highway. The town adopted an ordinance making it unlawful to maintain a millrace in any street of the town without covering the same with planking; and a separate resolution declared an uncovered millrace to be a nuisance.

Defendant having failed to comply with the ordinance, suit was brought to restrain further maintenance of the millrace without covering; and, reversing a decision of the trial judge, the supreme court holds that the town was entitled to the relief demanded in the suit. The principal points laid down by the higher court are:

The ownership of private property is subject to the exercise of police power by the state, directly or through such subordinate agencies as municipalities.

An Oregon statute requiring owners of waterways to bridge county roads where such ways cross highways implies a right to construct private waterways across roads laterally, but not along such highways longitudinally. An uncovered waterway in a public highway is a nuisance.

On inclusion of the road within the town's street system, the town became entitled to adopt such reasonable regulation as is involved in the ordinance mentioned.

SECTION 657. CONFUSION OF GOODS

One who willfully mixes his goods with those of the same kind belonging to another, in such manner that no separation can be made, and no apportionment which will do justice to the complaining party, stands to lose his property.

This penalty is inflicted by the law under a legal doctrine known as the "confusion of goods" rule. The doctrine does not apply to the everyday dealing in which grain is delivered at a warehouse and is intermingled with other grain of the same grade, on an understanding that the owner is to receive a stated quantity back, but applies where there has been a wrongful intermixing whereby one of the owners is prevented from securing the exact quantity and kind of goods due him.

"If one man mixes his corn or flour with that of another," said an English judge, "and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." (See 12 C. J. 495.)

The rule has been somewhat more explicitly stated by the United States Supreme Court:

"It is admitted, the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree that, if a man willfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part, of the property.

"Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrongdoer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

* *

The rule was followed by the New York supreme court in the case of Starr vs. Winegar, 3 Hun, 491, in a holding that, if there was any uncertainty as to the quantity of wheat plaintiff was entitled to out of a mass which defendant had formed by mixing plaintiff's grain with his, "the defendant, having caused such uncertainty by mingling plaintiff's wheat with his own, was bound to prove the true quantity belonging to plaintiff, or stand the loss or the risk of mistake in the calculation of the jury resulting from such confusion of the wheat."

* *

In the interesting case of D. M. Osborne & Co. vs. Cargill Elevator Co., 64 N. W. 1135, decided by the Minnesota supreme court, it is shown, however, that equity will be done by the courts when fairly called for by the circumstances. In this case, it appeared that a farmer had two fields of wheat and mortgaged one of them to plaintiff, but when he harvested them he placed all the grain in one bin and sold it to the defendant elevator company, without discharging the mortgage.

Plaintiff sued the elevator company for the full value of all the wheat so bought by it. The trial court permitted full recovery. But, on appeal, the supreme court decided that plaintiff was not entitled to more than a fair part of the proceeds of all the grain, according to the approximate quantity of the mortgaged wheat found to have been intermixed with the unmortgaged grain. After finding that there was no evidence of fraudulent intention to confuse the mortgaged property, the supreme court said:

"The goods mixed are all of the same kind and quality. Under these circumstances, plaintiff is only entitled to its proper share of the whole mass. . . . It is also true that, in this case, every reasonable doubt as to the amount of plaintiff's share should be resolved in its favor."

The opinion then lays down a proper basis for dividing the grain according to the relative acreages of the two fields, after making allowances for old grain included in the mass and quantities which had been removed from the bin by the farmer before making the sale to the elevator company.

* *

In the case of Sloan State Bank vs. B. M. Stoddard & Son, 159 N. W. 636,

the Iowa supreme court decided that, where mortgaged corn was sold to defendants and was so intermingled with other corn owned by them that it could not be identified, the mortgagee had a right to hold defendants liable for the value of the corn so converted to the prejudice of his mortgage, in lieu of a lien against any specific grain.

But, although a mortgage lien may be lost by a commingling of grain or other goods with those of a buyer from the mortgagor, the rule seems to be that, as against the mortgagor, or any person buying from him with notice of the mortgage, the mortgagee is entitled to hold the whole of a commingled mass formed by the mortgagor as security for the payment of the mortgage debt.

* *

It will be seen that intended fraud is the principal ground on which one may forfeit his own goods in intermingling them with those on which another has a claim. An intermixture resulting from pure accident places each owner on an equal standing and a court will strive to make the most nearly equitable division of the property or its proceeds possible. The same is true where confusion of goods results from honest mistake. But the courts are not in harmony as to the rights of parties where the confusion has been brought about by negligence.

The Minnesota supreme court has intimated that there should be no forfeiture on the ground of negligence, when there is no proof of fraudulent intent, while the supreme courts of New Hampshire and North Carolina have taken a different view. The trend of judicial decision seems to be to forfeit for negligence, as well as for intentional fraud, where the negligent person is unable to distinguish the portion of the confused goods fairly due the complaining person, either in kind or value.

It must be noted, however, that goods are not to be forfeited under this legal doctrine merely because the confusion has been brought about by the fault of the person against whom forfeiture is sought. It is still an essential to forfeiture that the goods of the respective parties cannot be separated in kind or value. When the brands on sacks or other marks afford means of identification, the aggrieved party must be content with a return of his specific goods. Or if bulk grain be intermixed with other grain of the same kind, the relative quantities being known, division must be made on that basis.

SECTION 658. REPLEVYING FLOUR

Although, of course, particularity of description of flour in legal papers is desirable where it is sought to reach a particular mass of flour, a decision handed down by the Oregon supreme court in the case of Foredice vs. Rinehart, 11 Oregon, 208, shows that a description by quantity and brand will usually suffice when the particular goods may be pointed out.

The suit was brought to recover a quantity of flour by replevin, and defendant complained that the goods were not sufficiently described in the replevin papers. The court did not sustain this contention. It is held that, since defendant seems to have retained possession of the goods pending determination of the suit, he was in no position to complain of any indefiniteness of description in the papers. But, apart from this, the court treats the description as sufficient, saying:

"There can be no doubt that an exceedingly strict rule of practice formerly prevailed in regard to the description of property in replevin, but of late years the stringency of this rule has been much relaxed. . . . The description goes to the identification of the thing—the property claimed—and when this is done with reasonable certainty, this object is accomplished, and the purpose of the law subserved. Whatever goes beyond this, would seem to be needlessly stringent, and subserve no good purpose.

"Now the flour in question is described as in sacks, a part of which was branded with Caveniss & Sterling's brand of Island City Mills, and the other marked with a brand of the mill at Weston, and considering the nature of the subject to be described, there would seem to be in the description as reasonable a degree of certainty as the nature of the subject will admit of.

"It is said that there ought to be such a description of the property as would enable the officer with his writ alone to distinguish it from other property of the same kind; but in Warner vs. Angenbaugh, 15 Sergh. & R. 11, the court says: 'that officer is not obliged to execute the writ unless somebody attend to point out the things he is to deliver.' . . . Nor in practice is he usually expected to do this, but the plaintiff or some one on his behalf points out the goods or property which has been taken from him, and to which his affidavit or judgment relates. . . . 'Barrels of flour' may be a proper description of flour in bags, because the

common usage of trade in many parts of the country warrants it.' (Wells on Replevin, sec. 180.)"

SECTION 659. COLLECTION OF JUDGMENTS

The general rule of law that, where two suits are pending between the same parties on the same subject matter, defendant is entitled to have the later one abated, has been distinguished by the Washington supreme court from the right of a judgment plaintiff to prosecute concurrent proceedings to collect the judgment.

Plaintiff obtained judgment in King County against the Garden City Milling Co., which had previously transferred its assets to the Shady Brook Milling Co. Afterwards, plaintiff brought suit in Walla Walla County against the last named company to compel it to apply enough of the transferred assets to satisfy the judgment.

While the Walla Walla County suit was pending, plaintiff instituted garnishment proceedings in King County under the same judgment against the Garden City company. The other company, having been brought in as claimant of the garnished funds under its assignment from the Garden City company, asserted that the pendency of the Walla Walla County suit was a bar to the garnishment proceedings, but the supreme court decided the contrary.

That court holds that, where a judgment has been obtained against a debtor, the creditor may at the same time pursue all available remedies to enforce payment of the judgment. (Fairbanks vs. Shady Brook Milling Co., 161 Pac. 840.)

SECTION 660. COMPETENCY OF WITNESSES

One who, by reason of considerable shipments of grain to a given point, is familiar with market prices there, is a competent witness on a question as to market values at that point, according to a decision of the Texas court of civil appeals, involving a shipment of corn. (Patterson & Roberts vs. Quanah, Acme & Pacific Railway Co., 195 S. W. 1163.)

SECTION 661. JURISDICTION OF COURTS

One of the general rights of a defendant in a suit is to be sued at the place of his residence, and this benefit is accorded corporations. Exceptions to the rule exist where one has an agent in another state, or where plaintiff is able to obtain jurisdiction over defendant by garnishment or attachment of property belonging to the latter. And where defendant can be served with process personally in a state other than that of his residence, he may ordinarily be required to defend there, howsoever inconvenient it may be for him.

But where there is no special circumstance permitting bringing of suit where plaintiff resides, he must bear the expense and inconvenience of starting his action where summons can be personally served on defendant.

A practical illustration of one phase of this subject is afforded by a decision of the Oklahoma supreme court, handed down in the case of Neil vs. Lonsdale Grain Co., 175 Pac. 823.

Plaintiff, a resident of Oklahoma, brought suit in the state courts at Enid against defendant, a Missouri corporation, to recover on contracts previously entered into by the parties. Defendant had no place of business in Oklahoma and no resident agent there, but summons was served on its assistant manager while he was present at Enid testifying as a witness in a suit brought against a third person by his company.

Defendant moved to quash the suit, on the ground that no jurisdiction had been acquired over it by plaintiff, and the supreme court upheld the contention, declaring that a resident of another state who has in good faith gone into Oklahoma to give evidence as a witness is exempt from service of a summons in a civil action against him, or against a corporation of which he is an officer or agent, while going to the place of trial, while attending the trial, and for a reasonable time thereafter in which to depart from the state in returning home.

* *

The Hubbard Milling Co. brought suit in its home county, Blue Earth County, Minnesota, to replevy flour which it claimed defendants, residents of Hennepin County, wrongfully detained. Defendants litigated to the state supreme court the question whether the suit should not have been transferred to Hennepin County, as the place of defendants' residence, but that court decided the case in favor of the milling company. The court holds that suit to replevy flour may be brought in the county where plaintiff resides, and that, although suit to recover damages for wrongful conversion of a specific quantity of flour must be brought in the county where defendants reside, there was no showing that in this case the replevin suit was a mere subterfuge to give the Blue Earth County court jurisdiction, with expecta-

tion of obtaining a money judgment only. (153 N. W. 266.)

* *

The Southern Flour & Grain Co. brought suit against Sims Jackson and L. H. Jackson, father and son, constituting a partnership, to recover on notes due the company and to enjoin disposal of assets under an alleged collusive arrangement whereby the company's chances of collecting judgment would be endangered. The suit was brought in Fulton County, Georgia, where the partnership business was carried on, and the trial court awarded judgment in the company's favor, but the Georgia supreme court reversed this judgment on the ground that suit should have been brought in another county where the father resided, and where the minor son's constructive residence was found to have been.

The decision turned on the point that the son, being a minor, must be regarded as having his residence with his father, notwithstanding his transaction of business in Fulton County, and that therefore suit should have been instituted at the domicile of the parties. (91 S. E. 481.)

Since the laws relating to suits against partnerships vary somewhat in the different states, this decision is not to be regarded as authority for saying that suit cannot ordinarily be brought in the county where the firm business is conducted, but the case is of interest as suggesting the importance of carefully considering the proper venue of a suit before bringing it.

* *

The Winner (S. D.) Milling Co. has defeated the Chicago & North Western Railway Co. before the South Dakota supreme court on an interesting question of constitutional law raised by that court on its own motion. (181 N. W. 195.)

The milling company built a flour mill adjacent to the defendant railway company's right of way, and filed a petition with the state board of railway commissioners to require defendant to construct a side track, connecting the mill and the railway company's main track. The commission granted the order asked for, and the railway company appealed to the supreme court, holding that the South Dakota law, which authorized appeals direct to the supreme court from an order of the railway commissioners, was unconstitutional.

It seems that the South Dakota constitution is so worded that the jurisdiction of the supreme court is limited, with certain exceptions not here pertinent, to the review of appeals from inferior courts. The supreme court said, in dismissing the appeal:

"It is very plain that the appellate jurisdiction, as well as the superintending control over inferior courts, is limited to appeals from one of the inferior courts mentioned in section 1. To hold otherwise would be to hold that the legislature could authorize appeals directly to this court from boards of county commissioners, city commissions, or any other board or commission that the legislature might see fit to create, as well as the board of railroad commissioners. . . . If appeals could be taken directly to this court from the board of railroad commissioners . . . and such other tribunals as the legislature may from time to time see fit to create, it would not be long until the time of this court would be monopolized by such appeals, to the exclusion of the business for which the court was created."

SECTION 662. PLEADING AND PROOF IN LAWSUITS

To borrow an expression from the game of pool, the law requires a litigant to "call" his "shots." He is not permitted to "rampse." In other words, a plaintiff is not entitled to plead one grievance and recover by proving another, nor is a defendant entitled to plead one defense and establish another.

A good illustration of this principle appears in the case of Acme-Jones Co. vs. Ellis Milling Co., 270 S. W. 843. There it was held that, where the only defense pleaded in an action for damages for breach of a contract to buy flour was that the seller had broken an agreement not to sell flour of the same brand to the buyer's competitors, the trial court erred in permitting the buyer to offer testimony that flour delivered under the contract was not of the kind contracted for. The Kentucky court of appeals said:

"No rule of practice is better established than that the evidence must conform to the pleadings, and that no issue can be submitted to the jury that is not presented by both pleadings and evidence."

SECTION 663. PROVINCE OF JURIES

Where the evidence as to the material facts of a case tried before a jury is conflicting it is improper for a trial judge to direct a verdict for either party; it being the province of the jury to determine the facts under such cir-

cumstances. (J. C. Lysle Milling Co. vs. Whitfield Grocery Co., 106 S. E. 8.)

SECTION 664. SETTLING WITH EMBEZZLERS

A Kansas suit to recover on notes signed by defendant to settle the amount of defalcation from a mill by defendant's brother-in-law, as bookkeeper and treasurer, was unsuccessfully defended on the ground that the notes were given to avoid prosecution of the defaulter (215 Pac. 286). The Kansas supreme court said:

"The making of restitution or the giving of security therefor is something to be commended rather than condemned, and if there was no duress by plaintiff, no use of the criminal proceedings to obtain the money or security or other private gain for plaintiff, and no concealing of the crime or stifling of a prosecution or withholding of evidence as a consideration for the notes, the embezzler and the defendant are equally liable for their payment."

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